

## 176. MIXED SUBJECTS

### Question 106

State B's legislature passed a statute that required every used car sold in the state to be tested prior to sale to determine whether it was in compliance with a set of strict exhaust emission standards that were also included in the legislation. Used cars would have to be brought up to standard and pass the emissions test prior to sale. Certain persons in the state object to the legislation because one of its results will be to raise the average price of used cars in State B. Only cars to be sold for junk are exempt from the statute.

Among the following, who would be most likely to have standing to raise a constitutional challenge to the legislation?

- (A) A State B resident who was thinking about selling used cars in State B.
- (B) A State B resident who was thinking about buying a used car in State B.
- (C) An out-of-state dealer in used cars who had a contract to sell cars to a large dealer in State B.
- (D) An out-of-state manufacturer who might be required to indemnify its dealers in State B for costs arising from the statute.

### Question 107

The state of North Freedonia has long had a reputation for growing the biggest and tastiest potatoes in the country. Growers of potatoes in North Freedonia recently began spraying Bugoff onto their crops to prevent the spread of the Potato Maggot, an insect that can destroy young potato plants. Bugoff is manufactured exclusively by Growit, Inc., at its plant in South Freedonia. When the plant is producing Bugoff it emits a fine, sticky, harmless mist as a byproduct. The mist drifts over Clampett's property which is adjacent to Growit's plant. Although Growit uses the best technology available, it is unable to prevent the release of the mist. Clampett brings suit against Growit on the theory of private nuisance to enjoin the production of Bugoff at the South Freedonia plant.

Which of the following facts, if established, will be most helpful to Growit's defense?

- (A) Growit commenced the manufacture of Bugoff at the South Freedonia plant three years before Clampett acquired the land adjacent to the plant.
- (B) Federal, state, and local agencies approved the design of the plant and equipment used to produce Bugoff.
- (C) The principal users of Bugoff are State and Federal Departments of Agriculture.
- (D) Bugoff is the only pesticide that can safely and effectively kill the Potato Maggot, which, if not controlled, would destroy North Freedonia's potato crop, its principal product.

**Questions 108-109** are based on the following fact situation:

While Doug was driving Olivia's car, he hit Peter in a pedestrian right-of-way. Peter sued both Doug and Olivia, alleging that Doug had negligently driven the car and that Olivia had negligently permitted an unfit driver to use her car.

108. Peter calls Walter as his first witness.

Walter testifies that within the last several months he is aware of three instances in which Doug has engaged in reckless driving. Both Doug and Olivia object to the admission of this evidence. The objection should be:

- (A) Sustained, because Doug's character is not in issue.
- (B) Sustained, because specific evidence of misconduct is not admissible to establish evidence of character.
- (C) Overruled as to the case against Olivia, but sustained as to the case against Doug.
- (D) Overruled, because the evidence goes to the issue of Doug's criminal negligence.

109. As part of her defense, Olivia calls her husband Harry to testify for her. Harry offers testimony that Olivia rarely loans her automobile to anybody, but that when she does loan it, Olivia invariably checks to see whether the driver is careful and law abiding. Peter objects to the admission of this evidence. His objection should be:

- (A) Sustained, because there is no evidence to corroborate Harry's testimony.
- (B) Sustained, because it seeks to prove conduct in conformity with the character evidence.
- (C) Overruled, because Olivia's character is in issue.
- (D) Overruled, because it tends to establish Olivia's habit.

**Questions 110-113** are based on the following fact situation:

Owner and Builder executed a contract providing that Builder was to construct a residence on a specified location according to plans and specifications drawn up by Architect. The total contract price was \$500,000. The lot on which the residence was to be built was located on the seashore in Palm Beach, Florida and there was an existing woodframe structure that had to be demolished before the residence could be built. Owner contracted with Designer to furnish the interior of the residence after Builder completed construction, but no date was included in either contract for completion of the home. The contract between Owner and Builder stated that construction would begin within two weeks after the existing structure was demolished and the rubble removed from the lot. The contract between Owner and Builder was signed November 12, and the contract between Owner and Designer was signed November 11.

110. Assume for the purposes of this question only that the day after the preexisting structure is demolished and the rubble removed, a severe storm causes gigantic

waves that erode the seashore so that Owner's lot is now under water. Must Builder still perform the contract?

- (A) No, the contract is void because the subject of the contract was destroyed through no fault of the parties.
- (B) No, Builder is discharged of his obligation because of impossibility of performance.
- (C) Yes, if Owner obtains an alternative lot within a reasonable period of time.
- (D) No, the contract is void because of mutual mistake.

111. Assume for the purposes of this question only that after Builder has completed 5% of the residence, a severe storm causes gigantic waves that demolish the construction but leave the lot undamaged. Must Builder still perform the contract?

