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3. For this question only, assume that Three-dee allowed Drafty to proceed with the design work, but that Drafty, without legal excuse, abandoned the project shortly after construction began.

Which of the following legal conclusions are correct?

- I. Plannah is liable to Threedeep for legal damages, if any, caused by Drafty's default.
 - II. Drafty is liable to Threedeep for legal damages, if any, caused by Drafty's default.
 - III. Threedeep is indebted to Drafty, on a divisible contract theory, for a pro-rated portion of the agreed \$25,000 architect's fee promised to Plannah.
- (A) I. and II. only.
 - (B) I. and III. only.
 - (C) II. and III. only.
 - (D) I., II., and III.

Question 4

Telco, a local telephone company, negligently allowed one of its telephone poles, located between a street and a sidewalk, to become termite-ridden. Rhodes, who was intoxicated and driving at an excessive rate of speed, lost control of her car and hit the weakened telephone pole. One week later, the pole fell and struck Walker, a pedestrian who was walking on the sidewalk. The pole fell because of the combination of the force of the impact and the pole's termite-ridden condition.

If Walker asserts a claim against Telco and Rhodes, will Walker prevail?

- (A) Yes, against Telco but not Rhodes.
- (B) Yes, against Rhodes but not Telco.
- (C) Yes, against Telco and Rhodes, each for one-half of his damages.
- (D) Yes, against both Telco and Rhodes for the full amount of his damages.

Question 5

Percy was shopping in ValuMart, a large department store. ValuMart was remodeling its menswear department and had hired Contractor to do the work. Cora, a carpenter employed by Contractor, was working on the ValuMart job. When Cora left ValuMart to take her lunch break, she left a carpenter's level projecting out into one of the aisles. Before Cora returned from lunch, Percy came down that aisle and tripped over the level. Percy fell and struck his head on the sharp corner of a display case. Percy required hospitalization and sued ValuMart for his injuries.

Will Percy prevail in his suit against ValuMart?

- (A) Yes, because Contractor's employee left the level in the aisle.
- (B) Yes, if ValuMart's employees had a reasonable time to discover the level before Percy fell.
- (C) No, because ValuMart's employees did not leave the level in the aisle.
- (D) No, if ValuMart's employees were unaware that the level was in the aisle.

Questions 6-7 are based on the following fact situation:

In the recently enacted Fair Opportunity Act, the United States Congress provided, among other things, that an employer whose products are in any way used by or sold to the federal government must meet certain very specific standards for integration of its workforce and affirmative action programs. Both civil and criminal penalties are established for violation of the Act, and it permits private civil suits for injunctive relief or for damages to enforce its provisions.

The city of Davis, California also enacted a jobs opportunity ordinance effective the same year, requiring that any employer doing business with the city have a workforce consonant with the ethnic and gender composition of the population of the city. The local ordinance permits employers to apply for exemptions from its requirements if they can demonstrate that the pool of potential qualified employees has a different mix of ethnicity or gender than the general population. The population of Davis is approximately 55% female and 45% male, 75% white, 10% Asian, 7% black, 7% Hispanic, and 1% other ethnic backgrounds.

Watson Janitorial Service, a private employer located in the city of Davis, does contract cleaning and maintenance for both the local United States Department of Agriculture office and for the City Jail. Its workforce is 95% male, 55% black, 40% Hispanic, and 5% other ethnic backgrounds. The city of Davis notified the company that it would either have to bring its workforce into compliance with the local job opportunity ordinance or its contract with the City Jail would be terminated. The United States Department of Justice has notified Watson Janitorial that it meets the guidelines of the Fair Opportunity Act, and that the contract with the Department of Agriculture is not in jeopardy.

6. Watson Janitorial brings an action in state court to enjoin enforcement of the Davis ordinance. It argues that the local rule is invalid since it conflicts with the federal statute by creating more stringent standards. The trial court should rule:
 - (A) There is no conflict, since Congress intended only that the Fair Opportunity Act apply to employers who dealt exclusively with the federal government.
 - (B) There is no conflict, since Davis is permitted to impose more strict requirements to a local problem than those established by the federal government.
 - (C) The federal act preempts the local ordinance and thus the latter cannot be enforced.
 - (D) The federal act preempts the local ordinance only insofar as it attempts to regulate employers who do business with the federal government, so the ordinance may not be enforced only as to Watson Janitorial, but is otherwise valid.
7. Assume for the purposes of this question only that the United States Department of Agriculture notifies Watson Janitorial that its workforce is in violation of the Fair Opportunity Act and that a referral will be made to the Department of Justice for prosecution unless the federal standards are met within six months. If Watson challenges the validity of the federal statute in court, what is the government's best response to the argument that Congress has exceeded its legitimate powers?

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- I. The act is a valid enforcement of the Due Process Clause of the Fifth Amendment.
 - II. The act is a valid exercise of the commerce power.
 - III. The act is a valid exercise of the Enabling Clause of the Thirteenth Amendment.
 - IV. The act is a valid exercise of the federal police power.
- (A) I. and III. only.
 - (B) II. and III. only.
 - (C) I. and III. only.
 - (D) II. and IV. only.

Question 8

Amp, an electrical contractor, sued Short, a homeowner. Amp alleged that Short refused to pay for extensive wiring repairs performed on Short's home by Wilson, an employee of Amp. Amp called Wilson to the stand as a witness. Wilson, under oath, testified that he did not perform any work at Short's home. Wilson also denied writing a letter to Lee telling Lee that Wilson was going to do electrical work on Short's house. Without releasing Wilson as a witness, Amp offers in evidence the letter written by Wilson to Lee.

If Wilson's letter to Lee is properly authenticated, the trial court should:

- (A) Admit the letter for impeachment purposes only.
- (B) Admit the letter as both substantive and impeachment evidence.
- (C) Exclude the letter because a party may not impeach his own witness.
- (D) Exclude the letter because it is inadmissible hearsay.

Question 9

In which of the following situations is Defendant most likely to be *not guilty* of the charge made?

- (A) Believing that state law made it a crime to purchase Valium without a prescription, Defendant purchased without a prescription a certain quantity of Valium. Unknown to Defendant, the state legislature had repealed the statute, and Valium could be legally purchased without a prescription. Defendant is charged with attempting to purchase Valium without a prescription.
- (B) While in the course of a fight, Defendant, intending to kill Stan, ran up and stabbed Stan from behind. Unknown to Defendant, Stan had been stabbed through the chest only seconds before by another participant in the fight, killing him instantly. Defendant is charged with attempted murder.
- (C) Defendant misrepresented his identity to a garage in order to take possession of an automobile that had been left with the garage for repairs earlier that week. The owner of the garage was not deceived and refused to turn over possession. Defendant is charged with attempting to obtain property by false pretenses.
- (D) Police arrested Robber as he was leaving a house where he had stolen a good deal of property. As part of a plea-bargain arrangement, Robber took the property to Defendant and offered to sell it. Defendant, believing the property to be stolen, purchased it. Defendant is charged with attempting to receive stolen property.

Question 10

The city of Newtown adopted an ordinance providing that street demonstrations involving more than 15 persons may not be held in commercial areas during “rush” hours. “Exceptions” may be made to the prohibition “upon 24-hour advance application to and approval by the police department.” The ordinance also imposes sanctions on any person “who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language tending to cause a breach of the peace.” No court has of yet interpreted the ordinance.

Which of the following is the strongest argument for the unconstitutionality of both parts of the ordinance on their faces?

- (A) No type of prior restraint may be imposed on speech in public places.
- (B) Laws, regulating by their terms expressive conduct or speech, may not be overbroad or unduly vague.
- (C) The determination as to whether public gatherings may be lawfully held cannot be vested in the police.
- (D) The right of association in public places without interference is ensured by the First and Fourteenth Amendments.

Question 11

Truffle agreed in writing to lease a restaurant site in a newly constructed mall from Lentil, the owner of the property. The term of the tenancy was two years, and rent was payable in monthly installments at the beginning of each month. At the end of the second year, there had been no discussions between Truffle and Lentil regarding renewal or termination. Truffle did not vacate the premises at the end of the term;

instead, she sent a check for the next month’s rent to Lentil. Lentil cashed the check after the term had expired but informed Truffle that his acceptance of the check did not mean that he was going to renew the lease or let Truffle stay. At the end of that month, Lentil seeks advice on whether he can evict Truffle.

How should Lentil be advised to proceed?

- (A) Lentil must give Truffle a full 30 days’ notice before beginning eviction proceedings because a month-to-month periodic tenancy has been created.
- (B) Lentil may begin eviction proceedings as soon as the additional month has expired.
- (C) Lentil may not evict Truffle for 11 months and must give six months’ notice before beginning eviction proceedings because a year-to-year periodic tenancy has been created.
- (D) Lentil may not evict Truffle for 11 months but need not give any notice prior to eviction because a tenancy for years for a term of one year has been created.

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Question 12

Dirk broke into Vera's house one night. As he started to stuff silverware into a sack, he was surprised by Vera, who had arrived home earlier than usual. Dirk struck Vera on the head with a candlestick and tied her up. He finished filling his sack and left.

The police discovered Vera several hours later and rushed her to the hospital. Dirk was apprehended by the police early the following morning with the loot still in his possession. He was taken to police headquarters, given *Miranda* warnings, and asked if he wished to make a statement about the prior evening's events. The police did not mention that Vera had been seriously injured and was in the hospital. Dirk said he understood his rights and was willing to talk. He then admitted that he committed the burglary of Vera's house. The following day, Vera died from injuries caused by the blow to her head.

If, at Dirk's trial for murder, Dirk moves to prevent introduction of the confession into evidence, his motion should most probably be:

- (A) Denied, because failure of the police to advise Dirk of Vera's condition was harmless error since felony murder does not require intent to kill or injure.
- (B) Denied, because Dirk's waiver of his rights did not depend upon the nature of the charges that were later filed against him.
- (C) Granted, because Dirk could not make a knowing and intelligent waiver unless he had information concerning Vera's condition.
- (D) Granted, because the use of a confession to burglary in a prosecution for murder violates due process where the police withheld information about the potential seriousness of the offense.

Question 13

West, a witness in a contract case, testified on direct examination that four people attended a meeting. When asked to identify them, she gave the names of three, but despite trying was unable to remember the name of the fourth person.

The attorney who called her as a witness seeks to show her his handwritten notes of the part of his pretrial interview with her in which she provided all four names.

The trial court is likely to consider the showing of the notes taken as:

- (A) A proper attempt to introduce recorded recollection.
- (B) A proper attempt to refresh West's recollection.
- (C) An improper attempt to lead the witness.
- (D) An improper attempt to support West's credibility.

Question 14

Buyer, a retail seller of lawn and garden equipment, entered into a written contract with Seller, a manufacturer of wheelbarrows. The terms of the contract call for Seller to deliver 100 fifteen-pound capacity, red wheelbarrows to Buyer by March 1. On February 28, Buyer received from Seller 90 fifteen-pound capacity, red wheelbarrows and 10 twenty-pound capacity, red wheelbarrows. A letter accompanying the shipment stated, "We no longer make fifteen-pound capacity wheelbarrows. We are sending the last 90 we have in stock along with 10 twenty-pound capacity wheelbarrows. The twenty-pound capacity were sent as an accommodation to you." Which of the following correctly states the rights of Buyer?

- I. Buyer can reject the entire shipment.
 - II. Buyer can accept the 90 conforming wheelbarrows, reject the 10 nonconforming wheelbarrows, and sue Seller for damages.
 - III. Buyer can accept the entire shipment and sue Seller for damages.
- (A) Only I. and II. are correct.
 (B) Only I. is correct.
 (C) I., II., and III. are correct.
 (D) Only II. is correct.

Question 15

The German-made Doppelpferd, featuring sleek styling and remarkable fuel efficiency, is the most popular automobile in the United States. Its United States sales are booming, and the average retail markup in such sales is 30%. Hardsell Motors, Inc., a franchised Doppelpferd dealer in the United States, contracted with Shift to sell him a new Doppelpferd for \$9,000 cash, the sale to be consummated after delivery to Hardsell of the car, which Hardsell ordered from the manufacturer specifically for Shift. The signed retail contractual document was a form

drafted by Hardsell's lawyer, and Shift did not question or object to any of its terms, including the price inserted by Hardsell. When the car arrived from Germany, Shift repudiated the contract. Hardsell at once sold the car for \$9,000 cash to Karbuff, for whom Hardsell had also ordered from the manufacturer a Doppelpferd identical to Shift's.

In an action against Shift for breach of contract, Hardsell will probably recover:

- (A) \$9,000 minus what it cost Hardsell to purchase the car from the manufacturer.
- (B) \$9,000 minus the wholesale price of an identical Doppelpferd in the local wholesale market among dealers.
- (C) Nominal damages only because Hardsell resold the car to Karbuff without lowering the retail price.
- (D) Nothing, because the parties' agreement was an adhesion contract and therefore unconscionable.

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Question 16

Pike sued Digger, the contractor who constructed Pike's house, for breach of warranty of habitability. At trial, in cross-examination of Pike, Digger's attorney asked whether Pike had sued another contractor 30 years earlier, claiming similar defects in another house built for Pike. The question was not objected to and Pike answered that she had had some "water problems" with the first house she ever purchased, but no suit was filed.

Digger then called Wirth, the contractor of 30 years earlier, to testify that Pike had brought suit against Wirth for defects in the earlier house, many of which were like those now claimed to be found in the home Digger built, but that the case was settled without trial.

The trial court should rule Wirth's offered testimony:

- (A) Admissible as proper impeachment since Pike will have an opportunity to deny or explain Wirth's statement.
- (B) Admissible, because Pike failed to object to Digger's questions on cross-examination relative to the prior suit.
- (C) Inadmissible, because the best evidence of the former suit is the court record.
- (D) Inadmissible, because its probative value is substantially outweighed by the danger that it will confuse the issues and waste time.

Questions 17-18 are based on the following fact situation:

Hammond decided to kill his wife by poisoning her. He asked his friend, Jordan, a pharmacist, to obtain some curare, a deadly poison, and to give it to him without recording the transaction. Because Jordan suspected Hammond's motive, she supplied Hammond with a small quantity of Marvane, an antibiotic, instead of curare. Marvane is harmless if administered in small quantities, except for the less than 1% of the population who are allergic to the drug.

Hammond injected his wife with the Marvane while she slept. She was allergic to the drug and died from the injection. Jordan was distraught and confessed the entire affair to the police, explaining that she had failed to report Hammond's conduct to the authorities because she feared that it would end their friendship if she did.

- 17. Jordan is an accomplice to:
 - (A) Murder.
 - (B) Manslaughter.
 - (C) Criminally negligent homicide.
 - (D) No degree of criminal homicide.
- 18. In a common law jurisdiction, Hammond is guilty of:
 - (A) Murder only.
 - (B) Murder and conspiracy.
 - (C) Attempted murder only.
 - (D) Attempted murder and conspiracy.

Question 19

Abco developed a new drug, ZB, for treatment of Wegener's disease. Abco extensively tested ZB for several years on animals and human volunteers and had observed no undesirable side effects. The Federal Drug Administration ("FDA") then approved ZB for sale as a prescription drug.

Five other drug companies, each acting independently, developed drugs identical to ZB. Each of these drugs was also approved by the FDA for sale as a prescription drug. True Blue Drug, a wholesaler, bought identically shaped pills from all six of the manufacturers and sold the pills to drugstores as Wegener's X.

This drug had a long-delayed side effect. Sons of male users of Wegener's X are sterile. One such son, Crane, brought an action against Abco for his damages. Abco, through True Blue Drug, supplied about 10% of the Wegener's X sold in the state where Crane lived. It is not possible to establish which of the five companies supplied the particular pills that Crane's father took.

If Crane asserts a claim against Abco based on strict liability in tort, which of the following will be a decisive question in determining whether Crane will prevail?

- (A) Does the res ipsa loquitur doctrine apply?
- (B) Can liability be imposed on Abco without proof that Abco knew that the drug had an undesirable side effect?
- (C) Is Abco relieved of liability by the FDA approval of the drug?
- (D) Can liability be imposed on Abco without showing that its pills were used by Crane's father?

Questions 20-21 are based on the following fact situation:

Lightpost, Inc., the owner of a retail outlet mall, leased one of its retail units to Shirts by

Sam ("Shirts"), a chain selling casual apparel, for a period of five years. The lease agreement provided that Shirts would pay to Lightpost, as additional rent, a share of maintenance costs for the construction and upkeep of the parking lots and other common areas in the mall, and Lightpost would be responsible for maintaining these areas. The maintenance fee was calculated based on total square footage of each unit and amounted to \$1,000 a month for the unit leased by Shirts. The agreement also permitted assignments and subleases. For four years, Shirts operated its apparel store and paid all rent and maintenance fees. At the end of the fourth year, Shirts properly assigned the lease to Shoes by Sheila ("Shoes"), a discount shoe outlet.

- 20. Assume for purposes of this question only that, at the time it assigned the lease, Shirts owed \$3,000 in maintenance fees for the last three months of its occupancy, and that Shoes paid its rent but did not pay any maintenance fees to Lightpost for the first six months. Shoes then abandoned the property. Lightpost made reasonable efforts during the last six months of the term to relet the unit but was unable to do so. After applying the security deposit to satisfy the balance of the rent, Lightpost wishes to collect the unpaid maintenance fees during the last 15 months of the lease, totaling \$15,000. Who is liable for those fees and in what amount?
 - (A) Shirts and Shoes are jointly and severally liable for the \$15,000 in fees.
 - (B) Shirts is solely liable for \$3,000 in fees, and Shirts and Shoes are jointly and severally liable for \$12,000 in fees.
 - (C) Shirts is solely liable for \$3,000 in fees, Shoes is solely liable for \$6,000 in fees, and Shirts and Shoes are jointly and severally liable for \$6,000 in fees.
 - (D) Shirts is solely liable for \$3,000 in fees, and Shoes is solely liable for \$12,000 in fees.

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21. Assume for purposes of this question only that, shortly after Shirts assigned the lease to Shoes, Lightpost sold the mall to Lakeview, Ltd. Lakeview took subject to all of the leases, including Shoes's lease, but did not assume any of Lightpost's obligations under it. Five months after the sale, a contractor originally hired by Lightpost who was reconstructing the parking lot in front of Shoes's store walked off the job because he had not received any progress payments from either Lightpost or Lakeview during the past five months. After notifying Lightpost and Lakeview and receiving no response, Shoes agreed to pay the contractor \$20,000 up front to finish the job so that the store would have parking for the holiday shopping season. Shoes then withheld its rent payment of \$2,000 for that month and brought an action against Lightpost and Lakeview to recover the balance of the payment to the contractor. Shoes had paid its maintenance fees in advance for the rest of its term.

Are either Lightpost or Lakeview liable to Shoes?

- (A) Neither Lakeview nor Lightpost is liable to Shoes because Shoes is in breach of its covenant to pay rent.
- (B) Lightpost is liable to Shoes, but Lakeview is not, because Lakeview did not assume Lightpost's obligations.
- (C) Lakeview is liable to Shoes, but Lightpost is not, because the sale by Lightpost to Lakeview severed any privity of estate between Lightpost and Shoes.
- (D) Both Lakeview and Lightpost are liable to Shoes because the maintenance duties constitute an independent covenant that is part of the lease and that runs with land.

Question 22

To secure an express lane on the information superhighway, the federal government contracted with a number of communications utilities to install fiberoptic communication lines between major federal offices across the country. The utilities, which maintained ownership of the lines, contracted with the federal government to install the lines on a "cost plus fixed fee" basis, whereby all installation costs would be reimbursed by the government. One such line was installed in State Yellow's capital city, Plains, where the Department of the Interior maintained its western regional office. State Yellow imposes a tax on the installation of all communication lines in the state, including fiberoptic cable lines. It seeks to impose the tax on the line running to the federal office.

Will the state be permitted to impose the tax?

- (A) Yes, because the tax is indirect and nondiscriminatory.
- (B) Yes, because the tax is a valid exercise of state power under the Tenth Amendment.
- (C) No, because the tax burdens the activities of the federal government.
- (D) No, because the activity taxed involves interstate commerce.

Question 23

In an action by Patrick against David, one of the issues is whether David is a licensed psychotherapist. Normally, the names of all licensed psychotherapists are registered with the office of the State Department of Professional Registrations. Patrick wishes to introduce a certified document, signed by the chief registrar of the Department, stating that an examination of the Department's rolls does not disclose David's name.

Should the document be admitted?

- (A) Yes, because a statement of absence from public record is admissible.
- (B) Yes, but only if the chief registrar is unavailable.
- (C) No, because the document is hearsay not within an exception.
- (D) No, because the document is not self-authenticating.

Question 24

While on a hiking trip during the late fall, Page arrived toward the end of the day at a clearing where several similar cabins were located, none of which was occupied. One of the cabins belonged to Levin, Page's friend, who had given Page permission to use it. Page entered one of the cabins, which she thought was Levin's, and prepared to spend the night. In fact the cabin was owned, not by Levin, but by Dwyer.

When the night turned cold, Page started a fire in the stove. Unknown to Page, there was a defect in the stove that allowed carbon monoxide fumes to escape into the cabin. During the night the fumes caused serious injury to Page.

If Page asserts a claim against Dwyer for her injury, will Page recover?

- (A) Yes, if Dwyer knew that the stove was defective.
- (B) Yes, if Dwyer could have discovered the defect in the stove by a reasonable inspection.
- (C) No, because Dwyer had no reason to anticipate Page's presence in the cabin.
- (D) No, unless Page needed to use the cabin for her own protection.

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Question 25

On a wholly random basis, a state agency has given a few probationary employees who were not rehired at the end of their probationary period a statement of reasons and an opportunity for a hearing; but the agency has very rarely done so. No statute or rule of the agency required such a statement of reasons or a hearing.

The employment of Masters, a probationary employee, was terminated without a statement of reasons or an opportunity for a hearing. The agency did not even consider whether it should give him either.

A suit by Masters requesting a statement of reasons and a hearing will probably be:

- (A) Successful, on the grounds that failure to give Masters reasons and an opportunity for a hearing constituted a bill of attainder.
- (B) Successful, on the grounds that an agency's inconsistent practices, even if unintentional, deny adversely affected persons the equal protection of the laws.
- (C) Unsuccessful, because Masters does not have a right to be rehired that is protected by procedural due process.
- (D) Unsuccessful, because the conditions of state employment are matters reserved to the states by the Tenth Amendment.

Question 26

Marvin Manufacturing Company was in the business of making copper tubing. Golde Industries telephoned Marvin's sales department and placed an order for 10,000 linear feet of copper tubing at a sale price of \$2 per foot. The tubing was to be used in the production of a custom order for one of Golde's customers. Marvin installed special equipment for the manufacture of the tubing to Golde's specifications and had completed a portion of the order when Golde again telephoned the sales department. This time, however, Golde canceled its order, saying it no longer had need of the tubing because its

customer had been declared bankrupt, and refused to pay for the order.

If Marvin sues for breach, it will:

- (A) Win, because the contract is fully enforceable.
- (B) Win, because the contract is enforceable to the extent of the portion of the order completed.
- (C) Lose, because a contract for the sale of goods over \$500 must be in writing.
- (D) Lose, because the parol evidence rule would preclude testimony about the initial telephone call.

Question 27

Police investigating a homicide had probable cause to believe that Drake had committed it. They then learned from a reliable informant that, a short while ago, Drake had gone to Trent's house to obtain a false driver's license from Trent, a convicted forger. Believing that Drake might still be there, the police, without obtaining a warrant, went to Trent's house. They entered the house and found Drake hiding in the basement. He was arrested and given his *Miranda* warnings. At the police station, he confessed to the homicide.

At a preliminary hearing, Drake's attorney contends that the confession should be suppressed on Fourth Amendment grounds.

Is the court likely to agree?

- (A) Yes, because the police did not have a search warrant to enter Trent's house and there were no exigent circumstances.
- (B) Yes, because the police did not have an arrest warrant for Drake and there were no exigent circumstances.
- (C) No, because a reliable informant told police that Drake was in Trent's house.
- (D) No, because the police had probable cause to arrest Drake.

Question 28

All of the deeds for the lots in the 5100 block of Elm Street contained a restrictive covenant requiring that all houses built on the lots be set back a minimum of 50 feet from the sidewalk. Local zoning regulations required that all homes in the area of the 5100 block of Elm Street be set back a minimum of 35 feet from the sidewalk. Dampier purchased a lot on the 5100 block of Elm Street on which it would be possible to build a home with a 50-foot setback. However, the lot was of an unusual shape, and Dampier applied to the city zoning commission asking for a variance allowing him to build a house set back 30 feet from the sidewalk. In his petition, Dampier cited the unusual shape of the lot and asserted that it would cause hardship for him to build in compliance with the 35-foot setback required by the zoning regulations. The zoning commission granted Dampier the variance. Nora, whose home was located at 5130 Elm Street, noticed surveyors putting up ropes 30 feet from the sidewalk on Dampier's lot, and she discovered that Dampier planned to build a home with only a 30-foot setback.

Nora seeks to enforce the restrictive covenant and brings suit to enjoin Dampier from building a residence with a setback of less than 50 feet. Who will prevail?

- (A) Dampier, because zoning regulations take precedence over restrictive covenants as a matter of public policy.
- (B) Dampier, because equity will not impose a hardship.
- (C) Nora, because Dampier will be unjustly enriched if he is permitted to build a 30-foot setback.
- (D) Nora, because a zoning variance does not affect the enforcement of a restrictive covenant.

Questions 29-30 are based on the following fact situation:

On January 1, Awl and Howser agreed in writing that Awl would build a house on

Howser's lot according to Howser's plans and specifications for \$60,000, the work to commence on April 1. Howser agreed to make an initial payment of \$10,000 on April 1, and to pay the balance upon completion of the work.

On February 1, Awl notified Howser that he (Awl) would lose money on the job at that price, and would not proceed with the work unless Howser would agree to increase the price to \$90,000. Howser thereupon, without notifying Awl, agreed in writing with Gutter for Gutter, commencing April 1, to build the house for \$75,000, which was the fair market cost of the work to be done.

On April 1, both Awl and Gutter showed up at the building site to begin work, Awl telling Howser that he had decided to "take the loss" and would build the house for \$60,000 as originally agreed. Howser dismissed Awl and allowed Gutter to begin work on the house.

29. In a contract action by Awl against Howser, which of the following would the court decide under the prevailing American view?
 - (A) Howser will win because Awl in legal effect committed a total breach of contract.
 - (B) Howser will win because Gutter's contract price was \$15,000 lower than the \$90,000 demanded by Awl on February 1.
 - (C) Awl will win because Howser did not tell him before April 1 about the contract with Gutter.
 - (D) Awl will win because he attempted to perform the contract as originally agreed.

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30. For this question only, assume that Awl is liable to Howser for breach of contract and also assume the following additional facts: Gutter finished the house on schedule and then showed Howser that he (Gutter) had spent \$85,000 on the job. Howser thereupon paid Gutter the full balance of their contract price plus an additional \$10,000, so that Gutter would not lose money.

In a contract action by Howser against Awl, Howser will recover:

- (A) The difference between the fair market value of the completed house and Awl's original contract price.
- (B) \$30,000, the difference between Awl's original contract price and the amount Awl demanded on February 1.
- (C) \$25,000, the difference between Awl's original contract price and the total amount Howser paid Gutter for building the house.
- (D) \$15,000, the difference between Awl's original contract price and Gutter's contract price.

Question 31

Benjamin, a foreign correspondent, wished to purchase Whiteacre. Smith, the owner of Whiteacre, was not yet sure he wished to sell the property. He was waiting to see if his bid on another parcel was going to be accepted. Before Smith could make up his mind, Benjamin was assigned to cover an ethnic conflict in eastern Europe that was escalating into a war. Prior to his departure, Benjamin gave his attorney, Lenora, \$100,000 and his power of attorney. He instructed Lenora that, should Whiteacre be put up for sale, she was authorized to: offer up to \$100,000 for it, enter into a binding contract to purchase it on Benjamin's behalf, and if he did not return in time, she was authorized to close on the property. In early January, Smith put Whiteacre on the market. Lenora offered \$75,000 for it, which Smith readily accepted. On January

15, Lenora, on Benjamin's behalf, entered into a written contract to purchase Whiteacre for \$75,000. Closing was set for February 15. During this time, Lenora heard nothing from Benjamin. When he had not returned by the date of closing, Lenora attended the closing and tendered the \$75,000. Smith tendered a deed made out to Benjamin as the grantee.

On February 20, news was received that Benjamin had been killed by a stray bullet on January 14. Benjamin's will left his entire estate to his niece, Nellie. In the meantime, Smith has had someone offer him \$150,000 for Whiteacre. Having heard of Benjamin's death, Smith believes the conveyance to Benjamin is invalid. Smith brings a suit to quiet title to Whiteacre.

The court will most likely find that the owner of Whiteacre is:

- (A) Nellie, because Lenora held the deed on constructive trust for Benjamin's estate.
- (B) Nellie, because of the operation of the doctrine of equitable conversion.
- (C) Smith, because a deed to a nonexistent person is void and conveys no title.
- (D) Smith, because the risk of loss is on the buyer.

Question 32

Patricia sued Doris for injuries suffered when her car collided in an intersection with one driven by Doris. At trial, Patricia testified that she had had the right-of-way over Doris to enter the intersection. Doris did not cross-examine. Patricia then called Wendy to testify that, shortly after the collision, as she pulled Patricia from the car, Wendy heard Patricia say, "I think I'm dying! Didn't the other driver see I had the right-of-way?" Wendy's testimony was admitted over defense counsel's objections. On appeal from a verdict for Patricia, Doris challenges the admission of Wendy's testimony.

Should the trial court's ruling be upheld?

- (A) Yes, because Patricia's statement was made under belief of impending death.
- (B) Yes, because Patricia's statement was an excited utterance.
- (C) No, because Patricia's credibility had not been attacked.
- (D) No, because Patricia's belief that she had the right-of-way had already been established without contradiction.

Question 33

There is high and persistent unemployment in the industrialized state of Green. Its legislature therefore enacted a statute requiring every business with annual sales in Green of over \$1 million to purchase each year goods and/or services in Green equal in value to at least half of its sales in Green.

Which of the following parties most clearly has standing to contest the constitutionality of this statute of Green in federal court?

- (A) A business in another state that supplies from that other state 95% of the goods and services bought by a corporation that has annual sales in Green of \$20 million.
- (B) A corporation selling \$300,000 worth of goods in Green but presently purchasing only \$10,000 in goods and services in Green.

- (C) The governor of an adjacent state on behalf of the state and its residents.

- (D) The owner of high-grade, secured bonds issued by a corporation with sales in Green of \$10 million that currently purchases only \$1 million in goods and services in Green.

Questions 34-35 are based on the following fact situation:

Jaywalking (crossing a street outside of a crosswalk or not at an intersection) is punishable by a fine in Metropolis. Bert, who had lived in Metropolis all of his 67 years, was out window-shopping with his wife, Ruth, also 67, when he saw a friend across the street at a diner they both frequented. Telling Ruth that he would be right back, he saw that there were no cars nearby and so strode briskly across the street in the middle of the block. As he reached the other sidewalk, a police officer who had been checking parked cars for parking violations stepped up to Bert and said, "Hold it buddy, let's see your driver's license," and then reached for her citation book. Bert, a city dweller from birth, had always walked or used public transportation, had never learned to drive, and did not have a driver's license. When he told the officer that he did not have a driver's license, she said, "All right, I'm taking you in," and seized his wrist, twisting it up and behind him in a personnel control lock. A black belt in judo, Bert easily slipped the officer's grasp. "You asked for it," she then growled, and pulled her baton from her belt. When she attempted to strike Bert, he moved swiftly to the side, chopped at her arm, and caused the baton to fall from her grasp to the pavement. At that point two other officers arrived on the scene and arrested Bert. Ruth watched the entire episode from across the street and became greatly distressed.

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34. Bert brings an action against the first officer for battery. What will be the probable outcome of this litigation?
- (A) He will lose, because he struck the officer.
 - (B) He will lose, because the offense was committed in the officer's presence.
 - (C) He will win, unless he is found guilty of jaywalking.
 - (D) He will win, because the officer was not privileged to arrest him.
35. Ruth also sues the officer, alleging intentional infliction of emotional distress. Will she recover?
- (A) No, unless the officer knew that Ruth and Bert were husband and wife.
 - (B) No, if the officer did not know that Ruth was watching from across the street.
 - (C) Yes, because the officer's conduct regarding Bert was extreme and outrageous.
 - (D) Yes, because the officer's conduct caused Ruth to be severely emotionally disturbed.

Questions 36-37 are based on the following fact situation:

One night after work, Dunken stopped in at a bar next to his place of employment to have a few drinks before heading home. While there, he became intoxicated. Upon leaving the bar, Dunken decided that he would drive home rather than walk. Dunken went next door to a used car lot to take a car to drive home. However, Dunken discovered that there were no keys in any of the cars. He then broke into the main office of the used car lot where he surmised correctly that the keys would be kept. As he left the office with keys to one of the cars, Dunken saw a security

guard coming toward him. Dunken pushed the guard to the side as he ran past. The guard fell back, hit his head on the pavement, and died. Dunken then climbed into the car and drove away. On his way home, he was so intoxicated that he missed his exit. Making an illegal u-turn to go back, he struck a car legally parked on the side of the road, killing its occupant. Relevant statutes extend burglary to include buildings not used as a dwelling. First degree murder is defined as "the premeditated and intentional killing of another or a killing during commission of a rape, robbery, burglary, or arson." Second degree murder is defined as all murders that are not first degree murder.

36. If Dunken is charged with first degree murder for the death of the security guard, the court should charge the jury on the issue of the defense of intoxication that:
- (A) Voluntary intoxication is no defense to the crime of first degree murder as defined by the statute.
 - (B) Voluntary intoxication is a defense to the crime of first degree murder if Dunken would not have killed the security guard but for the intoxication.
 - (C) Voluntary intoxication is a defense to the crime of first degree murder if it prevented Dunken from forming the intent to commit a burglary.
 - (D) Voluntary intoxication is a defense to first degree murder if it prevented Dunken from forming the intent to kill the security guard.

37. If Dunken is charged with homicide for the death of the occupant of the parked car, the most serious crime for which Dunken can be convicted is:

- (A) First degree murder.
- (B) Second degree murder.
- (C) Involuntary manslaughter based on criminal negligence.
- (D) Involuntary manslaughter based on unlawful conduct.

Question 38

The High National Grasslands is owned by the United States and is located in the center of a large western state. Acting pursuant to a federal statute authorizing such action, the United States Bureau of Land Management leased the grazing rights in the High National Grasslands to ranchers located nearby. Grazingland Company owns a vast amount of rangeland adjacent to the High National Grasslands and leases its land for livestock grazing purposes to the same ranchers, but at prices higher than those charged by the Bureau. Grazingland Company sued the Bureau in an appropriate federal district court to restrain the Bureau from competing with that company by leasing the High National Grasslands.

Which of the following constitutional provisions may most easily and directly be used to justify the federal statute authorizing this leasing program of the Bureau of Land Management?

- (A) The General Welfare Clause of Article I, Section 8.
- (B) The Federal Property Clause of Article IV, Section 3.
- (C) The Commerce Clause of Article I, Section 8.
- (D) The Supremacy Clause of Article VI.

Question 39

In Peck's antitrust suit against manufacturers of insulation, Peck's interrogatories asked for information concerning total sales of insulation by each of the defendant manufacturers in a particular year. The defendants replied to the interrogatories by referring Peck to the *Insulation Manufacturer's Annual Journal* for the information.

- If, at trial, Peck offers the annual as evidence of the sales volume, this evidence is:
- (A) Admissible, as an adoptive admission of the defendants.
 - (B) Admissible, as a business record.
 - (C) Inadmissible, as hearsay not within any exception.
 - (D) Inadmissible, as lacking sufficient authentication.

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Question 40

Farmer's Garden Foods ("FGF") was a manufacturer of quality red cheese made from imported yaks' milk. In a written agreement between FGF and Gourmet Mart ("GM"), a retail seller of fine quality foods, FGF agreed to "sell all output of FGF red cheese to GM," and GM agreed to "sell FGF red cheese exclusively." The agreement went on to state that GM would pay \$150 for each 10-wheel container of red cheese ordered from FGF.

Under the above facts, what are the relative obligations of the parties?

- (A) FGF has to sell all of its output to GM; GM has to buy all of FGF's output.
- (B) FGF has to sell all of its output to GM; GM has to sell exclusively FGF red cheese.
- (C) FGF has to sell all of its output to GM; GM has to sell exclusively FGF red cheese but it does not have to buy any.
- (D) FGF has to sell all of its output to GM; GM has to buy all of FGF's output and has to sell exclusively FGF red cheese.

Question 41

Constance owned Greenacre in fee simple. She executed two instruments in the proper form of deeds. The first instrument purported to convey an undivided one-half interest in Greenacre to Henry and his wife, Audrey, as joint tenants with right of survivorship. The second instrument purported to convey an undivided one-half interest in Greenacre to Susan, the only child of Henry. Susan was 13 years old at the time. The common law joint tenancy is unmodified by statute.

No actual consideration was paid for the deeds. Constance handed the two deeds to Henry. Henry promptly and properly recorded the deed to himself and Audrey and put the deed to his daughter, Susan, in a safe-deposit box without recording it.

The same year, Henry, Audrey, and Susan were on a vacation when the plane in which they were flying went down, and all three were killed simultaneously. Henry, Audrey, and Susan died intestate. The applicable statute in the jurisdictions provides that "when title to property on its devolution depends on priority of death and there is insufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived." An appropriate action was instituted by the heirs of Henry, Audrey, and Susan. Constance, who is not an heir of any of the deceased, was a party to the action.

The court should determine that title to Greenacre is:

- (A) Entirely in Constance.
- (B) One-half in the heirs of Henry and one-half in the heirs of Audrey.
- (C) One-half in Constance, one-quarter in the heirs of Henry, and one-quarter in the heirs of Audrey.
- (D) One-half in the heirs of Susan, one-quarter in the heirs of Henry, and one-quarter in the heirs of Audrey.

Question 42

Argus Corporation is privately owned and incorporated in the state of Kiowa. It contracted with the United States to construct a dam across the Big Sandy River in the state of Arapahoe. The state of Arapahoe imposed a gross receipts tax on all business conducted within the state. Arapahoe sued Argus Corporation to collect that tax on the receipts Argus received under this federal contract. No federal statutes or administrative rules are applicable, and the contract between the United States and the Argus Corporation does not mention state taxation.

The court should hold the state tax, as applied here, to be:

- (A) Constitutional, because a state has exclusive jurisdiction over all commercial transactions executed wholly within its borders.
- (B) Constitutional, because private contractors performing work under a federal contract are not immune in these circumstances from nondiscriminatory state taxation.
- (C) Unconstitutional, because it violates the Supremacy Clause.
- (D) Unconstitutional, because it imposes an undue burden on interstate commerce.

Question 43

Able, an attorney, sued Clinton, a client, for his fee, based on an agreed hourly rate. Clinton subpoenaed the attorney's time records for the days on which he purported to have worked for Clinton to show that Able had billed an impossible number of hours to Clinton and others on those days. Clinton's subpoena provided that any information concerning the matters handled for other clients be deleted or masked. Able moved to quash the subpoena on the ground of attorney-client privilege.

The subpoena should be:

- (A) Upheld, because the information about hours billed is not within the privilege.
- (B) Upheld, because an attorney has no right to invoke his client's privilege without instructions from the client.
- (C) Quashed, because an attorney is entitled to a right of privacy for the work product in his files.
- (D) Quashed, because no permission was obtained from the other clients to divulge information from their files.

Questions 44-45 are based on the following fact situation:

Torgeson, a prosperous widower, owned Fruitacre, a large tract of land located near Sunbelt City. Fruitacre was primarily used for extensive citrus orchards, but Torgeson was sure that rapidly growing Sunbelt City would expand toward Fruitacre, and that Fruitacre would be a prime tract for a residential subdivision within 20 years. Torgeson wanted to see his three grandchildren, Hubert (age 22), Dubert (age 17), and Luberta (age 15), benefit from the large price that he was sure Fruitacre would bring, but he was also concerned that the grandchildren be of sufficient maturity. Torgeson suggested to his only child, Diana, that he give her a life interest in Fruitacre, and that Diana's children take Fruitacre upon her death. Diana told Torgeson that she did not need the income from Fruitacre and would prefer that Torgeson give the land directly to Hubert, Dubert, and Luberta. Torgeson arrived at what he felt was a reasonable compromise, using his good friend, Fran (age 55), as the person to whom he conveyed the land. Torgeson's conveyance read, in pertinent part, as follows: "I convey Fruitacre to Fran for life, remainder to all of my grandchildren who ever attain the age of 25, and if none of them attains such age, to the Sisters of Charity."

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44. The grandchildren's interest can best be described as:
- (A) A contingent remainder.
 - (B) A vested remainder.
 - (C) An executory interest.
 - (D) Nothing.
45. The Sisters of Charity's interest can best be described as:
- (A) A contingent remainder.
 - (B) A vested remainder subject to total divestment.
 - (C) An executory interest.
 - (D) Nothing.

Questions 46-47 are based on the following fact situation:

Until 1954, the state of New Atlantic required segregation in all public and private schools, but all public schools are now desegregated. Other state laws, enacted before 1954 and continuing to the present, provide for free distribution of the same textbooks on secular subjects to students in all public and private schools. In addition, the state accredits schools and certifies teachers.

Little White School House, a private school that offers elementary and secondary education in the state, denies admission to all non-Caucasians. Stone School is a private school that offers religious instruction.

46. Which of the following is the strongest argument *against* the constitutionality of free distribution of textbooks to the students at the Little White School House?
- (A) No legitimate educational function is served by the free distribution of textbooks.
 - (B) The state may not in any way aid private schools.
 - (C) The Constitution forbids private bias of any kind.
 - (D) Segregation is furthered by the distribution of textbooks to these students.
47. Which of the following is the strongest argument *in favor of* the constitutionality of free distribution of textbooks to the students at Stone School?
- (A) Private religious schools, like public nonsectarian schools, fulfill an important educational function.
 - (B) Religious instruction in private schools is not constitutionally objectionable.
 - (C) The purpose and effect of the free distribution of these textbooks is secular and does not entangle church and state.
 - (D) The Free Exercise Clause requires identical treatment by the state of students in public and private schools.

Question 48

Edgar was employed as an electrician by Edgewater Electric Services. Edgewater had contracts with a number of large office and condominium buildings to provide emergency electrical services and repairs at any hour of the day or night. Edgewater also advertised in the telephone “yellow pages”: “If it’s an electrical emergency, call Edgewater Electric Services—night or day.” Although Edgar usually worked from 8 a.m. to 4 p.m. at Edgewater, the nature of Edgewater’s emergency services required Edgar to be “on call” 24 hours a day. Therefore, Edgewater required Edgar to drive his company van to his home each night, so he would be in a position to speed off to an emergency with all of his tools and equipment at hand. One afternoon, Edgar left the Edgewater Electric offices at 4 p.m. as usual. However, when he left the main highway, he did not turn left toward his home but instead turned right toward the supermarket a few blocks away to pick up some items for dinner. While leaving the supermarket parking lot, Edgar drove negligently and struck Parka, a pedestrian. Parka suffered serious injuries and required several operations and a lengthy hospital stay. Parka filed suit against Edgewater for \$100,000.

Is Parka likely to recover from Edgewater?

- (A) Yes, because Edgar’s trip to the market was only a slight deviation from the direct route to his home.
- (B) Yes, but only if Edgewater knew that Edgar had proclivities to drive negligently.
- (C) No, because turning in the opposite direction from his home constituted a “frolic” by Edgar.
- (D) No, because an employer is not liable for the torts of an employee traveling to and from work.

Question 49

Smythe was charged with the murder of his wife. In his defense, he testified that, at the time he killed her, he believed that his wife was planning to destroy the world by detonating a massive explosive device that she had developed and built in the basement of their home. He further testified that he had tried many times to dissuade his wife from her plan and had tried to destroy devices that she stored in the basement. She had, he testified, foiled his efforts by, on two occasions, signing papers for his hospitalization, which lasted for a brief period each time. He said that he had concluded that the only way to prevent her scheme was to kill her and that he had become so obsessed with the importance of doing so that he could think of nothing else. One day when he saw her open the door to the basement, he lunged at her and pushed her down the steps to her death.

The best defense raised by Smythe’s testimony is:

- (A) Lack of the requisite mental element.
- (B) Lack of the requisite act element.
- (C) Insanity.
- (D) Belief that the situation justified his actions.

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Question 50

Scholastica, the Academic Dean at Woodbine College, was well liked and considered a competent scholar and a fine teacher. However, six months after her appointment as Dean, Scholastica received a certified letter from Rector, the Provost of Woodbine College, summarily dismissing her. No reasons were given in the letter for Scholastica's dismissal. Scholastica had her lawyer, Loretta, contact Rector to discover the basis of her dismissal, if possible. Two days later, Loretta received a letter from Rector stating, in relevant part, "Scholastica was dismissed from her employment at Woodbine College because I received an anonymous telephone call informing me that Scholastica was involved in selling drugs to students. One can't be too careful about these things in this day and age." Rector had, in fact, received such a phone call, but the basis of the statement was untrue, because Scholastica had never even used illegal drugs, much less sold them.

If Scholastica files suit against Rector for libel:

- (A) Scholastica will win, if Rector should have verified the anonymous statement before repeating it to Loretta.
- (B) Scholastica will lose, because by having her attorney ask the reason for the dismissal, Scholastica impliedly consented to the statement in the letter.
- (C) Rector will win, because Rector was merely repeating the defamatory communication of another.
- (D) Rector will lose, because Scholastica was not dealing in drugs.

Question 51

Rose was convicted in federal court of possession of one kilogram of heroin with intent to distribute. She was sentenced to a prison term. Subsequently, Rose was indicted by a federal grand jury for conspiracy to distribute the same kilogram of heroin. She moved to dismiss the indictment.

Her motion should be:

- (A) Denied, because the Double Jeopardy Clause does not apply when the second prosecution is for violation of a separate statute.
- (B) Denied, because each prosecution requires proof of an element that the other does not.
- (C) Granted, because the Double Jeopardy Clause protects her against a second prosecution for the same criminal conduct.
- (D) Granted, because the Due Process Clause protects her against double punishment for the same criminal conduct.

Questions 52-53 are based on the following fact situation:

Three states, East Winnetka, Midland, and West Hampton, are located next to one another in that order. The states of East Winnetka and West Hampton permit the hunting and trapping of snipe, but the state of Midland strictly forbids it in order to protect snipe, a rare species of animal, from extinction. The state of Midland has a state statute that provides, "Possession of snipe traps is prohibited. Any game warden finding a snipe trap within the state shall seize and destroy it." Snipe traps cost about \$15 each.

Prentis is a resident of West Hampton and an ardent snipe trapper. She drove her car to East Winnetka to purchase a new improved snipe trap from a manufacturer there. In the course of her trip back across Midland with the trap in her car, Prentis stopped in a Midland state park to camp for a few nights. While she was in that park, a Midland game warden saw the trap, which was visible on the front seat of her car. The warden seized the trap and destroyed it in accordance with the Midland statute after Prentis admitted that the seized item was a prohibited snipe trap. No federal statutes or federal administrative regulations apply.

52. For this question only, assume that Prentis demonstrates that common carriers are permitted to transport snipe traps as cargo across Midland for delivery to another state and that, in practice, the Midland statute is enforced only against private individuals transporting those traps in private vehicles. If Prentis challenges the application of the Midland statute to her on the basis only of a denial of equal protection, this application of the statute will probably be found:

- (A) Constitutional, because the traps constitute contraband in which Prentis could have no protected property interest.
- (B) Constitutional, because there is a rational basis for differentiating between the possession of snipe traps as interstate cargo by common carriers and the possession of snipe traps by private individuals.
- (C) Unconstitutional, because the state cannot demonstrate a compelling public purpose for making this differentiation between common carriers and such private individuals.
- (D) Unconstitutional, because interstate travel is a fundamental right that may not be burdened by state law.

53. For this question only, assume that a valid federal administrative rule, adopted under a

federal consumer product safety act, regulates the design of snipe traps. The rule was issued to prevent traps from causing injury to human beings, *e.g.*, by pinching fingers while persons were setting the traps. No other federal law applies. Which of the following best states the effect of the federal rule on the Midland state statute?

- (A) The federal rule preempts the Midland state statute, because the federal rule regulates the same subject matter—snipe traps.
- (B) The federal rule preempts the Midland state statute, because the federal rule does not contain affirmative authorization for continued state regulation.
- (C) The federal rule does not preempt the Midland state statute, because the Midland state statute regulates wild animals, a field of exclusive state power.
- (D) The federal rule does not preempt the Midland state statute, because the purposes of the federal rule and the Midland state statute are different.

Question 54

Dryden is tried on a charge of driving while intoxicated. When Dryden was booked at the police station, a videotape was made that showed him unsteady, abusive, and speaking in a slurred manner. If the prosecutor lays a foundation properly identifying the tape, should the court admit it in evidence and permit it to be shown to the jury?

- (A) Yes, because it is an admission.
- (B) Yes, because its value is not substantially outweighed by unfair prejudice.
- (C) No, because the privilege against self-incrimination is applicable.
- (D) No, because specific instances of conduct cannot be proved by extrinsic evidence.

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Question 55

Simmons and Boyd entered into a written contract for the sale and purchase of Wideacre. The contract provided that "Simmons agrees to convey a good and marketable title to Boyd 60 days from the date of this contract." The purchase price was stated as \$60,000.

At the time set for closing, Simmons tendered a deed in the form agreed to in the contract. Boyd's examination of the record prior to the date of closing had disclosed, however, that the owner of record was not Simmons, but Olson. Further investigation by Boyd revealed that, notwithstanding the state of the record, Simmons had been in what Boyd concedes is adverse possession for 15 years. The period of time to acquire title by adverse possession in the jurisdiction is 10 years. Boyd refuses to pay the purchase price or to take possession "because of the inability of Simmons to transfer a marketable title."

In an appropriate action by Simmons against Boyd for specific performance, Simmons will:

- (A) Prevail, because he has obtained a "good and marketable title" by adverse possession.
- (B) Prevail, because Simmons's action for specific performance is an action in rem even though Olson is not a party.
- (C) Not prevail, because Boyd cannot be required to buy a lawsuit even if the probability is great that Boyd would prevail against Olson.
- (D) Not prevail, because Simmons's failure to disclose his lack of record title constitutes fraud.

Question 56

Jane, an architectural historian, bought a house in 1979 from William. She paid him \$50,000 in cash, and the balance of the \$150,000 sale price came from the proceeds of a mortgage she took out with State National Bank. The mortgage was recorded.

In 1987, Jane borrowed \$5,000 from the Home Finance Company, using her house as security. Home Finance recorded its mortgage on the property.

In 1996, Jane had an architect friend design an addition to her house. She borrowed \$40,000 from Property Equity Lenders, Inc. to pay for this construction. Property Equity did not record the mortgage Jane gave it to secure this debt.

In 2003, Jane lost her job and was unable to make payments on some of her obligations. She made the payments on the State National mortgage, but was unable to make any payments on either the Home Finance or Property Equity Lenders mortgages. Home Finance filed foreclosure of its mortgage.

At the foreclosure sale, Susan bought the property. After acquiring the property at the sale, what is Susan's obligation toward the holders of the other two mortgages, State National Bank and Property Equity Lenders, Inc.?

- (A) She takes the property subject to both mortgages.
- (B) She takes the property subject to neither mortgage.
- (C) She takes the property subject to Property Equity Lenders's mortgage, but not subject to State National Bank's mortgage.
- (D) She takes the property subject to State National Bank's mortgage, but not subject to Property Equity Lenders's mortgage.

Questions 57-58 are based on the following fact situation:

Alpha and Beta made a written contract pursuant to which Alpha promised to convey a specified apartment house to Beta in return for Beta's promise (1) to convey a 100-acre farm to Alpha and (2) to pay Alpha \$1,000 in cash six months after the exchange of the apartment house and the farm. The contract contained the following provision: "It is understood and agreed that Beta's obligation to pay the \$1,000 six months after the exchange of the apartment house and the farm shall be voided if Alpha has not, within three months after the aforesaid exchange, removed the existing shed in the parking area in the rear of the said apartment house."

57. Which of the following statements concerning the order of performances is *least* accurate?

- (A) Alpha's tendering of good title to the apartment house is a condition precedent to Beta's duty to convey good title to the farm.
- (B) Beta's tendering of good title to the farm is a condition precedent to Alpha's duty to convey good title to the apartment house.
- (C) Beta's tendering of good title to the farm is a condition subsequent to Alpha's duty to convey good title to the apartment house.
- (D) Alpha's tendering of good title to the apartment house and Beta's tendering of good title to the farm are concurrent conditions.

58. Alpha's removal of the shed from the parking area of the apartment house is:

- (A) A condition subsequent in form but precedent in substance to Beta's duty to pay the \$1,000.
- (B) A condition precedent in form but subsequent in substance to Beta's duty to pay the \$1,000.
- (C) A condition subsequent to Beta's duty to pay the \$1,000.
- (D) Not a condition, either precedent or subsequent, to Beta's duty to pay the \$1,000.