- (A) No, the contract is void because the subject of the contract was destroyed through no fault of the parties.
- (B) No, Builder is discharged of his obligation because of impossibility of performance.
- (C) Yes, but he is entitled to a quantum meruit recovery for the work done prior to the destruction of the construction.
- (D) Yes, Builder must perform the original contract without any compensation for the destruction of the construction.

112. Assume for the purposes of this question only that after Builder has completed 60% of the residence, a severe storm causes gigantic waves that partially erode the lot but leave the construction undamaged. Builder determines that it will cost an additional \$1.2 million to repair the lot by shoring and construction of a seawall so that the residence can be constructed

## 178. MIXED SUBJECTS

according to the plans of Architect. Without the additional lot repair work, the residence cannot be constructed at all. Must Builder perform the contract?

- (A) No, if the increased costs of construction would bankrupt him.
- (B) No, the contract is void because of mutual mistake.
- (C) No, Builder is discharged of his obligation because of impracticability of performance.
- (D) Yes, but he may bring an action against Owner for the increased costs of construction.

113. Assume for the purposes of this question only that after the contract was signed by the parties and after the preexisting structure has been demolished but before the rubble has been removed, the Florida Coastal Commission declares the land including Owner's lot part of a natural wilderness area, requiring that all residences constructed therein be single story and have plans approved by the Coastal Commission. The original plans called for a three-story, castle-like structure totally incompatible with the Commission's guidelines for residences in a wilderness area. Must Builder perform the contract?

- (A) No, the contract is void because of mutual mistake.
- (B) No, and he may recover his lost profits in an action against Owner.
- (C) No, Builder is discharged of his obligation because of supervening illegality.
- (D) Yes, if Owner and Architect supply new plans approved by the Coastal Commission.

### Question 114

In 1951, Owner conveyed Blackacre to Brian for "so long as Blackacre is used solely for residential purposes. Should Brian ever use Blackacre for any other purpose, the interest in Blackacre shall revert to Owner and his heirs." Brian used Blackacre as his personal residence for 20 years, but in 1971, he began operating a bar on Blackacre. Owner knew that Brian was operating a bar on Blackacre, but he took no action.

In 2000, the aged Brian decided to get out of the saloon business. Brian closed his business and once again began to use Blackacre solely as his personal residence. Also in 2000, Owner died, survived by his son and only heir, Stephen. In 2002, Stephen laid claim to Blackacre.

The jurisdiction in which Blackacre is located has a seven-year adverse possession statute and another statute that bars enforcement of possibilities of reverter 55 years after their creation.

May Stephen validly claim title to Blackacre?

- (A) Yes, because less than 55 years has elapsed since the creation of the possibility of reverter.
- (B) Yes, because the adverse possession period began to run when Brian returned the property to residential status, and Brian has not held for the requisite seven years.
- (C) No, because the adverse possession period began to run in 1971, and Brian has held the property for more than the requisite seven years.
- (D) No, because Owner did not assert his possibility of reverter; thus, no cause of action arose in Owner or his heirs.

### Question 115

One night when Bob was very drunk, he took one of his rifles, loaded it, and fired a bullet through his front door. Unknown to him, at the time he fired the rifle, someone was driving by

the house. The bullet went through the front door, through the window of the car, and killed the driver.

Bob was convicted of murder and appeals. He contends that there was insufficient evidence to support a finding of murder.

The court of appeals should rule that the evidence is:

- (A) Sufficient to prove that the killing was intentional.
- (B) Sufficient to prove that the killing was done with malice aforethought.
- (C) Insufficient, because Bob did not know that the driver was driving by his house and therefore he could not have acted intentionally.
- (D) Insufficient, because at most Bob's conduct constituted gross negligence and involuntary manslaughter.

**Questions 116-117** are based on the following fact situation:

Commercial fishing, primarily for salmon and tuna, in the waters of the Pacific Ocean along the state's western boundary, has long been one of Washington's major industries. To protect the fishing industry, which was being harmed by the too rapid depletion of the fish in the waters of the state's coast, and to promote the general welfare of the state's citizens, the state legislature enacted statutes for the first time requiring licenses for commercial fishing. To receive a license, the applicant must pay a \$500 fee and establish by acceptable evidence that he has been engaged in commercial fishing in the waters of the state of Washington (including ocean waters within three miles of its coastline) since January 1, 1995. A limited number of special licenses are available for those who do not meet the requirements of the regular licenses, and these special licenses are expressly reserved for citizens who have resided in Washington for at least three years prior to the date of the application.

116. Ng, a legally admitted alien who has been residing in the state of Washington for 10 years, brings suit in federal court to enjoin enforcement of the licensing statute as to himself and all other similarly situated noncitizen legal residents of the state of Washington. Which of the following doctrines will probably be determinative of his claims?