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Question 59

Cantebury Trails operated a fleet of touring buses. It owned its own garage for repairing and maintaining its fleet. Behind this garage was a large vacant lot in which Cantebury Trails stored old, discarded, and wrecked buses, which it salvaged for parts or sold for scrap. This area was fenced in by a five-foot high chain link fence, but Cantebury was aware that children from the neighborhood would climb the fence and play among the junked buses. Consequently, Cantebury Trails would have one of its employees walk through the storage area sometime during the day to chase away any children who may have scaled the fence.

One Saturday afternoon, when Cantebury Trails' garage had closed for the weekend, a group of children climbed over the storage area's fence to play army among the junked buses. One of the children, Donny (who had been chased away from the lot before and who also had been warned by his parents not to play in these buses), was trying to climb on the roof of one of the old buses, when he slipped on the front bumper of the bus and his arm broke through the front windshield. As a result of this accident, Donny severed the tendon and nerves in his right arm, leaving it permanently disabled.

Through an appropriate guardian, Donny brought suit against Cantebury Trails for his injury.

Which of the following, if established, would most aid Donny in showing that Cantebury Trails breached a duty owing to him?

- (A) It would have been economically feasible to remove the windows from all the abandoned buses.

- (B) This area would be classified more as a residential neighborhood than an industrial area.
- (C) Cantebury Trails could have eliminated the risk of injury without unduly interfering with its normal operations.
- (D) Cantebury Trails improperly maintained the fence that surrounded the lot with the discarded and abandoned buses.

Question 60

Cars driven by Pugh and Davidson collided, and Davidson was charged with driving while intoxicated in connection with the accident. She pleaded guilty and was merely fined, although, under the statute, the court could have sentenced her to two years in prison.

Thereafter, Pugh, alleging that Davidson's intoxication had caused the collision, sued Davidson for damages. At trial, Pugh offers the properly authenticated record of Davidson's conviction.

The record should be:

- (A) Admitted as proof of Davidson's character.
- (B) Admitted as proof of Davidson's intoxication.
- (C) Excluded, because the conviction was not the result of a trial.
- (D) Excluded, because it is hearsay not within any exception.

Question 61

In which of the following situations is Defendant *least likely* to be guilty of burglary in a jurisdiction that has extended burglary to buildings other than dwellings but otherwise retains the common law requirements?

- (A) Defendant posed as a member of a cleaning crew so that a security guard would give him access to a department store after it was closed for the night, and then hid in a storage closet until the cleaning crew left. He then stole a quantity of jewelry from several jewelry cases, and forced open a loading dock door to escape from the building.
- (B) Defendant, intending to steal money and valuables from a house he believed was unoccupied for the evening, pushed open a mail slot and reached his hand in to try to unlock the front door. The owners' dog bit Defendant's hand and he immediately pulled it out and fled.
- (C) Defendant was owed \$500 by Victor, his bookie. While Victor was out of town one night, Defendant went to Victor's house to get his money, because he knew that Victor had \$500 in cash in a desk drawer and the debt was long overdue. Defendant opened an unlocked window and entered the house. He could not find the cash, so he decided to take a painting that he knew was worth substantially more than \$500. He later sold it for \$1,000 and kept the proceeds.
- (D) Defendant, a security officer in a housing project, saw Von, who was wanted on a warrant for drug dealing, through a window of an apartment one evening. He fired his gun at Von from the sidewalk, intending to injure him, although Defendant knew that he was not legally authorized to use deadly force in that situation. The bullet went through the window and missed Von, lodging in a wall behind him.

Question 62

Pitt sued Dow for damages for injuries that Pitt incurred when a badly rotted limb fell from a curbside tree in front of Dow's home and hit Pitt. Dow claimed that the tree was on city property and thus was the responsibility of the city. At trial, Pitt offered testimony that, a week after the accident, Dow had cut the tree down with a chainsaw.

The offered evidence is:

- (A) Inadmissible, because there is a policy to encourage safety precautions.
- (B) Inadmissible, because it is irrelevant to the condition of the tree at the time of the accident.
- (C) Admissible to show the tree was on Dow's property.
- (D) Admissible to show the tree was in a rotted condition.

300. PRACTICE EXAM

Question 63

Talbot and Rogers, as lessees, signed a valid lease for a house. Lane, the landlord, duly executed the lease and delivered possession of the premises to the lessees.

During the term of the lease, Rogers verbally invited Andrews to share the house with the lessees. Andrews agreed to pay part of the rent to Lane, who did not object to this arrangement, despite a provision in the lease that provided that "any assignment, subletting or transfer of any rights under this lease without the express written consent of the landlord is strictly prohibited, null and void." Talbot objected to Andrews's moving in, even if Andrews were to pay a part of the rent.

When Andrews moved in, Talbot brought an appropriate action against Lane, Rogers, and Andrews for a declaratory judgment that Rogers had no right to assign. Rogers's defense was that he and Talbot were tenants in common of a term for years, and that he, Rogers, had a right to assign a fractional interest in his undivided one-half interest.

In this action, Talbot will:

- (A) Prevail, because a co-tenant has no right to assign all or any part of a leasehold without the consent of all interested parties.
- (B) Prevail, because the lease provision prohibits assignment.
- (C) Not prevail, because he is not the beneficiary of the nonassignment provision in the lease.
- (D) Not prevail, because his claim amounts to a void restraint on alienation.

Question 64

John Smith has denied his purported signature on a letter that has become critical in a breach of contract suit between Smith and Miller. At trial, Miller's counsel calls Alice, a teacher, who testifies that she taught John Smith mathematics in school 10 years earlier, knows his signature, and proposes to testify that the signature to the letter is that of John Smith. Smith's counsel objects.

The trial judge should:

- (A) Sustain the objection on the ground that identification of handwriting requires expert testimony and the teacher does not, per se, qualify as an expert.
- (B) Sustain the objection on the ground that the best evidence of Smith's handwriting would be testimony by a person who had examined his writing more recently than 10 years ago.
- (C) Overrule the objection on the ground that a schoolteacher qualifies as an expert witness for the purpose of identifying handwriting.
- (D) Overrule the objection on the ground that a layman may identify handwriting if he has seen the person in question write, and has an opinion concerning the writing in question.

Question 65

Harold and Wanda, once married to each other, had gone through a bitter divorce. The divorce decree awarded custody of the couple's four-year-old son Jake to Wanda, with Harold receiving visitation rights. On the first opportunity that Harold had to take Jake for the weekend, Harold disappeared with Jake. Wanda was greatly distressed and called Harold's parents, Grandmaw and Grandpaw, on a weekly basis, always asking if they knew anything about the whereabouts of Harold and Jake. Grandmaw and Grandpaw knew quite well where Harold and Jake were, and they often sent money to help support Harold while he was on the run. However, they always insisted that they knew nothing about the child. Four years after Jake was abducted, the police arrested Harold and returned Jake to his mother.

Wanda files an action against Grandmaw and Grandpaw alleging infliction of emotional distress. Will Wanda prevail?

- (A) Yes, because Grandmaw and Grandpaw acted in deliberate disregard of a high probability that their actions would cause Wanda to suffer emotional distress.
- (B) Yes, but only if Grandmaw and Grandpaw actually knew that their actions would cause Wanda to suffer emotional distress.
- (C) No, unless Wanda can prove that she suffered physical harm.
- (D) No, because Wanda never was in a zone of danger.

Questions 66-68 are based on the following fact situation:

As part of a comprehensive federal aid-to-education program, Congress included the following provisions as conditions for state receipt of federal funds: (1) Whenever textbooks are provided to students without charge, they must include no religious instruction and must be made available on the same terms to students

in all public and private schools accredited by the state educational authority. (2) Salary supplements can be paid to teachers in public and private schools, up to 10% of existing salary schedules, where present compensation is less than the average salary for persons of comparable training and experience, provided that no such supplement is paid to any teacher who instructs in religious subjects. (3) Construction grants can be made toward the cost of physical plants at private colleges and universities, provided that no part of the grant is used for buildings in which instruction in religious subject matters is offered.

66. Federal taxpayer Allen challenges the provision that allows the distribution of free textbooks to students in a private school where religious instruction is included in the curriculum. On the question of the adequacy of Allen's standing to raise the constitutional question, the most likely result is that standing will be:

- (A) Sustained, because any congressional spending authorization can be challenged by any taxpayer.
- (B) Sustained, because the challenge to the exercise of congressional spending power is based on a claimed violation of specific constitutional limitations on the exercise of such power.
- (C) Denied, because there is insufficient nexus between the taxpayer and the challenged expenditures.
- (D) Denied, because, in the case of private schools, no state action is involved.

302. PRACTICE EXAM

67. Federal taxpayer Bates also challenges the salary supplements for teachers in private schools where religious instruction is included in the curriculum. On the substantive constitutional issue, the most likely result is that the salary supplements will be:
- (A) Sustained, because the statute provides that no supplements will be made to teachers who are engaged in any religious instruction.
 - (B) Sustained, because to distinguish between private and public school teachers would violate the Free Exercise Clause of the First Amendment.
 - (C) Held unconstitutional, because some religions would benefit disproportionately.
 - (D) Held unconstitutional, because the policing of the restriction would amount to an excessive entanglement with religion.
68. Federal taxpayer Bates also challenges the construction grants to church-operated private colleges and universities. The most likely result is that the construction grants will be:
- (A) Sustained, because aid to one aspect of an institution of higher education not shown to be pervasively sectarian does not necessarily free it to spend its other resources for religious purposes.
 - (B) Sustained, because bricks and mortar do not aid religion in a way forbidden by the Establishment Clause of the First Amendment.
 - (C) Held unconstitutional, because any financial aid to a church-operated school strengthens the religious purposes of the institution.
 - (D) Held unconstitutional, because the grants involve or cause an excessive entanglement with religion.

Questions 69-70 are based on the following fact situation:

Eureka, Inc., inventor of the LBVC, a laser-beam vegetable chopper, ran a television ad that described the chopper and said, "The LBVC is yours for only \$49.99 if you send your check or money order to Box 007, Greenville. Not available in stores." Gourmet, who owned a retail specialty shop, wrote Eureka, "What's your best, firm price for two dozen LBVCs?" Eureka sent a written reply that said in its entirety, "We quote you for prompt acceptance \$39.99 per unit for 24 LBVCs." Gourmet subsequently mailed a check to Eureka in the appropriate amount, with a memo enclosed saying, "I accept your offer for 24 LBVCs."

69. A contract would arise from these communications only if:
- (A) Both parties were merchants.
 - (B) Eureka had at least 24 LBVCs in stock when Gourmet's check and memo were received.
 - (C) Gourmet's check and memo were mailed within three months after his receipt of Eureka's letter.
 - (D) Gourmet's check and memo were mailed within a reasonable time after his receipt of Eureka's letter.

70. For this question only, assume the following facts: Eureka shipped 24 LBVCs to Gourmet after receiving his check and memo, and with the shipment sent Gourmet an invoice that conspicuously stated, among other things, the following lawful provision: "These items shall not be offered for resale at retail." Gourmet received and read, but disregarded, the invoice restriction and displayed the 24 LBVCs for resale. Eureka has a cause of action against Gourmet for breach of contract only if:
- (A) Eureka, as inventor of the LBVC, was *not* a merchant.
 - (B) The invoice restriction was a material alteration of preexisting terms.
 - (C) Eureka's written reply that quoted \$39.99 per LBVC, but did not contain a restriction on retail sales, was *not* an offer that Gourmet accepted by ordering 24 LBVCs.
 - (D) Gourmet was consciously aware when taking delivery of the goods that the television ad had said, "Not available in stores."

Question 71

Which of the following is most likely to be found to be a strict liability offense?

- (A) A city ordinance providing for a fine of not more than \$200 for shoplifting.
- (B) A federal statute making it a felony to possess heroin.
- (C) A state statute making it a felony to fail to register a firearm.
- (D) A state statute making the sale of adulterated milk a misdemeanor.

Question 72

A group of children, ranging in age from 8 to 15, regularly played football on the common area of an apartment complex owned by O'Neill. Most of the children lived in the apartment complex, but some lived elsewhere. O'Neill knew that the children played on the common area and had not objected.

Peter, a 13-year-old who did not live in the apartment complex, fell over a sprinkler head while running for a pass and broke his leg. Although Peter had played football on the common area before, he had never noticed the sprinkler heads, which protruded one inch above the ground and were part of a permanently installed underground sprinkler system.

If a claim is asserted on Peter's behalf, Peter will:

- (A) Prevail, if the sprinkler head was a hazard that Peter probably would not discover.
- (B) Prevail, because O'Neill had not objected to children playing on the common area.
- (C) Not prevail, because Peter did not live in the apartment complex.
- (D) Not prevail, unless the sprinkler heads were abnormally dangerous to users of the common area.

304. PRACTICE EXAM

Question 73

A state statute provides that persons moving into a community to attend a college on a full-time basis may not vote in any elections for local or state officials that are held in that community. Instead, the statute provides that for voting purposes all such persons shall retain their residence in the community from which they came. In that state the age of majority is 18.

Which of the following is the strongest argument to demonstrate the unconstitutionality of this state statute?

- (A) A state does not have an interest that is sufficiently compelling to justify the exclusion from voting of an entire class of persons.
- (B) There are less restrictive means by which the state could assure that only actual residents of a community vote in its elections.
- (C) Most persons moving to a community to attend college full-time are likely to have attained the age of majority under the laws of this state.
- (D) On its face this statute impermissibly discriminates against interstate commerce.

Questions 74-75 are based on the following fact situation:

Seller and Buyer executed an agreement for the sale of real property.

74. Assume for this question only that Seller dies before closing and his will leaves his personal property to Perry and his real property to Rose. There being no breach of the agreement by either party, which of the following is correct?
- (A) Death, an eventuality for which the parties could have provided, terminates the agreement if they did not so provide.

- (B) Rose is entitled to the proceeds of the sale when it closes, because the doctrine of equitable conversion does not apply to these circumstances.
- (C) Perry is entitled to the proceeds of the sale when it closes.
- (D) Title was rendered unmarketable by Seller's death.

75. Assume for this question only that Buyer dies before closing, there being no breach of the agreement by either party. Which of the following is appropriate in most jurisdictions?

- (A) Buyer's heir may specifically enforce the agreement.
- (B) Seller has the right to return the down payment and cancel the contract.
- (C) Death terminates the agreement.
- (D) Any title acquired would be unmarketable by reason of Buyer's death.

Question 76

At trial of Pendergast's battery action against Dellacourt, arising from an incident in which Dellacourt allegedly bit off Pendergast's ear, Winchester testified that he was taking a short-cut through an urban alley one morning and heard someone cry "Help!" Rushing around the corner of a building, Winchester saw Pendergast lying on the sidewalk in a pool of blood, with his left ear missing. Dellacourt, who was standing nearby, turned quickly and made a move as if to approach Winchester, and so Winchester ran down the sidewalk away from Dellacourt to summon the police. The following exchange then occurred during cross-examination of Winchester by Dellacourt's counsel. D: "You didn't actually see my client bite off the plaintiff's ear, did you, Mr. Winchester?" W: "No." D: "For all you know, my client could have been an innocent bystander like yourself, but one who didn't run away but stayed to offer assistance." W: "I ran away because I was afraid of the defendant and because I wanted to call the police." D: "For all we know you might have been running out of that alley because you had just committed a crime yourself, Mr. Winchester." W: "Look, Dellacourt is the one who bit off the ear, not me!" D: "If you arrived on the scene after the alleged ear biting, how can you possibly know my client is the one who bit off the plaintiff's ear?" W: "Because I read in the newspaper the next day that an eyewitness to the entire event told police that he saw Dellacourt spit the ear out after I left." Dellacourt then moved to have Winchester's last remark stricken from the record.

If the trial court denies Dellacourt's motion, that ruling is most strongly supported by which of the following?

- (A) The report of the eyewitness was an excited utterance.
- (B) The report of the eyewitness was a statement of recent perception.

- (C) The error in admitting the statement could not be cured by an appropriate jury instruction.
- (D) The remark was invited by the cross-examiner's questions.

Questions 77-78 are based on the following fact situation:

Cycle Company manufactured a bicycle that it sold to Bike Shop, a retail bicycle dealer, which in turn sold it to Roth. Shortly thereafter, while Roth was riding the bicycle along a city street, he saw a traffic light facing him turn from green to amber. He sped up, hoping to cross the intersection before the light turned red. However, Roth quickly realized that he could not do so and applied the brake, which failed. To avoid the traffic that was then crossing in front of him, Roth turned sharply to his right and onto the sidewalk, where he struck Perez, a pedestrian. Both Perez and Roth sustained injuries. Assume that the jurisdiction follows traditional contributory negligence rules.

77. If Roth asserts a claim against Bike Shop based on strict liability in tort, will Roth prevail?
- (A) Yes, if the brake failed because of a defect present when the bicycle left the factory of Cycle Company.
 - (B) Yes, because the brake failed while Roth was riding the bicycle.
 - (C) No, if Roth contributed to his own injury by speeding up.
 - (D) No, if Bike Shop carefully inspected the bicycle before selling it.

306. PRACTICE EXAM

78. If Perez asserts a claim based on negligence against Cycle Company, and if it is found that the brake failure resulted from a manufacturing defect in the bicycle, will Perez prevail?
- (A) Yes, because Cycle Company placed a defective bicycle into the stream of commerce.
 - (B) Yes, if the defect could have been discovered through the exercise of reasonable care by Cycle Company.
 - (C) No, because Perez was not a purchaser of the bicycle.
 - (D) No, if Roth was negligent in turning onto the sidewalk.

Question 79

Which of the following is *least* likely to be the underlying felony in a prosecution for felony murder?

- (A) Arson.
- (B) Manslaughter.
- (C) Attempted rape.
- (D) Burglary.

Question 80

While crossing Spruce Street, Pesko was hit by a car that she did not see. Pesko sued Dorry for her injuries.

At trial, Pesko calls Williams, a police officer, to testify that, 10 minutes after the accident, a driver stopped him and said, "Officer, a few minutes ago I saw a hit-and-run accident on Spruce Street involving a blue convertible, which I followed to the drive-in restaurant at Oak and Third," and that a few seconds later Williams saw Dorry sitting alone in a blue convertible in the drive-in restaurant's parking lot.

Williams's testimony about the driver's statement should be:

- (A) Admitted as a statement of recent perception.
- (B) Admitted as a present sense impression.
- (C) Excluded, because it is hearsay not within any exception.
- (D) Excluded, because it is more prejudicial than probative.

Questions 81-83 are based on the following fact situation:

A written contract was entered into between Bouquet, a financier-investor, and Vintage Corporation, a winery and grape-grower. The contract provided that Bouquet would invest \$1 million in Vintage for its capital expansion and, in return, that Vintage, from grapes grown in its famous vineyards, would produce and market at least 500,000 bottles of wine each year for five years under the label "Premium Vintage-Bouquet."

The contract included provisions that the parties would share equally the profits and losses from the venture and that, if feasible, the wine would be distributed by Vintage only through Claret, a wholesale distributor of fine wines. Neither Bouquet nor Vintage had previously dealt with Claret. Claret learned of the contract two days later from reading a trade newspaper. In reliance thereon, he immediately hired an additional sales executive and contracted for enlargement of his wine storage and display facility.

81. If Vintage refuses to distribute the wine through Claret and Claret then sues Vintage for breach of contract, is it likely that Claret will prevail?
- (A) Yes, because Vintage's performance was to run to Claret rather than to Bouquet.
 - (B) Yes, because Bouquet and Vintage could reasonably foresee that Claret would change his position in reliance on the contract.
 - (C) No, because Bouquet and Vintage did not expressly agree that Claret would have enforceable rights under their contract.
 - (D) No, because Bouquet and Vintage, having no apparent motive to benefit Claret, appeared in making the contract to have been protecting or serving only their own interests.
82. For this question only, assume the following facts. Amicusbank lent Bouquet \$200,000 and Bouquet executed a written instrument providing that Amicusbank "is entitled to collect the debt from my share of the profits, if any, under the Vintage-Bouquet contract." Amicusbank gave prompt notice of this transaction to Vintage.
- If Vintage thereafter refuses to account for any profits to Amicusbank and Amicusbank sues Vintage for Bouquet's share of profits then realized, Vintage's strongest argument in defense is that:
- (A) The Bouquet-Vintage contract did not expressly authorize an assignment of rights.
 - (B) Bouquet and Vintage are partners, not simply debtor and creditor.
- (C) Amicusbank is not an assignee of Bouquet's rights under the Bouquet-Vintage contract.
- (D) Amicusbank is not an intended third-party beneficiary of the Bouquet-Vintage contract.
83. For this question only, assume the following facts. Soon after making its contract with Bouquet, Vintage, without Bouquet's knowledge or assent, sold its vineyards but not its winery to Agribiz, a large agricultural corporation. Under the terms of this sale, Agribiz agreed to sell to Vintage all grapes grown on the land for five years. Agribiz's employees have no experience in wine-grape production, and Agribiz has no reputation in the wine industry as a grape producer or otherwise. The Bouquet-Vintage contract was silent on the matter of Vintage's selling any or all of its business assets.
- If Bouquet seeks an appropriate judicial remedy against Vintage for entering into the Vintage-Agribiz transaction, is Bouquet likely to prevail?
- (A) Yes, because the Vintage-Agribiz transaction created a significant risk of diminishing the profits in which Bouquet would share under his contract with Vintage.
 - (B) Yes, because the Bouquet-Vintage contract did not contain a provision authorizing a delegation of Vintage's duties.
 - (C) No, because Vintage remains in a position to perform under the Bouquet-Vintage contract.
 - (D) No, because Vintage, as a corporation, must necessarily perform its contracts by delegating duties to individuals.

Question 84

Miller applied to the state liquor board for transfer of the license of Miller's Bar and Grill to a new site. The board held a hearing on the application.

At that hearing, Hammond appeared without being subpoenaed and stated that Miller had underworld connections. Although Hammond did not know this information to be true, he had heard rumors about Miller's character and had noticed several underworld figures going in and out of Miller's Bar and Grill. In fact, Miller had no underworld connections.

In a claim against Hammond based on defamation, Miller will:

- (A) Not recover if Hammond reasonably believed his statement to be true.
- (B) Not recover if the board granted Miller's application.
- (C) Recover, because Hammond's statement was false.
- (D) Recover, because Hammond appeared before the board voluntarily.

Question 85

Arthur and Celia, brother and sister, both of legal age, inherited Goodacre, their childhood home, from their father. They thereby became tenants in common.

Goodacre had never been used as anything except a residence. Arthur had been residing on Goodacre with his father at the time his father died. Celia had been residing in a distant city. After their father's funeral, Arthur continued to live on Goodacre, but Celia returned to her own residence.

There was no discussion between Arthur and Celia concerning their common ownership, nor had there ever been any administration of their father's estate. Arthur paid all taxes, insurance, and other carrying charges on Goodacre. He paid no rent or other compensation to Celia, nor did Celia request any such payment.

Thirty years later, a series of disputes arose between Arthur and Celia for the first time concerning their respective rights to Goodacre. The jurisdiction where the land is located recognizes the usual common law types of co-tenancies, and there is no applicable legislation on the subject.

If Arthur claims the entire title to Goodacre in fee simple and brings an action against Celia to quiet title in himself, and if the state where the land is located has an ordinary 20-year adverse possession statute, the decision should be for:

- (A) Arthur, because during the past 30 years Arthur has exercised the type of occupancy ordinarily considered sufficient to satisfy the adverse possession requirements.
- (B) Arthur, because the acts of the parties indicate Celia's intention to renounce her right to inheritance.
- (C) Celia, because there is no evidence that Arthur has performed sufficient acts to constitute her ouster.
- (D) Celia, because one co-tenant cannot acquire title by adverse possession against another.

Question 86

David is being tried in federal court for criminal conspiracy with John to violate federal narcotics law. At trial, the prosecutor calls David's new wife, Wanda, and asks her to testify about a meeting between David and John that she observed before she married David.

Which of the following is the most accurate statement of the applicable rule concerning whether Wanda may testify?

- (A) The choice is Wanda's.
- (B) The choice is David's.
- (C) Wanda is permitted to testify only if both Wanda and David agree.
- (D) Wanda is compelled to testify even if both Wanda and David object.

Question 87

Dillon held up a gasoline station. During the robbery he shot and killed a customer who attempted to apprehend him. Dillon was prosecuted for premeditated murder and convicted. Thereafter, he was indicted for armed robbery of the station. Before the trial, his attorney moved to dismiss the indictment on the ground that further proceedings were unconstitutional because of Dillon's prior conviction.

The motion to dismiss should be:

- (A) Granted, because once Dillon was convicted on any of the charges arising out of the robbery, the prosecution was constitutionally estopped from proceeding against Dillon on any charge stemming from the same transaction.
- (B) Granted, because the Double Jeopardy Clause prohibits a subsequent trial on what is essentially a lesser included offense.

- (C) Denied, because there is no constitutional requirement that all known charges against Dillon be brought in the same prosecution.
- (D) Denied, because estoppel does not apply when the defendant is charged with violating two different statutes.

Question 88

An appropriations act passed by Congress over the President's veto directs that \$1 billion "shall be spent" by the federal government for the development of a new military weapons system, which is available only from the Arms Corporation. On the order of the President, the Secretary of Defense refuses to authorize a contract for purchase of the weapons system. The Arms Corporation sues the Secretary of Defense, alleging an unlawful withholding of these federal funds.

The strongest constitutional argument for the Arms Corporation is that:

- (A) Passage of an appropriation over a veto makes the spending mandatory.
- (B) Congress's power to appropriate funds includes the power to require that the funds will be spent as directed.
- (C) The President's independent constitutional powers do not specifically refer to spending.
- (D) The President's power to withhold such funds is limited to cases where foreign affairs are directly involved.

310. PRACTICE EXAM

Question 89

Potts, a building contractor, sued Dennis for failure to pay on a small cost-plus construction contract. At trial, Potts, who personally supervised all of the work, seeks to testify to what he remembers about the amount of pipe used, the number of workers used on the job, and the number of hours spent grading.

Dennis objects on the ground that Potts had routinely recorded these facts in notebooks which are in Potts's possession.

Potts's testimony is:

- (A) Admissible as a report of regularly conducted business activity.
- (B) Admissible as based on firsthand knowledge.
- (C) Inadmissible, because it violates the best evidence rule.
- (D) Inadmissible, because a summary of writings cannot be made unless the originals are available for examination.

Question 90

A grand jury was investigating a bank robbery. The only information known to the prosecutor was a rumor that Taylor might have been involved. The grand jury subpoenaed Taylor. He refused to answer questions about the robbery and was granted use immunity. He then testified that he and Simmons had robbed the bank. The grand jury indicted both Taylor and Simmons for the bank robbery. The prosecutor permitted Simmons to enter a plea to a lesser offense in exchange for Simmons's agreement to testify against Taylor. The prosecutor had no evidence as to the identity of the robbers except the testimony of Simmons and Taylor.

At Taylor's trial, his objection to Simmons's being permitted to testify should be:

- (A) Sustained, because the prosecutor may not bargain away the rights of one co-defendant in a deal with another.
- (B) Sustained, because Simmons's testimony was acquired as a result of Taylor's grand jury testimony.
- (C) Overruled, because the police suspected Taylor even before he testified in the grand jury hearing.
- (D) Overruled, because a witness cannot be precluded from testifying if his testimony is given voluntarily.

Questions 91-93 are based on the following fact situation:

Dino purchased a new Belchfire automobile from Dealer. Within a few days of the purchase, Dino returned the car to Dealer for repairs. Dino complained, "There's something wrong with the brakes. The car keeps pulling to the left whenever I apply them." Dealer's mechanic readjusted the brakes but did not detect any other problem with the brake system. Dealer's mechanic told Dino, "You shouldn't have any more problems with those brakes. However, if the same problem does occur, don't panic. The car may pull to the left, but the brakes will still work, allowing you to stop the car."

Dino drove the car home. It worked fine for two days, but then the brakes started pulling to the left again. As Dino was driving the car back to Dealer's shop for further repair, he saw Pedestrian crossing the street. Dino pressed his foot down on the brake pedal, but the master cylinder failed, and the car would not stop. Dino's car struck Pedestrian, injuring him.

91. If Pedestrian sues Dino for his injuries:
- (A) Pedestrian will prevail, because Dino knew that there was a problem with his brakes.
 - (B) Pedestrian will prevail, because drivers have a duty to maintain their vehicles in safe working order.
 - (C) Dino will prevail, because he had no reason to know that his brakes would not stop the car.
 - (D) Dino will prevail, because he diligently had his brakes repaired.
92. If Pedestrian sues Belchfire Motors, the manufacturer of Dino's car, on a theory of strict liability for his injuries:
- (A) Pedestrian will prevail, because manufacturers are strictly liable for accidents that result from defects in their products.
 - (B) Pedestrian will prevail, if the master cylinder was defective when the vehicle left Belchfire's control.
 - (C) Belchfire will prevail, because Dealer's mechanic readjusted the brakes.
 - (D) Belchfire will prevail, unless the car model had a history of brake defects.

93. If Pedestrian brings a negligence action against Dealer for his injuries:
- (A) Pedestrian will prevail, if the car was sold by Dealer with an unreasonably dangerous defect.
 - (B) Pedestrian will prevail, because Dealer's mechanic did not discover the defective cylinder.
 - (C) Dealer will prevail, unless the defect should have been discovered when the mechanic inspected the car.
 - (D) Dealer will prevail, unless Belchfire was negligent in designing or manufacturing the master cylinder.

312. PRACTICE EXAM

Question 94

Fernwood Realty Company developed a residential development, known as the Fernwood Development, which included single-family dwellings, town houses, and high-rise apartments for a total of 25,000 dwelling units. Included in the deed to each unit was a covenant under which the grantee and the grantee's "heirs and assigns" agreed to purchase electrical power only from a plant Fernwood promised to build and maintain within the development. Fernwood constructed the plant and the necessary power lines. The plant did not supply power outside the development. An appropriate and fair formula was used to determine price.

After constructing and selling 12,500 of the units, Fernwood sold its interest in the development to Gaint Realty Investors. Gaint operated the power plant and constructed and sold the remaining 12,500 units. Each conveyance from Gaint contained the same covenant relating to electrical power that Fernwood had included in the 12,500 conveyances it had made.

Page bought a dwelling unit from Olm, who had purchased it from Fernwood. Subsequently, Page, whose lot was along the boundary of the Fernwood development, ceased buying electrical power from Gaint and began purchasing power from General Power Company, which provided such service in the area surrounding the Fernwood development. Both General Power and Gaint have governmental authorization to provide electrical services to the area. Gaint instituted an appropriate action against Page to enjoin her from obtaining electrical power from General Power.

If judgment is for Page, it most likely will be because:

- (A) The covenant does not touch and concern the land.
- (B) The mixture of types of residential units is viewed as preventing one common development scheme.

- (C) The covenant is a restraint on alienation.
- (D) There is no privity of estate between Page and Gaint.

Question 95

Amy Docent, a state college instructor, was discharged because of her refusal to comply with a state statute requiring public employees to swear or affirm that they will (1) "uphold and defend" the state and federal constitutions, and (2) "oppose the overthrow" of the state or federal governments "by force, violence, or by any improper method." The statute had previously been held constitutional by the state supreme court. Docent filed a complaint in federal district court alleging the unconstitutionality of the statute and seeking an injunction and damages.

Which of the following is the state's strongest argument for sustaining the validity of the statute?

- (A) Government employment is a privilege, not a right.
- (B) The oath as a whole is only a commitment to abide by constitutional processes.
- (C) The First and Fourteenth Amendments permit a state to fix the conditions of state employment.
- (D) The state has a compelling need to keep disloyal persons out of governmental positions of trust.

Questions 96-97 are based on the following fact situation:

On January 2, Hugh Homey and Sue Structo entered into a written contract in which Structo agreed to build on Homey's lot a new house for Homey, according to plans and specifications furnished by Homey's architect, Barbara Bilevel, at a contract price of \$200,000. The contract provided for specified progress payments and a final payment of \$40,000 upon Homey's acceptance of the house and issuance of a certificate of final approval by the architect. Further, under a "liquidated damages" clause in the agreement, Structo promised to pay Homey \$500 for each day's delay in completing the house after the following October 1. Homey, however, told Structo on January 2, before the contract was signed, that he would be on an around-the-world vacation trip most of the summer and fall and would not return to occupy the house until November 1.

96. For this question only, assume the following facts. Because she was overextended on other construction jobs, Structo did not complete the house until October 15. Homey returned on November 1 as planned and occupied the house. Ten days later, after making the \$40,000 final payment to Structo, Homey learned for the first time that the house had not been completed until October 15.

If Homey sues Structo for breach of contract on account of the 15-day delay in completion, which of the following will the court probably decide?

- (A) Homey will recover damages as specified in the contract, *i.e.*, \$500 multiplied by 15.
- (B) Homey will recover his actual damages, if any, caused by the delay in completion.
- (C) Having waived the delay by occupying the house and making the final payment, Homey will recover nothing.

(D) Homey will recover nothing because the contractual completion date was impliedly modified to November 1 when Homey on January 2 advised Structo about Homey's prospective trip and return date.

97. For this question only, assume the following facts: Structo completed the house on October 14 and, when Homey returned on November 1, requested the final payment of \$40,000 and issuance of a certificate of final approval by the architect, Bilevel. Homey, however, refused to pay any part of the final installment after Bilevel told him, "Structo did a great job and I find no defects worth mentioning, but Structo's contract price was at least \$40,000 too high, especially in view of the big drop in housing values within the past 10 months. I will withhold the final certificate, and you just hold on to your money."

If Structo sues Homey for the \$40,000 final payment after Bilevel's refusal to issue a final certificate, which of the following will the court probably decide?

- (A) Structo wins, because nonoccurrence of the condition requiring Bilevel's certificate of final approval was excused by Bilevel's bad-faith refusal to issue the certificate.
- (B) Structo wins, but, because all contractual conditions have not occurred, her recovery is limited to restitution of the benefit conferred on Homey, minus progress payments already received.
- (C) Homey wins, provided he can prove by clear and convincing evidence that the fair-market value of the completed house is \$160,000 or less.
- (D) Homey wins, provided he can prove by clear and convincing evidence that total payments to Structo of \$160,000 will yield a fair net profit.

314. PRACTICE EXAM

Question 98

Acting on an anonymous telephone call, police went to Desmond's apartment, knocked on the door, and demanded to search it for narcotics. When Desmond refused, the police forced the door open and placed him under arrest. As they were removing him from the apartment, Desmond offered to give the officers "valuable information" in exchange for his release. Before he could say anything else, Desmond was given *Miranda* warnings by the police. Thereafter, he told the police that he had stored some heroin in his friend's apartment and that he and his friend had been going to sell it. The heroin was recovered, and Desmond was prosecuted for conspiracy to sell narcotics and for possession of narcotics. At his trial, Desmond moved to suppress his statements.

Which of the following is Desmond's best argument in support of the motion to suppress?

- (A) Desmond is entitled to know the identity of his accuser, and the state cannot supply this information.
- (B) The police should have given Desmond *Miranda* warnings prior to entry into the apartment, and the warnings were ineffectual once Desmond offered to give the police information.
- (C) Desmond was intimidated by the forced entry into the apartment, and since the statements were involuntary and coerced, their use against him would violate due process of law.
- (D) The statements were fruits of an unlawful arrest, and though the *Miranda* warnings may have been sufficient to protect his right against self-incrimination, they were not sufficient to purge the taint of the illegal arrest.

Question 99

Supermedia, a television station, was conducting a "person on the street" interview segment live for its evening "magazine" show and asking citizens of the community what they thought were the biggest problems facing the city. When the interviewer stopped Don and asked him the question, he replied, "Corruption in city government, particularly the mayor."

William, mayor of the city, has now brought an action for defamation against Don. At trial, William has produced testimony as to his honesty and good character.

Which of the following evidence could Don properly adduce at trial as part of his defense?

- I. The fact that William was convicted two years ago of taking a bribe to award a city contract for solid waste disposal.
 - II. The testimony of Harold, a local newspaper editor, that William is known throughout the state as a corrupt politician.
 - III. The testimony of Allen, a former campaign manager of William's, that William was corrupt.
- (A) I. only.
 - (B) I. and II. only.
 - (C) I. and III. only.
 - (D) I., II., and III.

Question 100

Purr entered into a written contract to buy Oldacre from Venn at a price of \$160,000. At the time the contract was entered into, Purr gave Venn a cashier's check for \$10,000, representing Purr's "earnest money." According to procedures provided for by state law, the contract was promptly and properly recorded in the office of the county's Recorder of Deeds. The closing date was set for April 29.

On April 17, Purr's attorney conducted a title search, during which the lawyer discovered that Venn's distant cousin, Kuzz, had a legitimate claim to a 1/10 undivided interest in Oldacre, based upon some confusing language in the will of Venn's grandfather, from whom Venn inherited Oldacre. On April 26, Purr paid Kuzz \$10,000 and Kuzz gave Purr a quitclaim deed, surrendering any and all interest Kuzz had in Oldacre. Purr informed Venn of the situation and told Venn, "I'll see you at the closing." On April 29, Purr appeared at the Equity Title Company offices at the time appointed in the land-sale contract for the closing. Purr tendered a certified check to the closing officer, but Venn never appeared at the closing. Purr asked the closing officer to place the certified check in escrow and promptly sued Venn for specific performance.

Will Purr prevail in his specific performance action?

- (A) Yes, if the certified check is for \$150,000.
- (B) Yes, if the certified check is for \$140,000.
- (C) No, because Purr should have informed Venn of the title defect to allow Venn to obtain marketable title, but Venn must return Purr's earnest money.
- (D) No, because Purr has become a co-tenant of Venn and an action for partition rather than specific performance is appropriate.

Multistate Practice Exam

P.M. EXAM

Time—3 hours

You will be given three hours to work on this test. Be sure that the question numbers on your answer sheet match the question numbers in your test book. You are not to begin work until the supervisor tells you to do so.

Your score will be based on the number of questions you answer correctly. It is therefore to your advantage to try to answer as many questions as you can. Give only one answer to each question; multiple answers will not be counted. If you wish to change an answer, erase your first mark completely and mark your new choice. Use your time effectively. Do not hurry, but work steadily and as quickly as you can without sacrificing your accuracy.

YOU ARE TO INDICATE YOUR ANSWERS TO ALL QUESTIONS ON THE SEPARATE ANSWER SHEET PROVIDED.

DIRECTIONS

Each of the questions or incomplete statements in this test is followed by four suggested answers or completions. You are to choose the *best* of the stated alternatives. Answer all questions according to the generally accepted view, except where otherwise noted.

For the purpose of this test, you are to assume that Articles 1 and 2 of the Uniform Commercial Code have been adopted. You are also to assume relevant application of Article 9 of the U.C.C. concerning fixtures. The Federal Rules of Evidence are deemed to control.

The terms "Constitution," "constitutional," and "unconstitutional" refer to the federal Constitution unless indicated to the contrary.

You are also to assume that there is no applicable statute unless otherwise specified; however, survival actions and claims for wrongful death should be assumed to be available where applicable. You should assume that joint and several liability, with pure comparative negligence, is the relevant rule unless otherwise indicated.

**DO NOT OPEN THE TEST UNTIL
YOU ARE INSTRUCTED TO DO SO.**

ANSWER SHEET (P.M. EXAM)

- | | | | |
|---------------------|---------------------|---------------------|---------------------|
| 101. A B C D | 126. A B C D | 151. A B C D | 176. A B C D |
| 102. A B C D | 127. A B C D | 152. A B C D | 177. A B C D |
| 103. A B C D | 128. A B C D | 153. A B C D | 178. A B C D |
| 104. A B C D | 129. A B C D | 154. A B C D | 179. A B C D |
| 105. A B C D | 130. A B C D | 155. A B C D | 180. A B C D |
| | | | |
| 106. A B C D | 131. A B C D | 156. A B C D | 181. A B C D |
| 107. A B C D | 132. A B C D | 157. A B C D | 182. A B C D |
| 108. A B C D | 133. A B C D | 158. A B C D | 183. A B C D |
| 109. A B C D | 134. A B C D | 159. A B C D | 184. A B C D |
| 110. A B C D | 135. A B C D | 160. A B C D | 185. A B C D |
| | | | |
| 111. A B C D | 136. A B C D | 161. A B C D | 186. A B C D |
| 112. A B C D | 137. A B C D | 162. A B C D | 187. A B C D |
| 113. A B C D | 138. A B C D | 163. A B C D | 188. A B C D |
| 114. A B C D | 139. A B C D | 164. A B C D | 189. A B C D |
| 115. A B C D | 140. A B C D | 165. A B C D | 190. A B C D |
| | | | |
| 116. A B C D | 141. A B C D | 166. A B C D | 191. A B C D |
| 117. A B C D | 142. A B C D | 167. A B C D | 192. A B C D |
| 118. A B C D | 143. A B C D | 168. A B C D | 193. A B C D |
| 119. A B C D | 144. A B C D | 169. A B C D | 194. A B C D |
| 120. A B C D | 145. A B C D | 170. A B C D | 195. A B C D |
| | | | |
| 121. A B C D | 146. A B C D | 171. A B C D | 196. A B C D |
| 122. A B C D | 147. A B C D | 172. A B C D | 197. A B C D |
| 123. A B C D | 148. A B C D | 173. A B C D | 198. A B C D |
| 124. A B C D | 149. A B C D | 174. A B C D | 199. A B C D |
| 125. A B C D | 150. A B C D | 175. A B C D | 200. A B C D |

Question 101

Egbert, who was sent to prison for nine years for car theft, vowed to get even with Charles, the prosecutor at his trial. While in prison, Egbert was told by another prisoner, Duane, that when Charles was in private practice as a criminal defense attorney, he had represented Duane in a drug charge. Duane claimed that because he did not have the cash to pay Charles his fees, he offered to pay his fees with five ounces of cocaine, and Charles accepted.

Although Egbert had no independent reason to believe that what Duane said was true, when he got out of prison he learned that Charles was running for District Attorney. Egbert went to one of the local papers and sold them the story for \$1,000. In the article that resulted, Egbert was quoted as saying "I only hope that Charles suffers like I had to suffer for the last nine years."

Although the allegation was false, Charles withdrew from the race as a result of the article.

In a suit by Charles against Egbert for defamation, the probable result would be:

- (A) Charles prevails because Egbert acted with deliberate malice towards Charles.
- (B) Charles prevails if Egbert should have known that the story was false.
- (C) Egbert prevails because the story was a matter of public concern.
- (D) Egbert prevails if he honestly believed the truth of the assertion made by Duane.

Question 102

A statute in a jurisdiction makes it a crime to sell ammunition to a minor (defined as a person under the age of 18). The courts have interpreted this statute as creating a strict liability offense that does not require knowledge of the age of the purchaser and as creating vicarious liability. Duncan, who was 16 years old, but looked four or five years older, entered a store owned by Mathews and asked a clerk for a box of .22 caliber shells. Mathews had instructed her employees not to sell ammunition to minors. The clerk asked Duncan his age. Duncan said he was 20. The clerk then placed a box of shells on the counter and asked, "Anything else?" Duncan said that was all he wanted but then discovered he did not have enough money to pay for the shells, so the clerk put the box back onto the shelf.

If Mathews, the owner of the store, is charged with attempting to violate the statute, her best argument would be that:

- (A) It was impossible for the sale to have occurred.
- (B) She had strictly instructed her employees not to sell ammunition to minors.
- (C) Duncan lied about his age.
- (D) The clerk did not have the mental state needed for attempt.

322. PRACTICE EXAM

Question 103

Technix, Inc. produces the most up-to-date, high-speed mainframe computers on the market, and Cruncher Corporation is on the cutting edge of data storage technology. Technix and Cruncher contracted to purchase/sell a “Yellow Giant” computer. The written contract stated that Cruncher would purchase “one Technix ‘Yellow Giant’ computer at a price of \$175,000.” At the time, the going price for Yellow Giant computers was \$150,000. When Technix delivered a Yellow Giant on the specified date, Cruncher refused to accept delivery and refused to pay. Technix sued Cruncher for breach, claiming that its expensive computers were manufactured to order and so it was forced to dispose of the Yellow Giant at a price far below fair market value. In defending the suit, Cruncher’s president wishes to testify that Cruncher rejected the Yellow Giant because both parties knew that Cruncher really wanted a “Purple Giant,” a machine much faster than the Yellow Giant, but which the parties agreed would be called in the contract a “Yellow Giant” to keep competitors in the dark as to Cruncher’s new capabilities, and that the parties had executed contracts in the past that had specified a less powerful computer than the model that was actually delivered.

Should the testimony of Cruncher’s president be admitted?

- (A) Yes, because Cruncher is entitled to reformation of the contract.
- (B) Yes, because the president’s testimony would explain the meaning of a disputed contract term.
- (C) No, because the parol evidence rule applies and the president’s testimony contradicts a term in the written contract.
- (D) No, because the Statute of Frauds applies, since the contract is for a large amount of money.

Questions 104-105 are based on the following fact situation:

The state of Floribama has recently had a problem with people dealing in, and with, its booming garment industry. The use of independent contractors by major garment makers, most of whom were headquartered out of state, had led to the hiring of illegal aliens to work under conditions reminiscent of 19th century sweatshops.

The legislature of Floribama enacted a statute to remedy the situation and to protect its citizens against the problems in the future. The statute provides:

- I. That all garment makers must be licensed by the state attorney general.
 - II. That all subcontractors (defined separately in the statute) must be separately licensed by the attorney general and must have been a citizen of the United States for five years and a resident of Floribama for one year.
104. The requirement that garment makers be licensed by the attorney general is:
- (A) Constitutional, because it is within the proper scope of the exercise of the police powers of the state.
 - (B) Constitutional, because the attorney general is designated as the proper person to enforce the law.
 - (C) Unconstitutional, as a burden on interstate commerce.
 - (D) Unconstitutional, as a violation of the Privileges and Immunities Clause of Article IV.

105. The second clause of the legislation concerning subcontractors is subject to a constitutional challenge based on:

- (A) The Equal Protection Clause of the Fourteenth Amendment.
- (B) The Privileges and Immunities Clause of the Fourteenth Amendment.
- (C) The Due Process Clause of the Fifth Amendment.
- (D) The Tenth Amendment reserved powers of the state.

Question 106

In litigation over the estate of Baggs, who died intestate, Payton, who is 18 years old, claimed to be Baggs's niece and entitled, therefore, to a share of his large estate. In support of her claim, Payton offered in evidence a Bible, properly identified as having belonged to Baggs's family, in the front of which was a list of family births, marriages, and deaths. The list recorded Payton's birth to Baggs's oldest sister.

To prove that Payton is Baggs's niece, the Bible listing is:

- (A) Admissible as an ancient document.
- (B) Admissible as a family record.
- (C) Inadmissible, because it is hearsay not within any exception.
- (D) Inadmissible, because there was no showing of firsthand knowledge by the one who wrote it.

Question 107

Taylor and Scott, an unmarried couple, purchased a condominium as tenants in common and lived in the condominium for three years. Subsequently, they made an oral agreement that, on the death of either of them, the survivor would own the entire condominium, and, as a result, they decided they did not need wills.

Two years later, Taylor and Scott were involved in the same automobile accident. Taylor was killed immediately. Scott died one week later. Both died intestate. Taylor's sole heir is his brother, Mark. Scott's sole heir is her mother, Martha. Mark claimed one-half of the condominium, and Martha claimed all of it. The jurisdiction has no applicable statute except for the Statute of Frauds; nor does it recognize common law marriages.

In an appropriate action by Martha claiming the entire ownership of the condominium, the court will find that:

- (A) Martha owns the entire interest because Taylor and Scott did not make wills in reliance upon their oral agreement.
- (B) Martha owns the entire interest because she is entitled to reformation of the deed to reflect the oral agreement.
- (C) Mark and Martha each own an undivided one-half interest because Taylor and Scott each died as the result of the same accident.
- (D) Mark and Martha each own an undivided one-half interest because the Statute of Frauds applies.

324. PRACTICE EXAM

Question 108

A state statute provides that only citizens of the United States may be employed by that state. In an action brought in a federal court, a resident alien who was prevented from obtaining state employment as a garbage collector solely because of his alien status challenged the statute's constitutionality as applied to his circumstances.

Which of the following statements concerning the burden of persuasion applicable to this suit is correct?

- (A) The alien must demonstrate that there is no rational relationship between the citizenship requirement and any legitimate state interest.
- (B) The alien must demonstrate that the citizenship requirement is not necessary to advance an important state interest.
- (C) The state must demonstrate that there is a rational relationship between the citizenship requirement and a legitimate state interest.
- (D) The state must demonstrate that the citizenship requirement is necessary to advance a compelling state interest.

Question 109

Chemco designed and built a large tank on its premises for the purpose of storing highly toxic gas. The tank developed a sudden leak and escaping toxic gas drifted into the adjacent premises, where Nyman lived. Nyman inhaled the gas and died as a result.

In a suit brought by Nyman's personal representative against Chemco, which of the following must be established if the claim is to prevail?

- I. The toxic gas that escaped from Chemco's premises was the cause of Nyman's death.
- II. The tank was built in a defective manner.
- III. Chemco was negligent in designing the tank.

- (A) I. only.
- (B) I. and II. only.
- (C) I. and III. only.
- (D) I., II., and III.

Question 110

Pullen used aluminum brackets in her business. On the telephone listed as hers in the telephone book, Pullen received a call in which the caller said, "This is John Denison of Denison Hardware Company. We have a special on aluminum brackets this week at 30% off." Pullen ordered brackets from the caller. When the brackets were never delivered, Pullen sued Denison for breach of contract.

At trial, Denison, who denies having made the telephone call, objects to Pullen's testimony concerning it. When asked, Pullen testifies that, aside from the telephone call, she had never heard Denison speak until she met him in the judge's chambers before the trial and that, in her opinion, the voice on the telephone was Denison's.

The strongest argument for admission of Pullen's testimony concerning the telephone call is that:

- (A) The call related to business reasonably transacted over the telephone.
- (B) The call was received at a number assigned to Pullen by the telephone company.
- (C) After hearing Denison speak in chambers, Pullen recognized Denison's voice as that of the person on the telephone.
- (D) Self-identification is sufficient authentication of a telephone call.

Question 111

Drake owned a small warehouse that he leased to Teague, who used it as a storage and distribution center for fresh cut flowers being shipped to area florists. Drake wanted to put Teague out of business so that he could lease the warehouse to someone else at a higher rent. He entered the warehouse one night using a master key, and turned off the cooling system to destroy the flowers. To ensure that all of Teague's inventory would be destroyed, he also deployed several kerosene space heaters. While he was filling one, a small amount of kerosene spilled and was ignited by an ash from his cigarette. Although the fire that started was small at first, Drake panicked when he saw the flames and ran out of the building. The fire eventually spread to the walls of the building and heavily damaged it before being extinguished by firefighters.

If Drake is charged with arson, can he be found guilty?

- (A) Yes, because Drake caused the fire during the commission of a malicious felony.
- (B) Yes, because Drake did nothing when the kerosene caught on fire.
- (C) No, because Drake did not intend to set the building on fire.
- (D) No, because Drake cannot be liable for arson of a building that he owned.

Question 112

Dietz and Atkins worked together as pick-pockets. Dietz approached Verner from the front to distract him, holding a small camera and asking him to take a picture, while Atkins came up from behind with a knife to slice open Verner's back pocket of his pants and remove his wallet. Verner was drunk and believed Dietz had a gun and was trying to rob him, but was unaware of Atkins behind him. Verner reached into his back pocket to hand over his wallet and was cut by Atkins's knife as it was slicing through his pocket. The wallet dropped to the ground as Verner clutched his hand. Atkins picked it up and Dietz and Atkins fled while Verner knelt on the ground in pain. Dietz was apprehended shortly thereafter and charged with robbery.

Should Dietz be found guilty?

- (A) Yes, because Atkins obtained the property by means of force.
- (B) Yes, because Verner believed that Dietz would shoot him if he did not give up his wallet.
- (C) No, because neither Dietz nor Atkins intended to use force against Verner to obtain the property.
- (D) No, because Verner's belief that Dietz was robbing him was unreasonable.

Question 113

Professor Peterson, an expert on American Colonial and Revolutionary History, conducted full-day tours through the historic sites of Philadelphia every Wednesday and Thursday through the summer months. Peterson's fee for his services was \$105, which did not include the entrance fees for several of the historical sites. Other persons and organizations conducted various American history tours through the city for somewhat less than Peterson, but Peterson's tour was generally rated the best by the leading tourist guidebooks because Peterson personally conducted the tours and shared his encyclopedic knowledge of American history and the city of Philadelphia.

David had recently moved to Philadelphia, and all of his co-workers praised Professor Peterson's tour, but David was not inclined to pay \$105 for a tour of the historical sites of his new city. Therefore, David took a day off one Thursday and "hung around" the Liberty Bell monument, where Peterson's tour started. That day Peterson was conducting 27 persons on the tour. Most of the participants had paid in advance, but Peterson was holding up a sign with information about the tour and handing out brochures, one of which David took. Peterson accepted a few additional participants who signed up on the spot, but David was not among them. All day long, David hung around at the fringe of this group, paying the entrance fees separately but following the group through the different historical sites. However, he always positioned himself close enough to Peterson's group so that he could hear virtually every word of Peterson's lecture, although David did not ask Peterson any questions. David signed his name and address on the register at Independence Hall. Peterson noted this and took down the information. Two days after the tour concluded, David received a bill from Peterson in the amount of \$105.