- (A) The powers reserved to the states by the Tenth Amendment to the Federal Constitution.
- (B) The Equal Protection Clause of the Fourteenth Amendment.
- (C) The Due Process Clause of the Fifth Amendment to the Federal Constitution.
- (D) The Privileges and Immunities Clause of Article IV.

117. Limpett is a commercial fisherman residing in northern California. He frequently takes his fishing boat up the coast. His favorite spot is approximately two miles off the coast of Washington. If Limpett challenges the constitutionality of the Washington statutes, the court should find the statutes:

- (A) Constitutional, because Congress has not enacted legislation regarding the subject matter of the statutes.
- (B) Constitutional, because economic and social regulations are presumed valid.
- (C) Unconstitutional, because less restrictive means are available.
- (D) Unconstitutional, because Congress has exclusive power to regulate foreign commerce, which includes commercial ocean fishing.

#### Question 118

Oliver, who owned the Rocking O Ranch in fee simple, died and left the property to his daughter, "Melinda, her heirs and assigns; but if

## 180. MIXED SUBJECTS

my son, Oliver Jr., is living 25 years from the date of my death, then to Oliver Jr., his heirs and assigns." At the time of Oliver's death, Oliver Jr. was one year old. The common law Rule Against Perpetuities is unmodified in the jurisdiction.

The grant in the will to Oliver Jr. is:

- (A) Valid, because the interest vests, if at all, within a life in being.
- (B) Valid, because it grants Oliver Jr. a reversionary interest.
- (C) Invalid, because the will grants Melinda the complete interest in the property, so there is nothing to be left to Oliver Jr.
- (D) Invalid, if this jurisdiction does not recognize a testator's ability to convey a possibility of reverter by will.

**Questions 119-121** are based on the following fact situation:

Fred is arrested and charged with the burglary of Sam's warehouse.

119. At trial, prosecution offers evidence that when Fred was arrested, shortly after the crime had been committed, he had a large amount of cocaine hidden in the trunk of his car. This evidence should be:

- (A) Admitted to prove Fred's propensity to commit crimes.
- (B) Admitted to prove Fred's general bad character.
- (C) Excluded because such evidence may be offered only to rebut evidence of good character offered by the defendant.
- (D) Excluded because its probative value is substantially outweighed by the danger of unfair prejudice.

120. At the request of the police investigating the burglary, the night watchman at Sam's

Warehouse who had seen the thief leaving the premises wrote out a description of a person who bore a strong likeness to Fred. However, the night watchman died of a heart attack before Fred was arrested and brought to trial. The prosecution attempts to offer the description written out by the night watchman into evidence. The description is:

- (A) Admissible as a past recollection recorded.
- (B) Admissible as an identification of a person the night watchman knew committed the crime in question.
- (C) Inadmissible as hearsay not within an exception.
- (D) Inadmissible as an opinion of a nonexpert.

121. On cross-examination of Fred, the prosecution asked Fred whether he had been convicted of fraudulent business practices six months earlier. This question is:

- (A) Proper to show that Fred is a bad character.
- (B) Proper to show that Fred is inclined to lie.
- (C) Improper because the probative value of the evidence is outweighed by the danger of unfair prejudice.
- (D) Improper because the conviction has insufficient similarity to the crime charged.

### Question 122

Dennis was charged with larceny. His principal defense was that he had no intent to permanently deprive the victim of her property. The judge instructed the jury that the State had to prove beyond a reasonable doubt that Dennis was guilty of larceny and that the evidence tended to show that Dennis had taken some

jewels belonging to the victim; but if they believed that Dennis had proven by a fair preponderance of the evidence that he did not intend to keep the jewels, but to return them, they should find him not guilty. Dennis was convicted of larceny. He appeals the conviction, contending that the judge erred in his instructions to the jury.

Dennis's conviction will probably be:

- (A) Affirmed, because the jury has the power to ignore Dennis's testimony if they do not believe him.
- (B) Affirmed, because Dennis had failed to rebut the State's evidence tending to show that he intended to keep the jewels.
- (C) Reversed, because the judge cannot comment at all on the evidence.
- (D) Reversed, because the instructions put some of the burden of proof on Dennis.

### Question 123

At the intersection of First and Main Streets, a large truck owned by Ace Meat Packing Co. collided with a car driven by Sam. At the time of the accident, Wilber, the driver of the truck, said to Sam, "The accident was my fault; I wasn't paying any attention. Don't worry, my company will make it right." The subsequent investigation of the accident by Ace revealed that Wilber had been drinking on the day of the accident. Wilber was fired.

Sam brings an appropriate action against Ace for damages resulting from the accident. Wilber has disappeared. Sam seeks to testify as to what Wilber said at the time of the accident.

The evidence is:

- (A) Admissible, as an admission by an employee of the defendant.
- (B) Admissible, as an excited utterance.
- (C) Inadmissible, because Wilber is no longer employed by Ace.