David will most likely be required to pay Peterson:

- (A) \$105, because that is the contract price for the tour.
- (B) \$105, because the amount of the contract was less than \$500, making the Statute of Frauds inapplicable.
- (C) \$105, if that is a reasonable fee for the lectures based on Peterson's expertise.
- (D) Nothing, because the historical sites were open to the public and David paid his own way.

Question 114

In compliance with a federal statute requiring buildings to be made accessible to persons with disabilities, Walter installed wheelchair ramps at both entrances to his office building located on Blackacre, which he had owned for many years. One year later, Walter entered into a contract with Barbara to sell Blackacre, including the office building. After having the property surveyed, Barbara notified Walter that she was not going to complete the sale because the wheelchair ramp on the south side of the building extended over the property line and into the adjoining parcel of Whiteacre, making the title unmarketable. Walter insisted that Barbara proceed with the sale, and brought an action to compel her performance.

If the court were to find that title is marketable, it will be because:

- (A) The wheelchair ramp is required by federal law.
- (B) Walter currently owns Whiteacre and acquired Whiteacre and Blackacre as part of a larger parcel.
- (C) The wheelchair ramp extends only 10 inches over the property line.
- (D) The contract between Walter and Barbara requires Walter to convey only a quitclaim deed.

Question 115

An ordinance of City makes it unlawful to park a motor vehicle on a City street within 10 feet of a fire hydrant. At 1:55 p.m., Parker, realizing he must be in Bank before it closed at 2 p.m. and finding no other space available, parked his automobile in front of a fire hydrant on a City street. Parker then hurried into the bank, leaving his aged neighbor, Ned, as a passenger in the rear seat of the car. About five minutes later, and while Parker was still in Bank, Driver was driving down the street. Driver swerved to avoid what he mistakenly thought was a hole in the street and sideswiped Parker's car. Parker's car was turned over on top of the hydrant, breaking the hydrant and causing a small flood of water. Parker's car was severely damaged and Ned was badly injured. There is no applicable guest statute and the jurisdiction follows traditional contributory negligence rules.

If Ned asserts a claim against Parker, the most likely result is that Ned will:

- (A) Recover, because Parker's action was negligence per se.
- (B) Recover, because Parker's action was a continuing wrong that contributed to Ned's injuries.
- (C) Not recover, because a reasonably prudent person could not foresee injury to Ned as a result of Parker's action.
- (D) Not recover, because a violation of a city ordinance does not give rise to a civil cause of action.

Questions 116-118 are based on the following fact situation:

On May 1, Ohner telegraphed Byer, "Will sell you any or all of the lots in Grove subdivision at \$5,000 each. Details follow in letter." The letter contained all the necessary details concerning terms of payment, insurance, mortgages, etc., and provided, "This offer remains open until

June 1." On May 2, after he had received the telegram but before he had received the letter, Byer telephoned Ohner, "Accept your offer with respect to lot 101." Both parties knew that there were 50 lots in the Grove subdivision and that they were numbered 101 through 150.

116. For this question only, assume that Ohner and Byer were bound by a contract for the sale of lot 101 for \$5,000, that on May 3 Ohner telephoned Byer and stated that because he had just discovered that a shopping center was going to be erected adjacent to the Grove subdivision, he would "need to have \$6,000 for each of the lots including lot 101," that Byer thereupon agreed to pay him \$6,000 for lot 101, and that on May 6, Byer telegraphed, "Accept your offer with respect to the rest of the lots." Assuming that two contracts were formed and that there is no controlling statute, Byer will most likely be required to pay:

- (A) Only \$5,000 for each of the 50 lots.
- (B) Only \$5,000 for lot 101, but \$6,000 for the remaining 49 lots.
- (C) \$6,000 for each of the 50 lots.
- (D) \$6,000 for lot 101, but only \$5,000 for the remaining 49 lots.

328. PRACTICE EXAM

117. For this question only, assume that on May 5, Ohner telephoned Byer stating that he had sold lots 102 through 150 to someone else on May 4, and that Byer thereafter telegraphed Ohner, "Will take the rest of the lots." Assume further that there is no controlling statute. In an action by Byer against Ohner for breach of contract, Byer will probably:

- (A) Succeed, because Ohner had promised him that the offer would remain open until June 1.
- (B) Succeed, because Ohner's attempted revocation was by telephone.
- (C) Not succeed, because Byer's power of acceptance was terminated by Ohner's sale of the lots to another party.
- (D) Not succeed, because Byer's power of acceptance was terminated by effective revocation.

118. For this question only, assume that on May 6, Byer telegraphed Ohner, "Will take the rest of the lots," and that on May 8, Ohner discovered that he did not have good title to the remaining lots. Which of the following would provide the best legal support to Ohner's contention that he was not liable for breach of contract as to the remaining 49 lots?

- (A) Impossibility of performance.
- (B) Unilateral mistake as to basic assumption.
- (C) Termination of the offer by Byer's having first contracted to buy lot 101.
- (D) Excuse by failure of an implied condition precedent.

Question 119

Leonard was the high priest of a small cult of Satan worshippers living in New Arcadia. As a part of the practice of their religious beliefs, a cat was required to be sacrificed to the glory of Satan after a live dissection of the animal in which it endured frightful pain. In the course of such a religious sacrifice, Leonard was arrested on the complaint of the local Humane Society and charged under a statute punishing cruelty to animals.

On appeal, a conviction of Leonard probably will be:

- (A) Sustained, on the grounds that belief in or worship of Satan does not enjoy constitutional protection.
- (B) Sustained, on the grounds that sincere religious belief is not an adequate defense on these facts.
- (C) Overturned, on the grounds that the constitutionally guaranteed freedom of religion and its expression was violated.
- (D) Overturned, on the grounds that the beliefs of the cult members in the need for the sacrifice might be reasonable, and their act was religious.

Question 120

Peters sued Dietrich, claiming that they had entered into an oral agreement whereby Dietrich agreed to hire Peters as Chief Engineer of Dietrich Products and Peters agreed to take the job at a specified salary, and that Dietrich had subsequently breached their employment contract by refusing to hire Peters. At the trial of Peters's suit, Dietrich took the stand and denied having any contract with Peters for employment or otherwise. In response, Peters offers into evidence a properly authenticated phone message to Dietrich's wife, Wanda, that Dietrich had left with the switchboard operator at her office. The message stated, "I know you won't be happy, but I've offered Peters the Chief Engineer position and he's accepted." Dietrich's attorney objects.

The phone message should be ruled:

- (A) Admissible, because it is the statement of a party-opponent.
- (B) Admissible, if it is a recent perception.
- (C) Inadmissible, because it is a privileged communication between husband and wife.
- (D) Inadmissible, because it is hearsay not within any recognized exception to the hearsay rule.

Questions 121-122 are based on the following fact situation:

Husband and Wife were going through a nasty divorce. Wife hired Patrick, a retired detective, to spy on Husband. Patrick followed Husband to Hotel, where he saw Husband meet a woman and go into her hotel room. Patrick checked into the adjoining room, placed an electronic listening device on the wall, and listened to the activities of Husband and the woman in the next room. While Patrick was listening, a burglar broke into Patrick's room and hit Patrick over the head with a blackjack. As a result, Patrick was hospitalized. A state statute makes adultery a crime.

121. If Patrick sues Hotel for his injuries:

- (A) Patrick will prevail if Hotel's management had reason to believe the hotel room locks were inadequate.
- (B) Patrick will prevail, because innkeepers owe their guests a very high degree of care.
- (C) Hotel will prevail, because the burglar was a superseding intervening cause.
- (D) Hotel will prevail if it was in compliance with a state statute setting minimum standards for hotel room locks.

122. If Husband sues Patrick for invasion of privacy:

- (A) Husband will win, because he had an expectation of privacy in the woman's hotel room.
- (B) Husband will win, unless Patrick's electronic eavesdropping was legal.
- (C) Husband will lose, because adultery is illegal.
- (D) Husband will lose if Patrick published nothing about Husband's activities.

330. PRACTICE EXAM

Question 123

In 1975, Hubert Green executed his will which in pertinent part provided, "I hereby give, devise, and bequeath Greenvale to my surviving widow for life, remainder to such of my children as shall live to attain the age of 30 years, but if any child dies under the age of 30 years survived by a child or children, such child or children shall take and receive the share which his, her, or their parent would have received had such parent lived to attain the age of 30 years."

At the date of writing his will, Green was married to Susan, and they had two children, Allan and Beth. Susan died in 1980 and Hubert married Waverly in 1982. At his death in 1990, Green was survived by his wife, Waverly, and three children, Allan, Beth, and Carter. Carter, who was born in 1984, was his child by Waverly.

In a jurisdiction that recognizes the common law Rule Against Perpetuities unmodified by statute, the result of the application of the Rule is that the:

- (A) Remainder to the children and to the grandchildren is void because Green could have subsequently married a person who was unborn at the time Green executed his will.
- (B) Remainder to the children is valid, but the substitutionary gift to the grandchildren is void because Green could have subsequently married a person who was unborn at the time Green executed his will.
- (C) Gift in remainder to Allan and Beth or their children is valid, but the gift to Carter or his children is void.
- (D) Remainder to the children and the substitutionary gift to the grandchildren are valid.

Question 124

Downs was indicted in state court for bribing a public official. During the course of the investigation, police had demanded and received from Downs's bank the records of Downs's checking account for the preceding two years. The records contained incriminating evidence.

On the basis of a claim of violation of his constitutional rights, Downs moves to prevent the introduction of the records in evidence. His motion should be:

- (A) Granted, because a search warrant should have been secured for seizure of the records.
- (B) Granted, because the records covered such an extensive period of time that their seizure unreasonably invaded Downs's right of privacy.
- (C) Denied, because the potential destructibility of the records, coupled with the public interest in proper enforcement of the criminal laws, created an exigent situation justifying the seizure.
- (D) Denied, because the records were business records of the bank in which Downs had no legitimate expectation of privacy.

Question 125

Plummer, a well-known politician, was scheduled to address a large crowd at a political dinner. Just as Plummer was about to sit down at the head table, Devon pushed Plummer's chair to one side. As a result, Plummer fell to the floor. Plummer was embarrassed at being made to look foolish before a large audience but suffered no physical harm.

If Plummer asserts a claim against Devon for damages because of his embarrassment, will Plummer prevail?

- (A) Yes, if Devon knew that Plummer was about to sit on the chair.
- (B) Yes, if Devon negligently failed to notice that Plummer was about to sit on the chair.
- (C) No, because Plummer suffered no physical harm along with his embarrassment.
- (D) No, if in moving the chair Devon intended only a good-natured practical joke on Plummer.

Question 126

Paulsen sued Daly for nonpayment of a personal loan to Daly, as evidenced by Daly's promissory note to Paulsen. Paulsen called Walters to testify that he knows Daly's handwriting and that the signature on the note is Daly's. On direct examination, to identify himself, Walters gave his name and address and testified that he had been employed by a roofing company for seven years.

During presentation of Daly's case, Daly called Wilson to testify that she is the roofing company's personnel manager and that she had determined, by examining the company's employment records, that Walters had worked there only three years.

The trial judge should rule that Wilson's testimony is:

- (A) Inadmissible, because it is not the best evidence.
- (B) Inadmissible, because it is impeachment on a collateral question.
- (C) Admissible as evidence of a regularly conducted activity.
- (D) Admissible as tending to impeach Walters's credibility.

Question 127

A federal statute set up a program of dental education. The statute provided that the Secretary of Health and Human Services "shall, on a current basis, spend all of the money appropriated for this purpose" and "shall distribute the appropriated funds" by a specified formula to state health departments that agree to participate in the program. In the current year Congress appropriated \$100 million for expenditure on this program.

To ensure a budget surplus in the current fiscal year, the President issued an executive order directing the various Cabinet Secretaries to cut expenditures in this year by 10% in all

categories. He also ordered certain programs to be cut more drastically because he believed that "they are not as important to the general welfare as other programs." The President identified the dental education program as such a program and ordered it to be cut by 50%. Assume that no other federal statutes are relevant.

To satisfy constitutional requirements, how much money must the Secretary of Health and Human Services distribute for the dental education program this year?

- (A) \$50 million, because the President could reasonably determine that this program is not as important to the general welfare as other programs.
- (B) \$50 million, because as chief executive the President has the constitutional authority to control the actions of all of his subordinates by executive order.
- (C) \$90 million, because any more drastic cut for the program would be a denial of equal protection to beneficiaries of this program as compared to beneficiaries of other programs.
- (D) \$100 million, because the President may not unilaterally suspend the effect of a valid federal statute imposing a duty to spend appropriated monies.

332. PRACTICE EXAM

Question 128

Four years ago, Owen held Blackacre, a tract of land, in fee simple absolute. In that year he executed and delivered to Price a quitclaim deed which purported to release and quitclaim to Price all of the right, title, and interest of Owen in Blackacre. Price accepted the quitclaim and placed the deed in his safe deposit box.

Owen was indebted to Crider in the amount of \$35,000. In September of the current year, Owen executed and delivered to Crider a warranty deed, purporting to convey the fee simple to Blackacre, in exchange for a full release of the debt he owed to Crider. Crider immediately recorded his deed.

In December, Price caused his quitclaim deed to Blackacre to be recorded and notified Crider that he (Price) claimed title.

Assume that there is no evidence of occupancy of Blackacre and assume, further, that the jurisdiction where Blackacre is situated has a recording statute which required good faith and value as elements of the junior claimant's priority. Which of the following is the best comment concerning the conflicting claims of Price and Crider?

- (A) Price cannot succeed, because the quitclaim deed through which he claims prevents him from being bona fide (in good faith).
- (B) The outcome will turn on the view taken as to whether Crider paid value within the meaning of the statute requiring this element.
- (C) The outcome will turn on whether Price paid value (a fact not given in the statement).
- (D) Price's failure to record until December of the current year estops him from asserting title against Crider.

Question 129

Brown contended that Green owed him \$6,000. Green denied that he owed Brown anything. Tired of the dispute, Green eventually

signed a promissory note by which he promised to pay Brown \$5,000 in settlement of their dispute.

In an action by Brown against Green on the promissory note, which of the following, if true, would afford Green the best defense?

- (A) Although Brown honestly believed that \$6,000 was owed by Green, Green knew that it was not owed.
- (B) Although Brown knew that the debt was not owed, Green honestly was in doubt whether it was owed.
- (C) The original claim was based on an oral agreement, which the Statute of Frauds required to be in writing.
- (D) The original claim was an action on a contract, which was barred by the applicable statute of limitations.

Question 130

Ellis, an electrical engineer, designed an electronic game known as Zappo. Ellis entered into a licensing agreement with Toyco under which Toyco agreed to manufacture Zappo according to Ellis's specifications and to market it and pay a royalty to Ellis.

Carla, whose parents had purchased a Zappo game for her, was injured while playing with the game. Carla recovered a judgment against Toyco on the basis of a finding that the Zappo game was defective because of Ellis's improper design.

In a claim for indemnity against Ellis, will Toyco prevail?

- (A) Yes, because as between Ellis and Toyco, Ellis was responsible for the design of Zappo.
- (B) Yes, because Toyco and Ellis were joint tortfeasors.
- (C) No, because Toyco, as the manufacturer, was strictly liable to Carla.
- (D) No, if Toyco, by a reasonable inspection, could have discovered the defect in the design of Zappo.

Question 131

Defendant was charged with murder. His principal defense was that he had killed in hot blood and should be guilty only of manslaughter. The judge instructed the jury that the state must prove guilt beyond a reasonable doubt, that the killing was presumed to be murder, and that the charge could be reduced to manslaughter, and Defendant accordingly found guilty of this lesser offense, if Defendant showed by a fair preponderance of the evidence that the killing was committed in the heat of passion on sudden provocation. Defendant was convicted of murder. On appeal, he seeks a new trial and claims error in the judge's instructions to the jury.

Defendant's conviction will most probably be:

- (A) Affirmed, because the judge carefully advised the jury of the state's obligation to prove guilt beyond a reasonable doubt.
- (B) Affirmed, because Defendant's burden to show hot blood was not one of ultimate persuasion but only one of producing evidence to rebut a legitimate presumption.
- (C) Reversed, because the instruction put a burden on Defendant that denied him due process of law.
- (D) Reversed, because presumptions have a highly prejudicial effect and thus cannot be used on behalf of the state in a criminal case.

Question 132

While on walking patrol in a commercial district in the early evening, Officer Murdoch noticed that a light was on in Walker's Machine Shop. Curious about what was going on inside, the officer tried to look through the window of the shop, but it had been painted on the inside so that only a strip about three inches at the top,

eight feet above street level, was still transparent. Officer Murdoch quietly brought two trash cans from a neighboring business over to the window, stood on them and saw, through the strip of unpainted window, that the shop owner's son Tommy was inside with a friend, sucking white powder into his nose through a rolled up tube of paper from off a small mirror. Recognizing from his experience and training that Tommy was snorting cocaine, Officer Murdoch knocked at the front door to the shop, and Tommy let him in. Murdoch immediately arrested Tommy and his friend. In the back room of the shop through whose window he had peered, Murdoch found and seized several grams of cocaine, a razor blade, and a mirror.

In Tommy's subsequent prosecution for possession of cocaine, Tommy seeks to bar introduction of the cocaine, mirror, and razor blade into evidence. His motion will probably be:

- (A) Granted, because Officer Murdoch could not have known that Tommy was snorting cocaine absent a chemical test of the substance being snorted.
- (B) Granted, because Officer Murdoch violated Tommy's reasonable expectation of privacy.
- (C) Denied, because the search was incident to a valid arrest.
- (D) Denied, because Tommy consented to Officer Murdoch's entry into the shop.

334. PRACTICE EXAM

Question 133

Parmott sued Dexter in an automobile collision case. At trial, Parmott wishes to show by extrinsic evidence that Wade, Dexter's primary witness, is Dexter's partner in a gambling operation.

This evidence is:

- (A) Admissible as evidence of Wade's character.
- (B) Admissible as evidence of Wade's possible bias in favor of Dexter.
- (C) Inadmissible, because criminal conduct can be shown only by admission or record of conviction.
- (D) Inadmissible, because bias must be shown on cross-examination and not by extrinsic evidence.

Questions 134-136 are based on the following fact situation:

Farquart had made a legally binding promise to furnish his son Junior and Junior's fiancee a house on their wedding day, planned for June 10 of the following year. Pursuant to that promise, Farquart telephoned his old contractor-friend Sawtooth and made the following oral agreement—each making full and accurate written notes thereof:

Sawtooth was to cut 30 trees into fireplace logs from a specified portion of a certain one-acre plot owned by Farquart, and Farquart was to pay therefor \$20 per tree. Sawtooth agreed further to build a house on the plot conforming to the specifications of Plan OP5 published by Builders, Inc. for a construction price of \$18,000. Farquart agreed to make payments of \$2,000 on the first of every month for nine months beginning August 1 upon monthly presentation of a certificate by Builders, Inc. that the specifications of Plan OP5 were being met.

Sawtooth delivered the cut logs to Farquart in July, when he also began building the house. Farquart made three \$2,000 payments for the work done in July, August, and September, without requiring a certificate. Sawtooth worked through October, but no work was done from November 1 to the end of February because of bad weather; and Farquart made no payments during that period. Sawtooth did not object. On March 1, Sawtooth demanded payment of \$2,000; but Farquart refused on the grounds that no construction work had been done for four months and Builders had issued no certificate. Sawtooth thereupon abandoned work and repudiated the agreement.

134. Assuming that Sawtooth committed a total breach on March 1, what would be the probable measure of Farquart's damages in an action against Sawtooth for breach of contract?

- (A) Restitution of the three monthly installments paid in August, September, and October.
- (B) What it would cost to get the house completed by another contractor, minus installments not yet paid to Sawtooth.
- (C) The difference between the market value of the partly built house, as of the time of Sawtooth's breach, and the market value of the house if completed according to specifications.
- (D) In addition to other legally allowable damages, an allowance for Farquart's mental distress if the house cannot be completed in time for Junior's wedding on June 10.

135. Assuming that Sawtooth committed a total breach on March 1, and assuming further that he was aware when the agreement was made of the purpose for which Farquart wanted the completed house, which of the following, if true, would best support Farquart's claim for consequential damages on account of delay beyond June 10 in getting the house finished?

- (A) Junior and his bride, married on June 10, would have to pay storage charges on their wedding gifts and new furniture until the house could be completed.
- (B) Junior's fiancee jilted Junior on June 10 and ran off with another man who had a new house.
- (C) Farquart was put to additional expense in providing Junior and his bride, married on June 10, with temporary housing.
- (D) On June 10, Farquart paid a \$5,000 judgment obtained against him in a suit filed March 15 by an adjoining landowner on account of Farquart's negligent excavation, including blasting, in an attempt to finish the house himself after Sawtooth's repudiation.

136. What was the probable legal effect of the following?

- I. Sawtooth's failure to object to Farquart's making no payments on November 1, December 1, January 1, and February 1.
 - II. Farquart's making payments in August through October without requiring a certificate from Builders.
- (A) Estoppel-type waiver as to both I. and II.
 - (B) Waiver of delay in payment as to I. and revocable waiver as to II.

- (C) Mutual rescission of the contract by I. combined with II.
- (D) Discharge of Farquart's duty to make the four payments as to I. and estoppel-type waiver as to II.

Question 137

Rogers gave Mitchell a power of attorney containing the following provision:

My attorney, Mitchell, is specifically authorized to sell and convey any part or all of my real property.

Mitchell conveyed part of Rogers's land to Stone by deed in the customary form containing covenants of title. Stone sues Rogers for breach of a covenant.

The outcome of Stone's suit will be governed by whether:

- (A) Deeds without covenants are effective to convey realty.
- (B) The jurisdiction views the covenants as personal or running with the land.
- (C) Stone is a bona fide purchaser.
- (D) The power to "sell and convey" is construed to include the power to execute the usual form of deed used to convey realty.

336. PRACTICE EXAM

Question 138

Responding to an open bid solicitation from the procurement office of the Defense Department, Midwest Technologies submitted a bid for the development of a new flame-resistant fabric. Upon review of the bids, Midwest was notified that it was the low bidder; however, its bid for the contract was denied because of its failure to meet guidelines on minority representation that the procurement office imposed on firms contracting with the Defense Department. Several months later, the project was rebid. Although Midwest did not participate, company officials later learned that the contract had been awarded to another regional company, Great Plains Technologies, after the procurement office waived its minority representation guidelines for that project. Midwest filed an action in federal district court seeking only to enjoin performance of the contract.

The court should:

- (A) Dismiss the action, because Midwest cannot show a relationship between the procurement office's award of the contract and any injury that it may be claiming.
- (B) Dismiss the action, because the federal government may enter into contracts under whatever conditions it chooses.
- (C) Decide the case on the merits, because the procurement office must show that its waiver of the minority representation guidelines was necessary to further a compelling government interest.
- (D) Decide the case on the merits, because Midwest can claim that the unequal treatment of the two bidders violated its rights under the Due Process Clause of the Fifth Amendment.

Question 139

Phyllis was crossing the street at a crosswalk, but did not look both ways. As she walked, Phyllis was hit by a car driven by Brett, and immediately afterwards, she was struck by a car driven by Andrew. As a result of these collisions with the cars, Phyllis suffered severe injuries. Although it was impossible to determine which portion of Phyllis's injuries was caused by Andrew and which by Brett, at the trial of Phyllis's suit, the jury determined that Andrew was 20% negligent, that Brett was 40% negligent, and that Phyllis was 40% negligent. It was further determined that Phyllis had suffered \$100,000 in damages. Phyllis had already received \$10,000 from her group medical insurance plan. Andrew had a \$500,000 auto liability insurance policy, and Brett is now insolvent.

In a pure comparative negligence jurisdiction, how much will Phyllis recover in damages from Andrew?

- (A) \$90,000.
- (B) \$60,000.
- (C) \$50,000.
- (D) \$20,000.

Question 140

Ben contracted to buy Woodacre, a parcel of land, from Owen, with deed to be delivered and money paid on August 1. Ben planned to build a high-rise building on Woodacre. Ben had visually inspected the land, but did not take any special notice of the fact that a stream flowed up to the eastern property line of Woodacre and reappeared just beyond the western property line. In fact, there was a conduit under the surface of Woodacre through which the waters of the stream were diverted. On July 28, one of Ben's friends mentioned the existence of the conduit to Ben. Ben was amazed, and when Owen tendered a deed to Woodacre on August 1, Ben refused to accept it, stating, "I wouldn't have tried to buy Woodacre if I'd known about that conduit."

Owen files suit, demanding performance by Ben or damages for breach. Who should prevail?

- (A) Owen, because Ben had ample opportunity to discover the existence of the conduit before he agreed to buy Woodacre.
- (B) Owen, because the purpose for which Ben intended to use Woodacre is irrelevant.
- (C) Ben, because Owen had a duty to provide a marketable title.
- (D) Ben, because of the doctrine of frustration of purpose.

Question 141

Donaldson broke into Professor Ruiz's office to look at examination questions. The questions were locked in a drawer, and Donaldson could not find them. Donaldson believed that looking at examination questions was a crime, but in this belief he was mistaken.

Charged with burglary, Donaldson should be:

- (A) Acquitted, because he did not complete the crime and he has not been charged with attempt.
- (B) Acquitted, because what he intended to do when he broke in was not a crime.
- (C) Convicted, because he had the necessary mental state and committed the act of breaking and entering.
- (D) Convicted, because factual impossibility is not a defense.

Question 142

Nolan was negligently driving down the road, not paying attention to where he was going. Because of this, he hit and seriously injured Sue, who was lawfully crossing the street. The accident was witnessed by Martha, who suffered extreme emotional distress that physically affected her nervous system.

Martha brings suit against Nolan for negligent infliction of emotional distress in a jurisdiction that has not adopted the "foreseeability" test for this tort.

The most likely result of the suit will be that:

- (A) Martha will win, because she witnessed Sue being seriously injured by Nolan.
- (B) Martha will win, because severe shock to the nervous system constitutes a physical injury.
- (C) Martha will lose, unless she was crossing the street with Sue.
- (D) Martha will lose, unless she was a close relative of Sue.

338. PRACTICE EXAM

Question 143

An issue in Parker's action against Daves for causing Parker's back injury was whether Parker's condition had resulted principally from a similar occurrence five years before, with which Daves had no connection.

Parker called Watts, his treating physician, who offered to testify that when she saw Parker after the latest occurrence, Parker told her that before the accident he had been working full-time, without pain or limitation of motion, in a job that involved lifting heavy boxes.

Watts's testimony should be:

- (A) Admitted, because it is a statement of Parker's then-existing physical condition.
- (B) Admitted, because it is a statement made for purposes of medical diagnosis or treatment.
- (C) Excluded, because it is hearsay not within any exception.
- (D) Excluded, because Parker is available as a witness.

Question 144

A state statute requires the permanent removal from parental custody of any child who has suffered "child abuse." That term is defined to include "corporal punishment of any sort."

Zeller very gently spanks his six-year-old son on the buttocks whenever he believes that spanking is necessary to enforce discipline on him. Such a spanking occurs no more than once a month and has never physically harmed the child.

The state files suit under the statute to terminate Zeller's parental rights solely because of these spankings. Zeller defends only on the ground that the statute in question is unconstitutional as applied to his admitted conduct. In light of the nature of the rights involved, which of the following is the most probable burden of persuasion on this constitutional issue?

- (A) The state has the burden of persuading the court that the application of this statute to Zeller is necessary to vindicate a compelling state interest.
- (B) The state has the burden of persuading the court that the application of this statute to Zeller is rationally related to a legitimate state interest.
- (C) Zeller has the burden of persuading the court that the application of this statute to him is not necessary to vindicate an important state interest.
- (D) Zeller has the burden of persuading the court that the application of this statute to him is not rationally related to a legitimate state interest.

Questions 145-146 are based on the following fact situation:

Dunbar and Balcom went into a drugstore, where Dunbar reached into the cash register and took out \$200. Stone, the owner of the store, came out of a back room, saw what had happened, and told Dunbar to put the money back. Balcom then took a revolver from under his coat and shot and killed Stone.

Dunbar claims that Stone owed her \$200 and that she went to the drugstore to try to collect the debt. She said that she asked Balcom to come along just in case Stone made trouble but that she did not plan on using any force and did not know that Balcom was armed.

145. If Dunbar is prosecuted for murder on the basis of felony murder and the jury believes her claim, she should be found:

- (A) Guilty, because her companion, Balcom, committed a homicide in the course of a felony.
- (B) Guilty, because her taking Balcom with her to the store created the risk of death that occurred during the commission of a felony.
- (C) Not guilty, because she did not know that Balcom was armed and thus did not have the required mental state for felony murder.
- (D) Not guilty, because she believed she was entitled to the money and thus did not intend to steal.

146. If Dunbar is prosecuted for murder on the basis of being an accessory to Balcom in committing a murder and the jury believes her claim, she should be found:

- (A) Guilty, because in firing the shot Balcom was trying to help her.
- (B) Guilty, because she and Balcom were acting in concert in a dangerous undertaking.
- (C) Not guilty, because she had no idea that Balcom was armed and she did not plan to use force.
- (D) Not guilty, because she was exercising self-help and did not intend to steal.

Question 147

Duncan was charged with aggravated assault. At trial Duncan did not testify; however, he sought to offer opinion evidence of his good character for truth and veracity.

This testimony should be:

- (A) Admitted, because a criminal defendant is entitled to offer evidence of his good character.
- (B) Admitted, because a party's credibility is necessarily in issue.
- (C) Excluded, because evidence of character is not admissible to prove conduct in conformity therewith.
- (D) Excluded, because it is evidence of a trait not pertinent to the case.

Question 148

Otto conveyed Goldacre to "Andy, his heirs and assigns, but if Andy dies and is not survived by children by his present wife, Jane, then to Bob and his heirs and assigns." Shortly after taking possession, Andy discovered rich metal deposits on the land, opened a mining operation, and removed and sold a considerable quantity of valuable ore without giving Bob any notice of his action. Andy has no children. Andy, Jane, and Bob are all still living. Bob brought an action in equity for an accounting of the value of the ore removed and for an injunction against further removal.

If the decision is for Andy, it will be because:

- (A) Bob has no interest in Goldacre.
- (B) The right to take minerals is an incident of a defeasible fee simple.
- (C) The right to take minerals is an incident of the right to possession.
- (D) There was no showing that Andy acted in bad faith.

340. PRACTICE EXAM

Question 149

After being notified by Dr. Josephs that Nurse Norris's employment with his office was terminated, Norris applied for a position with Hospital. In her application, Norris listed her former employment with Josephs. Josephs, in response to a telephone inquiry from Hospital, stated that "Norris lacked professional competence." Although Josephs believed that to be a fair assessment of Norris, his adverse rating was based on one episode of malpractice for which he blamed Norris but which in fact was chargeable to another doctor. Because of Josephs's adverse comment on her qualifications, Norris was not employed by Hospital.

If Norris asserts a claim based on defamation against Josephs, will Norris prevail?

- (A) Yes, because Josephs was mistaken in the facts on which he based his opinion of Norris's competence.
- (B) Yes, because Josephs's statement reflected adversely on Norris's professional competence.
- (C) No, if Norris authorized Hospital to make inquiry of her former employer.
- (D) No, if Josephs had reasonable grounds for his belief that Norris was not competent.

Question 150

A 10-lot subdivision was approved by the proper governmental authority. The authority's action was pursuant to a map filed by Diaz, which included an undesignated parcel in addition to the 10 numbered lots. The shape of the undesignated parcel is different and somewhat larger than any one of the numbered lots. Subdivision building restrictions were imposed on "all the lots shown on said map."

Diaz contracts to sell the unnumbered lot, described by metes and bounds, to Butts. Is title to the parcel marketable?

- (A) Yes, because the undesignated parcel is not a lot to which the subdivision building restrictions apply.

- (B) Yes, because the undesignated parcel is not part of the subdivision.
- (C) No, because the undesignated parcel has never been approved by the proper governmental authority.
- (D) No, because the map leaves it uncertain whether the unnumbered lot is subject to the building restrictions.

Question 151

On March 15, Venus Viniferous entered into a written agreement with Tipple Winery that provided that Venus would sell 1,600 tons of tokay grapes to Tipple for \$750 per ton, delivery to be no later than November 1 of the same year. By November 1, Venus had delivered only 700 tons of grapes, and had informed Tipple by telegram that she had used the remainder of her crop in the production of her own boutique winery's latest release, Tokay With Me wine cooler. Tipple purchased an additional 900 tons of tokay grapes from other growers at the then-prevailing market price of \$800 per ton. Venus has submitted an invoice to the marketing department of Tipple for \$525,000. The head of marketing has come to you, Tipple's legal officer, for advice on how to respond to this billing.

Ignoring incidental costs of cover, you should advise her to:

- (A) Pay the \$525,000, since by accepting delivery of the 700 tons of grapes Tipple waived an objection to Venus's breach.
- (B) Pay Venus the market value of her 700 tons of grapes as of November 1, less the cost of cover for the remaining 900 tons.
- (C) Pay Venus \$480,000, representing the contract price for the grapes she delivered less the cost of cover for the remaining 900 tons.
- (D) Pay Venus nothing, since she will be unable to enforce any claim for payment in court.

Question 152

Dray was prosecuted for bank robbery. At trial, the bank teller, Wall, was unable to identify Dray, now bearded, as the bank robber. The prosecutor then showed Wall a group of photographs, and Wall testified that she had previously told the prosecutor that the middle picture (concededly a picture of Dray before he grew a beard) was a picture of the bank robber.

Wall's testimony is:

- (A) Inadmissible, because it is hearsay not within any exception.
- (B) Inadmissible, because it is a violation of Dray's right of confrontation.
- (C) Admissible as prior identification by the witness.
- (D) Admissible as past recollection recorded.

Questions 153-154 are based on the following fact situation:

Barnes had been a beekeeper for many years, making a modest living selling honey in the area surrounding his farm. When he became aware of a sudden demand for beeswax for use in the manufacture of candles and certain types of exotic soaps sold in specialty shops, he built a plant to manufacture these items. The candle and soap business developed so rapidly that Barnes found it profitable to sell his bee farm to Stevens for \$50,000. The sale contract provided that "Barnes reserves the right to purchase all of the beeswax produced by Stevens during the next five years at the current market price at time of delivery, delivery and payment to be made at weekly intervals, and Stevens agrees to supply in any event a minimum of 100 pounds of beeswax per month during that period." When the sale was closed, Barnes's lawyer handed Stevens's lawyer a letter stating: "This is to notify you that I will take all of your beeswax production until further notice."

For one year, Stevens delivered to Barnes and Barnes paid for all of the beeswax produced by Stevens. During that year, Stevens, who was an expert beekeeper, increased his beeswax production by 100% by increasing the number and productivity of the bees. Stevens then proposed to Barnes that, since he had doubled production, it would only be fair that he supply Barnes with half of his new total, but in any event a minimum of 100 pounds per month, leaving Stevens free to sell the remainder of the wax at higher prices for new uses being made of beeswax. Barnes, in a signed writing, agreed to the proposal by Stevens for the remaining period of the original contract. During the following year, Stevens delivered to Barnes, and Barnes paid for, one-half of all of the beeswax produced by Stevens.

As the first year of the new contract ended, Stevens was stung by a bee and, due to an allergy, became so seriously and permanently ill and impaired as to be unable to attend to the bees. From that time on he never made another delivery to Barnes.

153. The modification between Barnes and Stevens reducing the contractual amounts by 50% was:

- (A) Enforceable in all respects.
- (B) Enforceable only to the extent of beeswax tendered by Stevens.
- (C) Unenforceable, because there was no consideration for Barnes's promise to take only one-half of the production.
- (D) Unenforceable, because of the indefiniteness as to the quantity of the goods.

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154. Assuming that contractual obligations existed between Barnes and Stevens, Stevens's refusal to perform was:

- (A) Justifiable, because he had not promised to produce any beeswax.
- (B) Justifiable, because his performance was excused because of his permanent disability.
- (C) Justifiable only if he gave Barnes reasonable notice so that Barnes could buy beeswax elsewhere.
- (D) Not justifiable and constituted a breach of contract.

Question 155

A statute in the state of Peridot permits the state to seize and dispose of real property that was used to commit or facilitate the commission of a felony drug offense. After Keith's arrest for selling cocaine out of his home, a felony, the state instituted an action of forfeiture against Keith's house and property. After notice to Keith and a hearing, a judge granted the order and the state seized the property. Six months later, after the time for any appeals had expired, the property was sold at a public auction to a third party. It was only when the third party brought an action to quiet title that Northwest Bank, the holder of a properly recorded mortgage on Keith's property, learned of the forfeiture. Because the bank's mortgage payments were automatically deducted from an account Keith had under a different name, no one at the bank was aware that the property had been seized. The only notice provided to parties other than Keith was a public notice published for three weeks in a general circulation newspaper. The bank defends the quiet title action on the ground that it did not receive the notice required under the United States Constitution to protect its interest in the property.

If the court rules that Northwest Bank's rights under the Due Process Clause of the Fourteenth Amendment were violated by the state's seizure of the property, it will be because:

- (A) In any judicial proceeding affecting rights to real property, a claimant is required to provide notice and an evidentiary hearing to all parties with a legal interest in the property before taking actions affecting their rights.
- (B) The government itself was the party that seized the property, rather than a private party using governmental processes.
- (C) The notice was not adequate under the circumstances to apprise a party with a properly recorded legal interest in the property.
- (D) The jurisdiction treats the mortgagee as having title to the property rather than merely a lien.

Question 156

Darren's car was stopped by Officer Jones for a minor traffic violation. The officer recognized Darren as a suspect in a multimillion-dollar bank fraud scheme that had just been discovered by the authorities. She placed Darren under arrest and gave him *Miranda* warnings. She then asked for permission to search the trunk of the car. Darren nodded and unlocked the trunk. Officer Jones searched the trunk and discovered a bag containing what appeared to be cocaine in a compartment in the trunk. When later tests determined that it was cocaine, the authorities added a charge of transporting illegal narcotics to Darren's indictment. At a preliminary hearing, Darren moved to have evidence of the cocaine excluded as the result of a search in violation of the Fourth Amendment.

Should the court grant Darren's motion?

- (A) Yes, because one taken into custody cannot give valid consent to a search that would otherwise require a warrant.
- (B) Yes, because the search exceeded the scope of a permissible search incident to a lawful arrest.
- (C) No, if the court finds that Darren's consent was voluntary under the circumstances.
- (D) No, because persons have a lesser expectation of privacy in their vehicles for purposes of the Fourth Amendment.

Question 157

In which of the following situations is Defendant most likely to be guilty of the crime charged?

- (A) Without the permission of Owner, Defendant takes Owner's car with the intention of driving it three miles to a grocery store and back. Defendant is charged with larceny.
- (B) Defendant gets permission to borrow Owner's car for the evening by falsely promising to return it, although he does not intend to do so. Two days later, he changes his mind and returns the car. Defendant is charged with larceny by trick.
- (C) Defendant gets permission to borrow Owner's car for the evening by misrepresenting his identity and falsely claiming he has a valid driver's license. He returns the car the next day. Defendant is charged with obtaining property by false pretenses.
- (D) With permission, Defendant, promising to return it by 9 p.m., borrows Owner's car. Later in the evening, Defendant decides to keep the car until the next morning and does so. Defendant is charged with embezzlement.

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Questions 158-159 are based on the following fact situation:

In a trial between Jones and Smith, an issue arose about Smith's ownership of a horse, which had caused damage to Jones's crops.

158. Jones offered to testify that he looked up Smith's telephone number in the directory, called that number, and that a voice answered, "This is Smith speaking." At this, Jones asked, "Was that your horse that tramped across my cornfield this afternoon?" The voice replied, "Yes." The judge should rule the testimony:

- (A) Admissible, because the answering speaker's identification of himself, together with the usual accuracy of the telephone directory and transmission system, furnishes sufficient authentication.
- (B) Admissible, because judicial notice may be taken of the accuracy of telephone directories.
- (C) Inadmissible unless Jones can further testify that he was familiar with Smith's voice and that it was in fact Smith to whom he spoke.
- (D) Inadmissible unless Smith has first been asked whether or not the conversation took place and has been given the opportunity to admit, deny, or explain.

159. Jones seeks to introduce in evidence a photograph of his cornfield to depict the nature and extent of the damage done. The judge should rule the photograph:

- (A) Admissible if Jones testifies that it fairly and accurately portrays the condition of the cornfield after the damage was done.
- (B) Admissible if Jones testifies that the photograph was taken within a week after the alleged occurrence.

- (C) Inadmissible if Jones fails to call the photographer to testify concerning the circumstances under which the photograph was taken.
- (D) Inadmissible if it is possible to describe the damage to the cornfield through direct oral testimony.

Question 160

Pursuant to a state statute, Clovis applied for tuition assistance to attend the Institute of Liberal Arts. He was qualified for such assistance in every way except that he was a resident alien who did not intend to become a United States citizen.

The state's restriction of such grants to United States citizens or resident aliens seeking such citizenship is probably:

- (A) Valid, because aliens are not per se "a discrete and insular minority" specially protected by the Fourteenth Amendment.
- (B) Valid, because the line drawn by the state for extending aid was reasonably related to a legitimate state interest.
- (C) Invalid, because the justifications for this restriction are insufficient to overcome the burden imposed on a state when it uses such an alienage classification.
- (D) Invalid, because the Privileges and Immunities Clause of Article IV does not permit such an arbitrary classification.

Question 161

Allen and Barker are equal tenants in common of a strip of land 10 feet wide and 100 feet deep which lies between the lots on which their respective homes are situated. Both Allen and Barker need the use of the 10-foot strip as a driveway; and each fears that a new neighbor might seek partition and leave him with an unusable five-foot strip.

The best measure to solve their problem is:

- (A) A covenant against partition.
- (B) An indenture granting cross-easements in the undivided half interest of each.
- (C) A partition into two separate five-foot-wide strips and an indenture granting cross-easements.
- (D) A trust to hold the strip in perpetuity.

Question 162

In 1956, Silo Cement Company constructed a plant for manufacturing ready-mix concrete in Lakeville. At that time Silo was using bagged cement, which caused little or no dust. In 1970, Petrone bought a home approximately 1,800 feet from the Silo plant. One year ago, Silo stopped using bagged cement and began to receive cement in bulk shipments. Since then at least five truckloads of cement have passed Petrone's house daily. Cement blows off the trucks and into Petrone's house. When the cement arrives at the Silo plant, it is blown by forced air from the trucks into the storage bin. As a consequence, cement dust fills the air surrounding the plant to a distance of 2,000 feet. Petrone's house is the only residence within 2,000 feet of the plant.

If Petrone asserts a claim against Silo based on nuisance, will Petrone prevail?

- (A) Yes, unless using bagged cement would substantially increase Silo's costs.
- (B) Yes, if the cement dust interfered unreasonably with the use and enjoyment of Petrone's property.
- (C) No, because Silo is not required to change its industrial methods to accommodate the needs of one individual.
- (D) No, if Silo's methods are in conformity with those in general use in the industry.

Question 163

Congress enacts a law providing that all disagreements between the United States and a state over federal grant-in-aid funds shall be settled by the filing of suit in the federal district court in the affected state. "The judgment of that federal court shall be transmitted to the head of the federal agency dispensing such funds, who, if satisfied that the judgment is fair and lawful, shall execute the judgment according to its terms."

This law is:

- (A) Constitutional, because disagreements over federal grant-in-aid funds necessarily involve federal questions within the judicial power of the United States.
- (B) Constitutional, because the spending of federal monies necessarily includes the authority to provide for the effective settlement of disputes involving them.
- (C) Unconstitutional, because it vests authority in the federal court to determine a matter prohibited to it by the Eleventh Amendment.
- (D) Unconstitutional, because it vests authority in a federal court to render an advisory opinion.

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Question 164

In a civil suit by Pine against Decker, Decker called Wall, a chemist, as an expert witness and asked him a number of questions about his education and experience in chemistry. Over Pine's objection that Wall was not shown to be qualified in chemistry, the trial court permitted Wall to testify as to his opinion in response to a hypothetical question.

On cross-examination, Pine asked Wall if he had failed two chemistry courses while doing his graduate work. The answer should be:

- (A) Admitted, because it is relevant to the weight to be given Wall's testimony.
- (B) Admitted, because specific acts bearing on truthfulness may be inquired about on cross-examination.
- (C) Excluded, because the court has determined that Wall is qualified to testify as an expert.
- (D) Excluded, because Wall's character has not been put in issue.

Question 165

Davison was driving through an apartment building area plagued with an unusually high incidence of burglaries and assaults. Acting pursuant to a police department plan to combat crime by the random stopping of automobiles in the area between midnight and 6 a.m., a police officer stopped Davison and asked him for identification. As Davison handed the officer his license, the officer directed a flashlight into the automobile and saw what appeared to be the barrel of a shotgun protruding from under the front seat on the passenger side of the car. The officer ordered Davison from the car, searched him, and discovered marijuana cigarettes and a shotgun.

At Davison's trial for unlawful possession of narcotics, his motion to suppress the use of the marijuana as evidence should be:

- (A) Sustained, because the marijuana was discovered as a result of the unlawful stopping of Davison's automobile.

- (B) Sustained, because the use of the flashlight constituted a search of the interior of Davison's automobile without probable cause.
- (C) Denied, because the officer's conduct was consistent with the established police plan.
- (D) Denied, because the discovery of the gun in plain view created the reasonable suspicion necessary to justify the arrest and search of Davison.

Question 166

Hunko, a popular professional wrestler, entered into a written agency contract with Adman, who agreed to try to get Hunko's picture on a variety of food products. Hunko promised that Adman would have the exclusive right to promote Hunko on food product lines. They agreed that Hunko would receive 70% of the proceeds and Adman would receive 30%. Adman was able to persuade the makers of "Chocolate Charms" breakfast cereal to put Hunko's picture on the cereal boxes. Shortly after Adman confirmed the Chocolate Charms deal with the cereal manufacturer, Hunko and Adman agreed orally that henceforth Hunko would receive 50% of the proceeds, including proceeds from the Chocolate Charms deal, and Adman would receive the other 50%. Hunko received a \$10,000 check from Chocolate Charms, and he promptly sent Adman a check for \$3,000. Adman demanded an additional \$2,000, but Hunko refused to pay.

If Adman sues Hunko for the \$2,000, the party likely to prevail is:

- (A) Hunko, because of the parol evidence rule.
- (B) Adman, because consideration is not required for a modification.
- (C) Hunko, because Adman had a preexisting legal duty to secure food product promotions for Hunko.
- (D) Hunko, because an exclusive contract requires that the party given the privileges of exclusivity use his best efforts.

Question 167

At a time when Ogawa held Lot 1 in the Fairoaks subdivision in fee simple, Vine executed a warranty deed that recited that Vine conveyed Lot 1, Fairoaks, to Purvis. The deed was promptly and duly recorded.

After the recording of the deed from Vine to Purvis, Ogawa conveyed Lot 1 to Vine by a warranty deed that was promptly and duly recorded. Later, Vine conveyed the property to Rand by warranty deed and the deed was promptly and duly recorded. Rand paid the fair market value of Lot 1 and had no knowledge of any claim of Purvis.

In an appropriate action, Rand and Purvis contest title to Lot 1. In this action, judgment should be for:

- (A) Purvis, because Purvis's deed is senior to Rand's.
- (B) Rand, because Rand paid value without notice of Purvis's claim.
- (C) Purvis or Rand, depending on whether a subsequent grantee is bound, at common law, by the doctrine of estoppel by deed.
- (D) Purvis or Rand, depending on whether Purvis's deed is deemed recorded in Rand's chain of title.

Question 168

Paul sued Dave for making a slanderous statement that greatly embarrassed Paul. Dave denied that he ever made such a statement. At trial, Paul called Willie to the stand, and Willie testified that he heard Dave make the statement on August 4. Dave discredited Willie, and Park offers evidence of Willie's good reputation for truthfulness.

The rehabilitation is most likely to be permitted if the discrediting evidence by Dave was testimony that:

- (A) Willie and Paul had known each other since childhood.

- (B) Willie had been convicted of perjury in an unrelated case.
- (C) Willie had attended a school for mentally retarded children.
- (D) Willie disliked Dave.

Questions 169-171 are based on the following fact situation:

Poe ordered some merchandise from Store. When the merchandise was delivered, Poe decided that it was not what he had ordered, and he returned it for credit. Store refused to credit Poe's account, continued to bill him, and, after 90 days, turned the account over to Kane, a bill collector, for collection.

Kane called at Poe's house at 7 p.m. on a summer evening while many of Poe's neighbors were seated on their porches. When Poe opened the door, Kane, who was standing just outside the door, raised an electrically amplified bullhorn to his mouth. In a voice that could be heard a block away, Kane called Poe a "deadbeat" and asked him when he intended to pay his bill to Store.

Poe, greatly angered, slammed the door shut. The door struck the bullhorn and jammed it forcibly against Kane's face. As a consequence, Kane lost some of his front teeth.

169. If Poe asserts a claim based on defamation against Kane, will Poe prevail?

- (A) Yes, if Kane's remarks were heard by any of Poe's neighbors.
- (B) Yes, because Kane's conduct was extreme and outrageous.
- (C) No, unless Kane knew that Poe owed no money to Store.
- (D) No, unless Poe suffered some special damage.

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170. If Poe asserts a claim based on intentional infliction of emotional distress against Kane, will Poe prevail?

- (A) Yes, because Kane's conduct was extreme and outrageous.
- (B) Yes, because Kane was intruding on Poe's property.
- (C) No, unless Poe suffered physical harm.
- (D) No, if Poe still owed Store for the merchandise.

171. If Kane asserts a claim based on battery against Poe, will Kane prevail?

- (A) Yes, because Poe had not first asked Kane to leave the property.
- (B) Yes, if Poe knew that the door was substantially certain to strike the bullhorn.
- (C) No, if Kane's conduct triggered Poe's response.
- (D) No, because Kane was an intruder on Poe's property.

Question 172

Rimm and Hill were fooling around with a pistol in Hill's den. Rimm aimed the pistol in Hill's direction and fired three shots slightly to Hill's right. One shot ricocheted off the wall and struck Hill in the back, killing him instantly.

The most serious crime of which Rimm can be convicted is:

- (A) Murder.
- (B) Voluntary manslaughter.
- (C) Involuntary manslaughter.
- (D) Assault with a dangerous weapon.

Question 173

When the latest generation of interactive video games reached the video arcades in State Russet, community groups and civic leaders were alarmed to discover that the most popular games among young teenagers had graphic displays of violence and sexual themes. The state legislature quickly responded to the public outcry. With the stated aim of protecting minors from the perceived evils of offensive but not necessarily obscene materials, the legislature enacted a statute banning the commercial licensing of video arcade games with a specifically defined degree of graphic violent or sexual content.

Delmar, the owner of a chain of video arcades in State Russet shopping malls, was denied licenses for a number of video games that he wanted to install at his arcades. He challenges the state's action in federal district court.

The court will probably find the State Russet statute:

- (A) Constitutional, because for materials accessible to minors, the state may adopt a different standard for determining whether the material is offensive or obscene than the standard it applies for adults.
- (B) Constitutional, because the statute precisely defines the type of content that is prohibited in the video games.
- (C) Unconstitutional, because narrower means are available to deny minors access to the objectionable material without affecting rights of adults.
- (D) Unconstitutional, because some of the banned video games may have serious literary, artistic, political, or scientific value, as determined by contemporary community standards, and thus do not fall within the definition of obscenity.

Question 174

Dent and Wren were playing golf. After they had completed nine holes, Dent left to make a telephone call. When he returned, he told Wren, "My wife was just involved in an accident. She ran a red light and hit another car. I have to skip the back nine." After arriving at the scene of the accident, Dent, after talking with bystanders, determined that his wife had not driven through a red light. Notch, the driver of the other car, brought suit against Dent's wife for injuries suffered in the accident. To help establish liability, Notch seeks to have Wren testify as to Dent's statements on the golf course.

Wren's testimony is:

- (A) Admissible as an admission.
- (B) Admissible as a statement against interest.
- (C) Inadmissible, because it is hearsay not within any recognized exception.
- (D) Inadmissible, because it constitutes opinion.

Question 175

Ortega owned Blackacre in fee simple and by his will specifically devised Blackacre as follows: "To my daughter, Eugenia, her heirs and assigns, but if Eugenia dies survived by a husband, a child or children, then to Eugenia's husband during his lifetime with remainder to Eugenia's children, their heirs and assigns. Specifically provided, however, that if Eugenia dies survived by a husband and no child, Blackacre is specifically devised to my nephew, Luis, his heirs and assigns."

While Ortega's will was in probate, Luis quitclaimed all his interest in Blackacre to Eugenia's husband, Jose. Three years later Eugenia died, survived by Jose but no children. Eugenia left a will devising her interest in Blackacre to Jose. The only applicable statute provides that any interest in land is freely alienable.

Luis instituted an appropriate action against Jose to establish title to Blackacre. Judgment should be for:

- (A) Luis, because his quitclaim deed did not transfer his after-acquired title.
- (B) Luis, because Jose took nothing under Ortega's will.
- (C) Jose, because Luis had effectively conveyed his interest to Jose.
- (D) Jose, because the doctrine of after-acquired title applies to a devise by will.

Questions 176-177 are based on the following fact situation:

On June 1, Kravat, a manufacturer of men's neckties, received the following order from Clothier: "Ship 500 two-inch ties, assorted stripes, your catalogue No. V34. Delivery by July 1."

On June 1, Kravat shipped 500 three-inch ties that arrived at Clothier's place of business on June 3. Clothier immediately telegraphed Kravat: "Reject your shipment. Order was for two-inch ties." Clothier, however, did not ship the ties back to Kravat. Kravat replied by telegram: "Will deliver proper ties before July 1." Clothier received this telegram on June 4, but did not reply to it.

On June 30, Kravat tendered 500 two-inch ties in assorted stripes, designated in his catalogue as item No. V34; but Clothier refused to accept them.

176. Did Clothier properly reject the ties delivered on June 3?

- (A) Yes, because the ties were nonconforming goods.
- (B) Yes, because Kravat did not notify Clothier that the ties were shipped as an accommodation to Clothier.
- (C) No, because Kravat could accept Clothier's offer by prompt shipment of either conforming or nonconforming goods.
- (D) No, because Clothier waived his right to reject the ties by not returning them promptly to Kravat.

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177. Did Clothier properly reject the ties tendered on June 30?
- (A) Yes, because Kravat's shipping the three-inch ties on June 1 was a present breach of contract.
 - (B) Yes, because Kravat's shipping the three-inch ties on June 1 was an anticipatory repudiation.
 - (C) No, because Kravat cured the June 1 defective delivery by his tender of conforming goods on June 30.
 - (D) No, because a contract for the sale of goods can be modified without consideration.

Question 178

Deanna was moving to Russia to work in a foreign policy institute, and was in the process of moving out of the apartment that she had shared with Vanessa, who was not in at the time. Just before leaving, Deanna collected numerous items of hers from Vanessa's room that Vanessa had borrowed, usually without permission. As she was leaving the apartment, she grabbed what she believed to be her laptop computer, which Vanessa had often borrowed to do reports for work. Because it was an older, slower machine, she planned to trade it in for a different model at a computer resale store during a stopover in London. When she arrived at the computer store she discovered that she had taken a brand new, state-of-the-art laptop that Vanessa had apparently just purchased.

Is Deanna guilty of larceny of the computer?

- (A) No, because she mistakenly believed that the computer she had picked up was hers.
- (B) No, if her mistake as to whose computer she had picked up was reasonable.
- (C) Yes, because she intended to permanently deprive Vanessa of the computer when she took it.
- (D) Yes, if she decides to keep the computer or trade it in for a different one.

Question 179

Don Dent was on trial for the murder of Michael Richards. At the trial, Dent put forth the defense of self-defense, claiming that Michael was about to kill him when he shot Michael. To help establish that he was in fear of Michael, Dent called Walter to testify. Walter will testify that he heard Sam Smith say to Dent, "Michael Richards is a mean, vicious killer; he has murdered three people in the past year."

Walter's testimony is:

- (A) Admissible under the state of mind exception to the hearsay rule.
- (B) Admissible nonhearsay.
- (C) Inadmissible, because it is hearsay not covered by an exception.
- (D) Inadmissible, because it does not help establish that Dent acted in self-defense.

Question 180

Lordsville was a small, agricultural village with a population of 400. It was a quiet, conservative town, and 90% of the inhabitants belonged to the Lordsville Church of Jesus, a white-washed frame building located on Lordsville's main street. The Lordsville Village Council consisted of five members, all of whom were members of the Lordsville Church of Jesus. The Council unanimously appropriated \$350 to pay Mower to mow the lawn of the Lordsville Church of Jesus for a year. Mower was a 15-year-old resident of Lordsville and a member of the Lordsville Church of Jesus whose father had been killed the previous year when he was struck by lightning. Curmudgeon, a Lordsville resident, lived in a tiny house and paid only \$200 per year in village and county property taxes, but he was incensed that any of it should go to support what he called "a bunch of holier-than-thou, superstitious, holy-rollers." Curmudgeon filed suit in federal district court to strike down the Council's appropriation to mow the church lawn.

Should the court entertain Curmudgeon's suit?

- (A) No, because Curmudgeon paid so little in taxes that his interest in the matter, if any, is too minimal.
- (B) No, because taxpayers lack standing to sue over appropriations by duly constituted legislative bodies.
- (C) Yes, because a taxpayer may sue under the authority of the First Amendment's Establishment Clause if a fund into which he has paid is being used for religious purposes.
- (D) Yes, because taxpayers have standing to sue when questions involving constitutional rights are at issue.

Question 181

Acorp and Beeco are companies that each manufacture pesticide X. Their plants are located along the same river. During a specific 24-hour period, each plant discharged pesticide into the river. Both plants were operated negligently and such negligence caused the discharge of the pesticide into the river.

Landesmann operated a cattle ranch downstream from the plants of Acrop and Beeco. Landesmann's cattle drank from the river and were poisoned by the pesticide. The amount of the discharge from either plant alone would not have been sufficient to cause any harm to Landesmann's cattle.

If Landesmann asserts a claim against Acrop and Beeco, what, if anything, will Landesmann recover?

- (A) Nothing, because neither company discharged enough pesticide to cause harm to Landesmann's cattle.
- (B) Nothing, unless Landesmann can establish how much pesticide each plant discharged.
- (C) One-half of Landesmann's damages from each company.
- (D) The entire amount of Landesmann's damages, jointly and severally, from the two companies.

Question 182

For a valuable consideration, Amato, the owner of Riveracre, signed and gave to Barton a duly executed instrument that provided as follows: "The grantor may or may not sell Riveracre during her lifetime, but at her death, or if she earlier decides to sell, the property will be offered to Barton at \$500 per acre. Barton shall exercise this right, if at all, within 60 days of receipt of said offer to sell." Barton recorded the instrument. The instrument was not valid as a will.

Is Barton's right under the instrument valid?

- (A) Yes, because the instrument is recorded.
- (B) Yes, because Barton's right to purchase will vest or fail within the period prescribed by the Rule Against Perpetuities.
- (C) No, because Barton's right to purchase is a restraint on the owner's power to make a testamentary disposition.
- (D) No, because Barton's right to purchase is an unreasonable restraint on alienation.

Question 183

In a contract suit by Perez against Drake, each of the following is an accepted method of authenticating Drake's signature on a document offered by Perez *except*:

- (A) A nonexpert who, in preparation for trial, has familiarized himself with Drake's usual signature testifies that, in his opinion, the questioned signature is genuine.
- (B) The jury, without the assistance of an expert, compares the questioned signature with an admittedly authentic sample of Drake's handwriting.
- (C) A witness offers proof that the signature is on a document that has been in existence for at least 20 years, that was in a place where it would likely be if it was authentic, and that has no suspicious circumstances surrounding it.
- (D) A witness testifies that Drake admitted that the signature was his.

Question 184

The industrial city of Tunbridge suffered from battles over gang turf and a rash of drive-by shootings. Most street gangs were affiliated with one of the two loose gang confederations that fought for dominance, the Assassins and the Ghouls. To “issue a warning” to the Ghouls, a carload of Assassins, armed with Uzi sub-machine guns, sped into the Ghouls’ neighborhood. It was late at night when the car passed a corner store, around which the Ghouls were known to congregate during daylight hours. The Assassins knew that the store closed at 6 p.m. and that the Ghouls went elsewhere after nightfall. As the Assassins drove by, they sprayed the store with submachine gunfire, smashing the windows and pocking the brick exteriors. One of the bullets struck and killed Jamie, a six-year-old girl who was asleep in an apartment located on the second floor, above the corner store. A few days later, the police arrested Dennison, who admitted to being a member of the Assassins and to having been in the car when the Assassins shot up the store. Dennison was placed on trial for the murder of Jamie.

If Dennison takes the stand in his own defense, and the jury believes Dennison’s testimony, which of the following assertions by Dennison would be his best defense to the murder charge?

- (A) “I was the driver of the car and did not actually shoot into the building.”
- (B) “I took a lot of drugs that night, and I was so high that I don’t even remember the incident; I was certainly in no condition to form an intent to kill somebody.”
- (C) “Another member of my gang pointed a gun at me. I was really scared that if I didn’t shoot into the building I would be seriously injured or killed myself.”
- (D) “I believed that the building was abandoned and had no idea that there would be people inside it.”

Questions 185-186 are based on the following fact situation:

Orris had title to Brownacre in fee simple. Without Orris’s knowledge, Hull entered Brownacre in 1950 and constructed an earthen dam across a watercourse. The earthen dam trapped water that Hull used to water a herd of cattle he owned. After 12 years of possession of Brownacre, Hull gave possession of Brownacre to Burns. At the same time, Hull also purported to transfer his cattle and all his interests in the dam and water to Burns by a document that was sufficient as a bill of sale to transfer personal property but was insufficient as a deed to transfer real property.

One year later, Burns entered into a lease with Orris to lease Brownacre for a period of five years. After the end of the five-year term of the lease, Burns remained on Brownacre for an additional three years and then left Brownacre. At that time Orris conveyed Brownacre by a quitclaim deed to Powell. The period of time to acquire title by adverse possession in the jurisdiction is 10 years.

185. After Orris’s conveyance to Powell, title to Brownacre was in:

- (A) Hull.
- (B) Orris.
- (C) Burns.
- (D) Powell.

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186. After Orris's conveyance to Powell, title to the earthen dam was in:

- (A) The person who then held title to Brownacre in fee simple.
- (B) Burns, as purchaser of the dam under the bill of sale.
- (C) The person who then owned the water rights as an incident thereto.
- (D) Hull, as the builder of the dam.

Question 187

A statute authorizes a specified federal administrative agency to issue rules governing the distribution of federal grant funds for scientific research. The statute provides that, in issuing those rules, the agency must follow procedures and substantive standards contained in the statute. In a severable provision, the statute also provides that otherwise valid rules issued by the agency under authority delegated to it by this statute may be set aside by a majority vote of a designated standing joint committee of Congress.

The provision of this statute relating to the power of the designated standing joint committee of Congress is:

- (A) Constitutional, because it is a necessary and proper means of ensuring that the rules issued by this agency are actually consistent with the will of Congress.
- (B) Constitutional, because discretionary money grants authorized by statute are privileges, not rights, and, therefore, Congress has greater freedom to intervene in their administration than it has to intervene in the administration of regulatory laws.

- (C) Unconstitutional, because it denies equal protection of the laws to members of Congress who are not appointed to the joint legislative committee authorized to set aside rules of this agency.
- (D) Unconstitutional, because it authorizes a congressional change of legal rights and obligations by means other than those specified in the Constitution for the enactment of laws.

Question 188

Johnson and Tenniel owned Brownacre as joint tenants with the right of survivorship. Johnson executed a mortgage on Brownacre to Lowden to secure a loan. Subsequently, but before the indebtedness was paid to Lowden, Johnson died intestate with Stokes as her only heir at law. The jurisdiction in which Brownacre is located recognizes the title theory of mortgages.

In an appropriate action, the court should determine that title to Brownacre is vested:

- (A) In Tenniel, with the entire interest subject to the mortgage.
- (B) In Tenniel, free and clear of the mortgage.
- (C) Half in Tenniel, free of the mortgage, and half in Stokes subject to the mortgage.
- (D) Half in Tenniel and half in Stokes, with both subject to the mortgage.

Question 189

In 1980 Omar, the owner in fee simple absolute, conveyed Stoneacre, a five-acre tract of land. The relevant, operative words of the deed conveyed to "Church [a duly organized religious body having power to hold property] for the life of my son, Carl, and from and after the death of my said son, Carl, to all of my grandchildren and their heirs and assigns in equal shares; provided that Church shall use the premises for church purposes only."

In an existing building on Stoneacre, Church immediately began to conduct religious services and other activities normally associated with a church.

In 1995, Church granted to Darin a right to remove sand and gravel from a one-half acre portion of Stoneacre upon the payment of royalty. Darin has regularly removed sand and gravel since 1995 and paid a royalty to Church. Church has continued to conduct religious services and other church activities on Stoneacre.

All four of the living grandchildren of Omar, joined by a guardian ad litem to represent unborn grandchildren, instituted suit against Church and Darin seeking damages for the removal of sand and gravel and an injunction preventing further acts of removal. There is no applicable statute.

Which of the following best describes the likely disposition of this lawsuit?

- (A) The plaintiffs should succeed, because the interest of Church terminated with the first removal of sand and gravel.
- (B) Church and Darin should be enjoined, and damages should be recovered but impounded for future distribution.
- (C) The injunction should be granted, but damages should be denied, because Omar and Carl are not parties to the action.
- (D) Damages should be awarded, but the injunction should be denied.

Question 190

Defendant, a worker in a metal working shop, had long been teasing Vincent, a young colleague, by calling him insulting names and ridiculing him. One day Vincent responded to the teasing by picking up a metal bar and attacking Defendant. Defendant could have escaped from the shop. He parried the blow with his left arm, and with his right hand struck Vincent a blow on his jaw from which the young man died.

What is the most serious offense of which Defendant could be properly convicted?

- (A) Involuntary manslaughter.
- (B) Voluntary manslaughter.
- (C) Murder.
- (D) None of the above.

Question 191

Dean, charged with murder, was present with her attorney at a preliminary examination when White, who was the defendant in a separate prosecution for concealing the body of the murder victim, testified for the prosecution against Dean. When called to testify at Dean's trial, White refused to testify, although ordered to do so.

The prosecution offers evidence of White's testimony at the preliminary examination. The evidence is:

- (A) Admissible as former testimony.
- (B) Admissible as past recollection recorded.
- (C) Inadmissible, because it would violate White's privilege against self-incrimination.
- (D) Inadmissible, because it is hearsay not within any exception.

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Question 192

The town of Hometown had a municipal auditorium that all groups were permitted to use. Lately, Bhagwan Bigbucks has begun to hold recruiting seminars for his religious cult at the auditorium. Sensing the displeasure of the voting public and fearing that the auditorium would become a mecca of fringe religious groups, the Hometown Town Council adopted the following ordinance: "Effective immediately, no religious groups will be permitted to use the Municipal Auditorium for meetings, speeches, or other public gatherings."

Bigbucks, who was having great success recruiting followers in Hometown, challenged the constitutionality of the ordinance in federal court. His suit should:

- (A) Fail, because the ordinance treats all religions equally.
- (B) Fail, because continuing to allow religious groups to use the auditorium would violate the Establishment Clause of the First Amendment.
- (C) Succeed, because "religious groups" is an unconstitutionally vague term.
- (D) Succeed, unless Hometown can show that the ordinance serves a compelling government interest.

Question 193

Light Company is the sole distributor of electrical power in City. The company owns and maintains all of the electric poles and equipment in City. Light Company has complied with the National Electrical Safety Code, which establishes minimum requirements for the installation and maintenance of power poles. The Code has been approved by the federal and state governments.

Light Company has had to replace insulators on its poles repeatedly because unknown persons

repeatedly shoot at and destroy them. This causes the power lines to fall to the ground. On one of these occasions, Paul, Faber's five-year-old son, wandered out of Faber's yard, intentionally touched a downed wire, and was seriously burned.

If a claim on Paul's behalf is asserted against Light Company, the probable result is that Paul will:

- (A) Recover if Light Company could have taken reasonable steps to prevent the lines from falling when the insulators were destroyed.
- (B) Recover, because a supplier of electricity is strictly liable in tort.
- (C) Not recover unless Light Company failed to exercise reasonable care to stop the destruction of the insulators.
- (D) Not recover, because the destruction of the insulators was intentional.

Question 194

Santos agreed to sell and Perrine agreed to buy a described lot on which a single-family residence had been built. Under the contract, Santos agreed to convey marketable title subject only to conditions, covenants, and restrictions of record and all applicable zoning laws and ordinances. The lot was subject to a 10-foot side line setback originally set forth in the developer's duly recorded subdivision plot. The applicable zoning ordinance zones the property for single-family units and requires an 8.5-foot side line setback.

Prior to closing, a survey of the property was made. It revealed that a portion of Santos's house was 8.4 feet from the side line.

Perrine refused to consummate the transaction on the ground that Santos's title is not marketable. In an appropriate action, Santos seeks specific performance.

Who will prevail in such an action?

- (A) Santos, because any suit against Perrine concerning the setback would be frivolous.
- (B) Santos, because the setback violation falls within the doctrine of *de minimis non curat lex*.
- (C) Perrine, because any variation, however small, amounts to a breach of contract.
- (D) Perrine, because the fact that Perrine may be exposed to litigation is sufficient to make the title unmarketable.

Question 195

According to a statute of the state of Kiowa, a candidate for state office may have his name placed on the official election ballot only if he files with the appropriate state official a petition containing a specified number of voter signatures. Roderick failed to get his name placed on the state ballot as an independent candidate for governor because he failed to file a petition with the number of voter signatures required by state statute. In a suit against the appropriate state officials in federal district court, Roderick sought an injunction against the petition signature requirement on the ground that it was unconstitutional.

Which of the following, if established, constitutes the strongest argument for Roderick?

- (A) Compliance with the petition signature requirement is burdensome.
- (B) The objectives of the statute could be satisfactorily achieved by less burdensome means.
- (C) Because of the petition signature requirement, very few independent candidates have ever succeeded in getting on the ballot.
- (D) The motivation for the statute was a desire to keep candidates off the ballot if they did not have strong support among voters.

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Question 196

Alford was a suspect in a homicide committed during a robbery of a liquor store. Barber was a friend of Alford. Police telephoned Barber and asked if he would help locate Alford. Barber agreed and met the police officers at headquarters later that night.

After a discussion during which police asked questions about Alford and the homicide, Barber said that he wanted to get something “off his chest” and advised the officers that he was in on the robbery but that Alford had shot the owner of the store without his permission or prior knowledge. The officers then for the first time gave Barber his *Miranda* warnings.

Barber was indicted for felony murder. He moved to prevent the introduction of his statement into evidence. His motion should be:

- (A) Granted, because Barber was effectively in custody and entitled to receive *Miranda* warnings at the beginning of the discussion.
- (B) Granted, because Barber’s right to counsel and due process were violated by the interrogation at police headquarters.
- (C) Denied, because his statement was freely and voluntarily given and he was not entitled to *Miranda* warnings.
- (D) Denied, because by visiting headquarters voluntarily, Barber waived his right to have *Miranda* warnings at the beginning of the discussion.

Question 197

Astin left her car at Garrison’s Garage to have repair work done. After completing the repairs, Garrison took the car out for a test drive and was involved in an accident that caused damages to Placek.

A statute imposes liability on the owner of an automobile for injuries to a third party that are caused by the negligence of any person driving

the automobile with the owner’s consent. The statute applies to situations of this kind, even if the owner did not specifically authorize the mechanic to test-drive the car.

Placek sued Astin and Garrison jointly for damages arising from the accident. In that action, Astin cross-claims to recover from Garrison the amount of any payment Astin may be required to make to Placek. The trier of fact has determined that the accident was caused solely by negligent driving on Garrison’s part, and that Placek’s damages were \$100,000.

In this action, the proper outcome will be that:

- (A) Placek should have judgment for \$50,000 each against Astin and Garrison; Astin should recover nothing from Garrison.
- (B) Placek should have judgment for \$100,000 against Garrison only.
- (C) Placek should have judgment for \$100,000 against Astin and Garrison jointly, and Astin should have judgment against Garrison for 50% of any amount collected from Astin by Placek.
- (D) Placek should have judgment for \$100,000 against Astin and Garrison jointly, and Astin should have judgment against Garrison for any amount collected from Astin by Placek.

Questions 198-199 are based on the following fact situation:

Although by all appearances Herb and Edna, an elderly couple, were destitute, they had, in fact, substantial cash in the bank. Their new neighbors, the Smiths, feeling sorry for them on Thanksgiving, bought a month's supply of food and gave it to Herb and Edna. Later, Edna confided in the Smiths that she and Herb had money and told them that, because they had been so kind, she was leaving them money in her will. All of Herb's and Edna's bank accounts were held in joint tenancy. When Edna died, at the Smiths' request Herb gave the Smiths the following signed instrument: "In consideration of my wife's promise to the Smiths, and their agreement not to sue her estate, I agree to pay them the sum of \$5,000." When Herb died of a heart attack several days later, the Smiths asked the administrator of his estate to pay them the \$5,000. The administrator refused on the ground that there was no consideration for the agreement.

198. Besides the consideration stated in Herb's written instrument, what other fact would strengthen the Smiths' claim?

- (A) They would have never given the food if they had known Herb and Edna had money.
- (B) They believed they could sue Edna's estate.
- (C) The majority of the funds in the bank were left to Edna by her parents.
- (D) Edna's promise to them was in writing.

199. On which of the following theories would it be most likely that the Smiths would recover?

- (A) Herb's written instrument was a binding unilateral contract.
- (B) Herb's acceptance of the food was fraudulent.

(C) Herb is bound by promissory estoppel.

(D) Herb and the Smiths entered into a valid compromise.

Question 200

Vincent was engaged in a telephone conversation with Walter. At one point in the conversation, Vincent said to Walter, "There's my doorbell. Hold the line a minute while I go see who it is." Two minutes later Vincent returned to the phone. He told Walter, "Dornbach is here. I'll have to hang up. Talk to you later." The next morning, Vincent's housekeeper found him dead and obviously the victim of foul play. Dornbach was arrested and charged with Vincent's murder.

The prosecution seeks to have Walter testify at Dornbach's trial as to Walter's telephone conversation with Vincent. The prosecution's attempt is met by an objection from the defense.

How should the court rule on Walter's testimony?

- (A) Admissible, as a present sense impression.
- (B) Admissible, as evidence of the victim's state of mind.
- (C) Admissible, as a prior identification.
- (D) Inadmissible, as hearsay not within any recognized exception to the hearsay rule.

ANSWER KEY AND SUBJECT MATTER KEY

| <u>Answer</u> | <u>Subject Matter</u> |
|----------------------|--|
| 1. C | Criminal Law/Procedure—search and seizure |
| 2. C | Contracts—specific performance |
| 3. A | Contracts—assignment and delegation |
| 4. D | Torts—joint and several liability |
| 5. A | Torts—duty of owners and occupiers of land |
| 6. B | Constitutional Law—preemption |
| 7. B | Constitutional Law—legislative power |
| 8. B | Evidence—impeachment |
| 9. A | Criminal Law—attempt/impossibility |
| 10. B | Constitutional Law—freedom of expression |
| 11. B | Real Property—landlord-tenant |
| 12. B | Criminal Law/Procedure— <i>Miranda</i> rights |
| 13. B | Evidence—refreshing recollection |
| 14. C | Contracts/Sales—buyer's remedies |
| 15. A | Contracts/Sales—measure of damages |
| 16. D | Evidence—probative value/impeachment |
| 17. D | Criminal Law—parties to crime |
| 18. A | Criminal Law—conspiracy/homicide |
| 19. D | Torts—proof of fault/products liability |
| 20. B | Real Property—assignment of leasehold interest |
| 21. D | Real Property—transfer of leased property |
| 22. A | Constitutional Law—intergovernmental immunity |
| 23. A | Evidence—hearsay |
| 24. C | Torts—duty of owners and occupiers of land |
| 25. C | Constitutional Law—procedural due process |
| 26. A | Contracts/Sales—Statute of Frauds |
| 27. D | Criminal Law/Procedure—warrantless arrest |
| 28. D | Real Property—equitable servitude |
| 29. A | Contracts—excuse of condition/anticipatory repudiation |
| 30. D | Contracts—measure of damages |
| 31. C | Real Property—delivery of deeds |
| 32. B | Evidence—hearsay exceptions |
| 33. A | Constitutional Law—standing |
| 34. D | Torts—battery/privilege of arrest |
| 35. B | Torts—intentional infliction of emotional distress |
| 36. C | Criminal Law—murder/intoxication |
| 37. B | Criminal Law—murder/intoxication |
| 38. B | Constitutional Law—legislative powers |
| 39. A | Evidence—admissions of party-opponent |
| 40. C | Contracts—consideration/requirements contract |
| 41. D | Real Property—tenancy in common |
| 42. B | Constitutional Law—intergovernmental immunities |
| 43. A | Evidence—attorney-client privilege |
| 44. D | Real Property—Rule Against Perpetuities |
| 45. D | Real Property—Rule Against Perpetuities |

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| 46. | D | Constitutional Law—Equal Protection Clause |
| 47. | C | Constitutional Law—Establishment Clause |
| 48. | A | Torts—vicarious liability |
| 49. | C | Criminal Law—insanity |
| 50. | B | Torts—defamation |
| 51. | B | Criminal Law/Procedure—double jeopardy |
| 52. | B | Constitutional Law—equal protection |
| 53. | D | Constitutional Law—preemption |
| 54. | B | Evidence—probative value |
| 55. | C | Real Property—marketable title |
| 56. | D | Real Property—priority of mortgages |
| 57. | C | Contracts—conditions |
| 58. | A | Contracts—conditions |
| 59. | C | Torts—duty of owners and occupiers of land |
| 60. | B | Evidence—public records exception to hearsay rule |
| 61. | C | Criminal Law—burglary |
| 62. | C | Evidence—subsequent remedial measures |
| 63. | C | Real Property—assignments and subletting |
| 64. | D | Evidence—lay opinions |
| 65. | A | Torts—intentional infliction of emotional distress |
| 66. | B | Constitutional Law—standing |
| 67. | D | Constitutional Law—Establishment Clause |
| 68. | A | Constitutional Law—Establishment Clause |
| 69. | D | Contracts/Sales—offer and acceptance |
| 70. | C | Contracts/Sales—“battle of the forms” |
| 71. | D | Criminal Law—strict liability |
| 72. | A | Torts—duty of owners and occupiers of land |
| 73. | B | Constitutional Law—regulation of voting rights |
| 74. | C | Real Property—equitable conversion |
| 75. | A | Real Property—equitable conversion |
| 76. | D | Evidence—scope of cross-examination |
| 77. | A | Torts—strict products liability |
| 78. | B | Torts—products liability based on negligence |
| 79. | B | Criminal Law—felony murder |
| 80. | C | Evidence—hearsay |
| 81. | D | Contracts—third-party beneficiaries |
| 82. | C | Contracts—assignment of rights |
| 83. | A | Contracts—delegation of duties |
| 84. | A | Torts—defamation |
| 85. | C | Real Property—adverse possession |
| 86. | A | Evidence—husband-wife privilege |
| 87. | C | Criminal Law/Procedure—double jeopardy |
| 88. | B | Constitutional Law—separation of powers |
| 89. | B | Evidence—personal knowledge requirement |
| 90. | B | Criminal Law/Procedure—immunized testimony |
| 91. | C | Torts—duty of care |
| 92. | B | Torts—strict products liability |
| 93. | C | Torts—negligence |
| 94. | A | Real Property—equitable servitude |
| 95. | B | Constitutional Law—freedom of expression |

96. B Contracts—liquidated damages
97. A Contracts—excuse of conditions
98. D Criminal Law/Procedure—exclusionary rule
99. D Evidence—character evidence
100. B Real Property—marketable title/specific performance
101. D Torts—defamation
102. D Criminal Law—attempt
103. B Contracts/Sales—parol evidence rule
104. A Constitutional Law—state regulation of commerce
105. A Constitutional Law—Equal Protection Clause
106. B Evidence—hearsay rule
107. D Real Property—Statute of Frauds
108. D Constitutional Law—equal protection
109. A Torts—strict liability
110. C Evidence—lay opinions
111. B Criminal Law—arson
112. A Criminal Law—robbery
113. A Contracts—implied-in-fact contract
114. B Real Property—easements/marketable title
115. C Torts—proximate cause
116. B Contracts—consideration
117. D Contracts—offer and acceptance
118. C Contracts—offer and acceptance
119. B Constitutional Law—Free Exercise Clause
120. A Evidence—privileged communications/admissions
121. A Torts—duty of innkeepers
122. A Torts—invasion of privacy
123. D Real Property—Rule Against Perpetuities
124. D Criminal Law/Procedure—search and seizure
125. A Torts—battery
126. B Evidence—impeachment
127. D Constitutional Law—executive power
128. B Real Property—recording
129. B Contracts—mistake
130. A Torts—indemnity
131. C Criminal Law/Procedure—burden of proof
132. B Criminal Law/Procedure—search and seizure
133. B Evidence—impeachment/bias
134. B Contracts—measure of damages
135. C Contracts—consequential damages
136. B Contracts—discharge of duties
137. D Real Property—covenants for title
138. A Constitutional Law—standing
139. B Torts—comparative negligence
140. A Real Property—marketable title
141. B Criminal Law—burglary/impossibility
142. C Torts—negligent infliction of emotional distress
143. B Evidence—hearsay rule
144. A Constitutional Law—fundamental rights
145. D Criminal Law—felony murder

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| 146. | C | Criminal Law—parties to crime |
| 147. | D | Evidence—character evidence |
| 148. | B | Real Property—executory interests |
| 149. | D | Torts—defamation |
| 150. | D | Real Property—marketable title |
| 151. | C | Contracts/Sales—buyer's remedies |
| 152. | C | Evidence—prior identification by witness |
| 153. | A | Contracts/Sales—consideration |
| 154. | D | Contracts—impossibility |
| 155. | C | Constitutional Law—procedural due process |
| 156. | C | Criminal Law/Procedure—consent to search |
| 157. | B | Criminal Law—larceny |
| 158. | A | Evidence—authentication |
| 159. | A | Evidence—authentication |
| 160. | C | Constitutional Law—equal protection |
| 161. | C | Real Property—easements |
| 162. | B | Torts—nuisance |
| 163. | D | Constitutional Law—judicial power |
| 164. | A | Evidence—expert witnesses/impeachment |
| 165. | A | Criminal Law/Procedure—search and seizure |
| 166. | C | Contracts—consideration/preexisting duty rule |
| 167. | D | Real Property—conveyancing |
| 168. | B | Evidence—rehabilitation of impeached witness |
| 169. | D | Torts—defamation |
| 170. | A | Torts—intentional infliction of mental distress |
| 171. | B | Torts—battery |
| 172. | A | Criminal Law—murder |
| 173. | C | Constitutional Law—obscenity/overbreadth |
| 174. | C | Evidence—hearsay/admission of party opponent |
| 175. | C | Real Property—transfer of executory interest |
| 176. | A | Contracts/Sales—rejection of nonconforming goods |
| 177. | C | Contracts/Sales—remedies for breach |
| 178. | A | Criminal Law—larceny |
| 179. | B | Evidence—hearsay/relevance |
| 180. | C | Constitutional Law—taxpayer standing/Establishment Clause |
| 181. | D | Torts—causation/joint and several liability |
| 182. | B | Real Property—right of first refusal |
| 183. | A | Evidence—authentication |
| 184. | D | Criminal Law—homicide/malice aforethought |
| 185. | A | Real Property—adverse possession |
| 186. | A | Real Property—fixtures |
| 187. | D | Constitutional Law—separation of powers |
| 188. | C | Real Property—mortgage of joint tenancy |
| 189. | B | Real Property—life estates |
| 190. | D | Criminal Law—self-defense |
| 191. | A | Evidence—former testimony |
| 192. | D | Constitutional Law—Equal Protection Clause/freedom of speech |
| 193. | A | Torts—proximate cause |
| 194. | D | Real Property—marketable title |
| 195. | B | Constitutional Law—ballot restrictions |

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| 196. | C | Criminal Law/Procedure—confessions |
| 197. | D | Torts—indemnity |
| 198. | B | Contracts—consideration |
| 199. | D | Contracts—consideration |
| 200. | A | Evidence—hearsay/present sense impression |

MULTISTATE PRACTICE EXAM ANALYTICAL ANSWERS

Answer to Question 1

- (C) The court should suppress all of the evidence because it was the fruit of an unlawful arrest. As a general rule, the police must have an arrest warrant to effect an arrest of an individual in his own home. There is no general “emergency” exception to the warrant requirement. While police officers in hot pursuit of a fleeing felon or trying to prevent the destruction of evidence may sometimes make a warrantless search and seizure, the burden is on the government to show that one of those exceptions applies. Here, the police did not arrive at Dennis’s house in hot pursuit of Dennis, and there was no indication that Dennis might be destroying the money or other evidence; *i.e.*, there were no circumstances precluding them from keeping the house under surveillance while they obtained a warrant. Hence, the arrest was illegal. Because an arrest constitutes a seizure under the Fourth Amendment, the exclusionary rule applies, and evidence that is the fruit of the unlawful arrest may not be used against the defendant at trial. Here, all of the evidence was seized without a warrant and none of the other exceptions to the warrant requirement are applicable. While the protective sweep that turned up the money and gun probably would have been within the bounds of a search incident to an arrest because the police had reason to believe an armed accomplice was present, the illegality of the arrest makes the search unlawful. Similarly, while the bags of marijuana were discovered in plain view, the police have to be legitimately on the premises for that exception to apply. Thus, (C) is correct; (A), (B), and (D) are incorrect.

Answer to Question 2

- (C) Threedee cannot compel Plannah to resume performance. Contracts for personal services are not subject to specific performance notwithstanding the fact that damages might be inadequate or difficult to assess or the services to be performed are unique. The courts reason that specific performance of personal service contracts is tantamount to involuntary servitude and would present enforcement problems. At most, Threedee would be able to obtain an injunction to prevent Plannah from working on another project at the times Plannah agreed to work for Threedee. Thus, (C) is correct and (A) is incorrect. (B) is incorrect because it is irrelevant. Whether specific performance is available at all generally depends on whether the subject matter is unique, but even a contract for unique services cannot be enforced by specific performance. The fact that a party has begun performance is irrelevant. (D) is incorrect because duties involving personal skill and judgment may not be delegated absent consent by the obligee (Threedee). Plannah did not have Threedee’s consent and so there was no valid delegation.

Answer to Question 3

- (A) Conclusions I. and II. are correct, and III. is incorrect. I. is correct because when contractual duties are delegated, the delegator remains liable on the contract, even if the delegate assumes the duties. The result might be different if the obligee expressly consented to the delegation of duties and released the original obligee (a novation), but that did not happen here. Here, Threedee allowed Drafty to proceed with the design work, but that does not, without more, constitute a novation. II. is also correct. The liability of a delegate turns on whether there has been a mere “delegation” or delegation plus an “assumption of duty.” Here the delegate, Drafty, “assumed the duties” by making a promise to perform supported by consideration (*i.e.*, the right to collect Plannah’s fees). Thus, the non-delegating party (Threedee) can sue for nonperformance. III. is incorrect because the facts do not describe a “divisible” contract. The rule of divisibility allows a party who has performed one of the units of a divisible contract to claim the agreed upon fee for that unit even though he fails to perform the other units. The three requirements are: (i) performance of each party is divided into two or more parts under the contract; (ii) the number of parts due from each is the same; and (iii) the performance of each part by one party is agreed upon as the corresponding part (*quid pro quo*)

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from the other party. [Restatement (Second) of Contracts §266] Here the facts establish none of the three requirements. Hence, Threedee is not indebted to Drafty on this theory. Based on the above, (A) is correct, and (B), (C), and (D) are incorrect.

Answer to Question 4

- (D) Telco and Rhodes are liable for the full amount as joint tortfeasors. In cases where there are joint tortfeasors and the injury suffered is not divisible, each tortfeasor will be jointly and severally liable for that injury. The rule of joint and several liability applies even where (as in the case described by the facts) each defendant acted entirely independently. Both defendants were negligent and contributed to the injuries suffered by the plaintiff when the pole fell. (A) is incorrect because Telco's prior negligence has no effect on Rhodes's liability. Her conduct was the direct cause of the foreseeable harmful result of the pole falling; the fact that it did not happen immediately is irrelevant. (B) is incorrect because Rhodes's reckless driving was not a superseding intervening force that would cut off Telco's liability for its original negligence. Because of Telco's negligence, it was foreseeable that the pole would fall. The fact that it was caused by another's reckless conduct, whether foreseeable or unforeseeable, does not cut off Telco's liability. (C) is incorrect because there is no basis to divide the plaintiff's injuries as 50% caused by Telco and 50% caused by Rhodes.

Answer to Question 5

- (A) Percy will prevail because the employee of the contractor hired by ValuMart left the level in the aisle. The general rule that a principal will not be vicariously liable for the acts of its independent contractor agent is subject to several broad exceptions, including one for duties that are nondelегable because of public policy considerations. One of these duties is the duty of a business to keep its premises safe for customers. Hence, a business would be liable for the negligence of an employee of an independent contractor to the same extent as for the negligence of its own employee. Here, Cora was employed by Contractor, which was hired by ValuMart. Cora breached the duty owed to business invitees such as Percy by leaving the level projecting out into one of the aisles. Percy was injured as a result, so he will prevail in a suit against ValuMart. (B) is incorrect. As part of the duty owed to business invitees, ValuMart employees have a duty to make reasonable inspections of their premises to discover unsafe conditions (such as if a customer had spilled something slippery in an aisle). However, even if they did not have a reasonable time to discover the level, ValuMart is liable because it is responsible for Cora's conduct. (C) is wrong because, as discussed above, ValuMart is liable under these circumstances for the conduct of its independent contractor's employee. (D) is wrong because ValuMart is liable regardless of the knowledge of its employees.

Answer to Question 6

- (B) If the federal legislation does not address the issue of preemption, and a problem is uniquely local, the local government is permitted to enact rules more strict than the federal standards. The Court has made it clear that for preemption, either the federal statute must *expressly* preempt state measures, or its preemptive force must be clear by either "occupying the field" or posing a conflict that makes compliance with both measures impossible. Since the facts do not indicate that the federal measure expressly preempts state regulation, and since neither of the implied preemption conditions are met, (B) is the correct answer and (C) and (D) are incorrect. (A) misstates the facts.

Answer to Question 7

- (B) Congress has addressed the problem of racial discrimination primarily under the commerce power, but the Thirteenth Amendment does contain an enabling clause that would authorize this

type of statute because it is not limited to governmental action. [See *Patterson v. McLean Credit Union* (1989)] While the Due Process Clause of the Fifth Amendment has been applied to the federal government in the same way that the Equal Protection Clause of the Fourteenth Amendment has been applied to states in racial segregation cases, Watson Janitorial is not a government agency and therefore the Fifth Amendment argument would not be very effective, since it is not the government itself that is being accused of discrimination. Thus, (A) and (C) do not offer the best response, since option I. presents a weak case. (D) is incorrect because option IV. misstates the law: there is no general federal police power.

Answer to Question 8

- (B) The letter is admissible as substantive evidence as well as for impeachment purposes. For the purpose of impeaching the credibility of a witness, a party may show that the witness has, on another occasion, made statements that are inconsistent with some material part of his present testimony. This may be done by first cross-examining the witness as to the prior inconsistent statement that he has made. If the witness denies having made the statement or fails to remember it, the making of the statement may be proved by extrinsic evidence. A proper foundation must be laid by giving the witness an opportunity to explain or deny the statement, and it must be relevant to some issue in the case. Here, Wilson has denied on cross-examination that he wrote the letter to Lee. Amp can then impeach Wilson by offering the letter into evidence. Because Wilson has not been released as a witness, he will have an opportunity to explain or deny the statement, and it is relevant to whether any work was done at Short's home. Because prior inconsistent statements are generally hearsay, they often are admissible only for purposes of impeachment. In this case, however, the statement is admissible as substantive evidence because it falls within an exception to the hearsay rule. Under Rule 803(3), a statement of a declarant's then existing state of mind is admissible as a basis for a circumstantial inference that the declarant acted in accordance with his state of mind. [See also *Mutual Life Insurance Co. v. Hillmon*] Wilson's statement that he was going to do electrical work on Short's house is admissible as circumstantial evidence tending to show that he followed through with his plans and did the electrical work, which is what the statement is being offered to establish. In this case, therefore, the letter should be admissible as both substantive and impeachment evidence, making (B) correct and (A) incorrect. (C) is incorrect because the Federal Rules provide that the credibility of a witness may be attacked by any party, including the party calling him. [Fed. R. Evid. 607] (D) is incorrect. The letter is hearsay because it is being offered to prove the truth of the matter asserted—that Wilson was going to do electrical work on Short's house—as a basis for inferring that Wilson did do the work. However, as discussed above, it falls within the "present state of mind" exception to the hearsay rule.

Answer to Question 9

- (A) To prove an attempt, the government must establish that the defendant had a specific intent to commit the crime and committed an act beyond mere preparation for the offense. There can be no attempt, however, if there is no crime on the books to cover either the defendant's behavior or his intended behavior. This is known as the doctrine of legal impossibility. In (A), the defendant could not be found guilty of attempting to purchase Valium without a prescription because it was not illegal to purchase Valium without a prescription. In (B), (C), and (D), the defendant could be held for attempt. In each fact situation, the defendant acted with the specific intent to commit the crime. In (B), the death of the intended victim made it impossible to commit the homicide. In (C), the refusal of the garage owner to be deceived made it impossible to commit false pretenses. In (D), the fact that the property no longer had "stolen" status made it impossible to commit the crime of receiving stolen property. The mistake as to the attendant circumstances in (B) and (D) and the inability to complete the crime in (C) all constitute factual impossibility, which is not a defense to attempt.

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Answer to Question 10

- (B) A regulation will not be upheld if it is overbroad (*i.e.*, if it prohibits substantially more speech than is necessary). If a regulation punishes a substantial amount of protected speech, judged in relation to the regulation's plainly legitimate sweep, the regulation is facially invalid unless a court has limited construction of the regulation so as to remove the threat to constitutionally protected expression. If a criminal law or regulation fails to give persons reasonable notice of what is prohibited, it may violate the Due Process Clause on vagueness grounds. This principle is applied somewhat strictly when First Amendment activity is involved in order to avoid the chilling effect a vague law might have on speech (*i.e.*, if it is unclear what speech is regulated, people might refrain from speech that is permissible for fear that they will be violating the law). The ordinance at issue here is overbroad in banning all street demonstrations of more than 15 people in commercial areas during rush hour. This regulation bans far more speech than is necessary. This regulation is also unduly vague because "rush" hours is apparently not defined in the ordinance. The section of the ordinance referring to certain types of prohibited language is also so vague as to be facially invalid. (A) is incorrect because prior restraints may be imposed on speech in public places if such restraints are granted under narrowly and clearly defined standards. (C) is incorrect because the police have powers to prevent breaches of the peace. (D) is incorrect since the state may interfere with the right of association, where, for example, there is an imminent danger to public health and welfare.

Answer to Question 11

- (B) Lentil may begin eviction proceedings at any time. When a tenant continues in possession after the termination of her right to possession, the landlord has two choices of action: he may treat the hold-over tenant as a trespasser and evict her under an unlawful detainer statute, or he may, in his sole discretion, bind the tenant to a new periodic tenancy, in which case the terms and conditions of the expired tenancy apply to the new tenancy. Here, while Lentil accepted the check sent by Truffle, he informed Truffle that he was not electing to bind her to a new tenancy. Lentil may keep the check because he is entitled to rent for the month that Truffle was a hold-over tenant, but at the end of that month he has the right to evict Truffle because no periodic tenancy was created and Truffle's right to possession has terminated. (A) is incorrect because Lentil did not elect to create a periodic tenancy. Furthermore, had he done so, the tenancy would have been a year-to-year tenancy rather than a month-to-month tenancy because it is a commercial lease for more than one year, rather than a residential lease. (C) is incorrect because, as discussed above, Lentil did not elect to create a periodic tenancy when Truffle held over. (D) is incorrect because no tenancy for years is created when a tenant holds over. If the landlord elects to bind the tenant to a new tenancy, it will be a periodic tenancy, regardless of whether the original tenancy was a tenancy for years.

Answer to Question 12

- (B) Dirk's motion should be denied because his waiver of his *Miranda* rights was valid. Even though the prosecution must show, by a preponderance of the evidence, that a defendant's waiver of his *Miranda* rights was knowing, voluntary, and intelligent, the suspect need not have been informed of all subjects of an interrogation to effect a valid waiver. The police were not required to tell Dirk of Vera's condition. (A) is incorrect because no error was involved. (C) is incorrect for the reasons described in the analysis of option (A), *i.e.*, the police need not inform the subject of all aspects of the interrogation for the waiver to be considered valid. (D) is incorrect because due process requires only that confessions be voluntary, *i.e.*, not the product of official compulsion. Withholding information about the potential seriousness of the offense does not violate due process.

Answer to Question 13

- (B) Showing West the notes is a proper attempt to refresh her recollection. A witness may use any writing or thing for the purpose of refreshing her present recollection. This is known as “present recollection revived.” Under most circumstances she may not read from the writing while she actually testifies because the writing is neither authenticated nor in evidence. Here, the writing was shown to her solely to refresh her recollection and is, therefore, proper. (A) is incorrect because it describes “past recollection recorded,” which is a hearsay exception [Fed. R. Evid. 803(5)] allowing the writing itself to be introduced into evidence if a proper foundation is laid for its admissibility. Here there is no attempt to enter the notes into evidence. (C) is incorrect because what the attorney is asking to do does not constitute a traditional “leading question,” which generally calls for a “yes” or “no” answer or is framed to suggest the desired answer. Furthermore, the ordinary rules on leading questions may be waived when the witness needs help to respond because of loss of memory. (D) is incorrect because aiding a witness’s present recollection has nothing to do with bolstering the witness’s credibility (which generally may not be done until the witness has been impeached).

Answer to Question 14

- (C) I. is correct. Buyer has a contract for 100 wheelbarrows; she is not required to accept anything less. II. is also correct. Buyer can accept if she wants less than the full order and hold Seller responsible for damages. III. is also correct. Under the U.C.C., if a valid contract existed, Buyer can accept the entire shipment and sue Seller for damages. If there had been no prior contract and Seller had attempted to accept by shipment, shipment of the “accommodation” units would be a counteroffer and if Buyer accepted them, she could not sue for damages. However, here there was a prior written contract. Thus, since all the statements are correct, (C) is the correct pick, and (A), (B), and (D) are wrong.

Answer to Question 15

- (A) Hardsell can collect his lost profits, *i.e.*, the difference between the contract price (\$9,000) and what Hardsell paid to purchase the car from the manufacturer. In a contract for the sale of goods, a seller can collect his lost profits when the buyer breaches if the seller cannot be made whole by a subsequent sale of the item contracted for. This occurs where the seller has an unlimited supply of the goods and demand is limited (*e.g.*, a car dealership), because in such a situation, the seller would have been able to sell to the subsequent purchaser anyway. This is known as a lost volume situation, and in such a situation, the U.C.C. allows the seller to sue for his lost profits. Generally, lost profit is measured by the difference between the cost of goods and the contract price, less the seller’s saved expenses. (B) is incorrect because it uses the wrong measure for lost profits. The cost of a similar car in the local wholesale market is irrelevant since Hardsell did not purchase the car on the wholesale market, but rather purchased the car from the manufacturer. Hardsell’s actual price will be used to determine his lost profit. (C) is incorrect because although Hardsell resold the car, the resale has not made him whole since he could have sold a car to Karbuff anyway. Thus, the resale does not put Hardsell in as good a position as he would have been had Shift performed (the goal of contract remedies). Thus, Hardsell will be allowed to recover his lost profits, as explained above. (D) is incorrect because contracts of adhesion are not unconscionable *per se*, and there is nothing in the facts to indicate a degree of unconscionability that would render the contract voidable at buyer’s option.

Answer to Question 16

- (D) The trial court should rule Wirth’s testimony inadmissible because its probative value is substantially

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outweighed by the danger that it will confuse the issues and waste time. Where a witness makes a statement not directly relevant to the issues in the case, the rule against impeachment (other than by cross-examination) on a collateral matter applies to bar the opponent from proving the statement untrue either by extrinsic contradictory facts or by a prior inconsistent statement. The purpose of the rule is to avoid the possibility of unfair surprise, confusion of issues, and undue consumption of time. An issue is considered collateral if it would not be admissible other than to contradict the testimony. Evidence that a person has previously filed similar claims is generally inadmissible to show the invalidity of the present claim. At best, this evidence shows the plaintiff's tendency toward litigation. Unless there is evidence that the previous claim was false, the probative value of such evidence is deemed outweighed by the risk of confusion of the issues. Since the prior suit would not be the subject of proof independent of impeachment, it is a collateral matter, and extrinsic evidence, such as Wirth's testimony, is inadmissible. (A) is wrong because the testimony is not proper impeachment and is inadmissible. Furthermore, this choice states the foundational requirement for introducing a prior inconsistent statement. This is not a prior inconsistent statement and, if the testimony were admissible, the opportunity to explain or deny would not be required. (B) is wrong because the failure to object merely meant that Pike's answer to the question was admitted into evidence; it does not change the fact that the matter is collateral. Since it is a collateral matter, extrinsic evidence will not be permitted. (C) is wrong for two reasons. First, the suit is a fact that exists independently of the court record, and thus, the best evidence rule would not apply. Furthermore, as stated above, extrinsic evidence of any kind is not admissible on a collateral matter; Digger is limited to cross-examination for impeachment in these circumstances.

Answer to Question 17

- (D) Jordan is not an accomplice to criminal homicide because intent is required to invoke accomplice liability. To be convicted as an accomplice, a person must have given aid, counsel, or encouragement with the intent that an offense be committed or, in some cases, with knowledge that he was contributing to the commission of a crime. Jordan supplied the apparently benign antibiotic to prevent the possible commission of a crime of homicide rather than to aid or abet the commission of such crime by Hammond. Jordan lacked intent to commit any of the homicide crimes. (A) is incorrect because murder is the unlawful killing of a human being with malice aforethought and Jordan lacked any of the states of mind required to establish malice. (B) is incorrect because voluntary manslaughter involves a killing after adequate provocation, and "unlawful act" involuntary manslaughter requires a killing in the course of a felony or a malum in se misdemeanor. None of these situations is present here. (C) is incorrect because criminal negligence requires negligence of a greater degree than the "reasonable person" standard for torts. Jordan did not reach this degree of negligence by supplying Hammond with the usually harmless antibiotic.

Answer to Question 18

- (A) Hammond is guilty of murder only. Murder requires a killing of a human being with malice aforethought. Hammond planned to kill his wife and proceeded to do so. It is irrelevant that he killed her by injecting her with a drug that is normally harmless rather than with the poison he thought he was injecting. Ignorance or mistake as to a matter of fact will affect criminal guilt only if the defendant did not have the state of mind required for the crime. (B) is incorrect because no legal conspiracy existed. The common law elements of conspiracy are: (i) an agreement between two or more persons, (ii) an intent to enter into an agreement, and (iii) an intent to achieve the objective of the agreement. By this definition, Jordan was not a co-conspirator, and therefore Hammond is not guilty of common law conspiracy because he did not have an agreement with another guilty party. (C) is incorrect because, for reasons given above, Hammond's

mistake of fact regarding the substance he was injecting into his wife does not reduce murder to attempted murder. (D) is incorrect for reasons given in the analysis of options (B) and (C).

Answer to Question 19

- (D) The decisive question in this case involves establishing causation in a strict products liability action. A cause of action based on strict liability for products requires: (i) strict duty owed by a commercial supplier; (ii) breach of that duty; (iii) actual and proximate cause; and (iv) damages for a *prima facie* case. Option (D) goes to the question of actual causation (*i.e.*, whether Abco was the cause-in-fact of Crane's injuries), which is an essential element in strict liability cases. The issue here is whether the court will apply an "enterprise liability" theory (which has been done in negligence cases). In these cases, courts use an alternative causes approach, which shifts the burden of proof to each of the several defendants to establish that its negligence was not the actual cause of plaintiff's injury. (A) is incorrect because *res ipsa loquitur*, which allows the trier of fact to infer a breach of duty on the part of the defendant, is only applicable in negligence cases. (B) is incorrect because in strict liability cases the supplier can be held liable even if it was unaware of the harm the product could cause. (C) is incorrect because FDA approval would not affect Abco's liability in a strict liability action.

Answer to Question 20

- (B) Shirts is liable for the total amount on privity of contract grounds, and Shoes is liable for \$12,000 on privity of estate grounds. When a leasehold interest is assigned, the assignor and the landlord are no longer in privity of estate; the assignee is now in privity of estate with the landlord. Hence, each is liable to the other on all covenants in the lease that "run with the land." Here, the agreement to pay a maintenance fee for upkeep of the common areas of the mall is a covenant that runs with the land because it burdens the tenant and benefits the landlord with respect to their interests in the property (*i.e.*, it "touches and concerns" the land). Shoes is therefore liable for the maintenance fees for the 12-month term of its tenancy. However, since Shoes was not in privity of estate prior to the assignment, it is not liable for the \$3,000 in maintenance fees that Shirts owed; thus, (A) is incorrect. (C) and (D) are incorrect because Shirts continues to be liable for the maintenance fees after the assignment. While the original tenant is no longer in privity of estate with the landlord after assignment, the tenant can still be held liable on its original contractual obligation in the lease, *i.e.*, on privity of contract. This allows the landlord to sue the original tenant where the assignee has disappeared, is judgment-proof, etc. Here, Shirts is liable for the period Shoes occupied the property as well as the period the property was abandoned. Thus, Lightpost has the choice of suing either Shirts (under privity of contract) or Shoes (under privity of estate) for the \$12,000 in maintenance fees, as provided in choice (B).

Answer to Question 21

- (D) Both Lakeview and Lightpost are liable to Shoes. A landlord's assignment of the rents and reversion interest, such as through a sale of the property, is subject to the same rules as a tenant's assignment of the leasehold interest. The assignee is liable to the tenants for performance of all covenants made by the original landlord in the lease, provided that those covenants touch and concern the land. The burdens of those covenants run with the landlord's estate and become the burdens of the new landlord. The original landlord also remains liable (on privity of contract grounds) on all covenants that he made in the lease. Here, the duty to maintain the parking lot touches and concerns the land because it benefits the tenant and burdens the landlord with respect to their interests in the property. Thus, regardless of who hired the contractor, Lakeview had a duty to ensure that the contractor completed the work, and is liable to Shoes for the costs Shoes