- (D) Inadmissible, unless Ace authorized Wilber to speak on its behalf.

### Question 124

Alice owned Lot A, and Barry owned the adjacent Lot B. Both lots were located in State Red, which has a 20-year adverse possession statute. In 1970, Alice married and left State Red to reside in State Blue. Alice did not return to view the property during her period of residence in State Blue. In 1971, Barry built a driveway on Lot B. The driveway extended three feet over onto Lot A. Barry mistakenly believed that this three-foot strip of land was his property. Barry regularly used the driveway and continued to use it when Alice, having been widowed, returned to State Red in 2002. Alice discovered the encroachment upon her return.

If Alice consults you as to her rights against Barry, how should you advise her?

- (A) Alice has no action against Barry, because Barry's title to the three-foot strip has been established by adverse possession.
- (B) Alice has no action against Barry, because her prolonged absence from State Red establishes a presumption of abandonment of her rights in the property.
- (C) Alice has an action against Barry, because Alice had no knowledge of Barry's encroachment.
- (D) Alice has an action against Barry, because Barry mistakenly thought the three-foot strip was his.

### Question 125

Carter, a nonunion carpenter, went to work on a construction project that was involved in a labor dispute. Every morning when he arrived at work, he would be accosted by the picketers who would try to persuade him not to continue to work. One morning while Carter was trying to get to work, one of the union workers, John, stopped Carter at the gate and told him that he shouldn't go to work. When Carter insisted that

## 182. MIXED SUBJECTS

John get out of the way, John said, "Try to make me, scab!" Carter, intending to frighten John, swung his hammer at him. The head on the hammer, however, was defective and it flew off, hitting John in the face.

John sues Carter for battery. Most likely he will:

- (A) Prevail, because he was struck by the hammer head.
- (B) Prevail, unless he intended to provoke Carter.
- (C) Not prevail, because the negligence of the manufacturer of the hammer was the direct cause of the injury.
- (D) Not prevail, if a reasonable person would have been angered by what John had said.

### Question 126

Dr. Wally, a local physician who was prominent in the community and beloved by his patients, died suddenly of a heart attack. Wally was only 46 years old at the time of his death, and so the local newspaper, *The Daily Bleat*, had never prepared a "pre-obituary," as it did for many prominent figures. Snoops, a reporter with *The Daily Bleat*, was assigned to write an obituary before the next day's edition went to press. Snoops talked briefly with Mary, Wally's widow, and then called State Medical School, from which Wally had always said he had graduated. As it was late in the afternoon, all the professors were out on the golf course; thus, Snoops spoke with Nina, a secretary in the office of the dean of the medical school. When asked about Wally, Nina replied, "I don't think Wally ever graduated."

In Snoops's obituary, which appeared in the next morning's *Daily Bleat*, Snoops had written that Wally had never actually received a medical degree from State Medical School. Upon reading the obituary, Mary broke into tears and then became very angry, for she had worked hard to help put Wally through State Medical School, from which Wally had, in fact, graduated with

high honors. Wally's executor, Eddie, was equally incensed. Both Eddie and Mary called *The Daily Bleat*, demanding a retraction. The next day, on the front page, *The Daily Bleat* admitted its error and stated that Wally graduated with high honors from State Medical School. They also fired Snoops. Nonetheless, both Eddie and Mary sued *The Daily Bleat* for defamation.

What is *The Daily Bleat*'s best defense?

- (A) There was no malice on the part of the defendant.
- (B) The newspaper's retraction negated any harm.
- (C) Snoops got his information from a secretary at the Medical School.
- (D) Wally is dead.

**Questions 127-128** are based on the following fact situation:

Christine and her friend Zelda were going away to college and had quite a few personal belongings to transport. Christine's father offered to drive them in his van, but when the van was loaded they discovered there was only room for two people, so Christine asked her boyfriend Harry to drive her in his car while Christine's father and Zelda rode in the van.

About halfway to the college, while the van and Harry's car were driving down the freeway, the van in front, the van suddenly swerved out of control and ran off the highway, ending up on its side in the center divider. When Harry stopped his car and Christine ran to the van, she discovered to her horror that her father was dead. Zelda appeared to be injured, but not severely. Because her father previously had heart trouble, Christine assumed that he had had a heart attack while driving, although a later investigation would reveal that the accident was caused solely by a defect in the steering mechanism of the van. Filled with remorse, Christine told Zelda, "I'm so sorry about this. I'll make good any losses you suffer because of this accident." Later, when

Christine learned that Zelda was going to seek treatment from Dr. Winston, she wrote the doctor a letter stating that she would be responsible for all of Zelda's medical expenses; Dr. Winston received the letter the next day.

127. Assume for purposes of this question only that several months after the accident, but within the applicable statute of limitations, Zelda discovered that she had suffered an injury to her spinal column that would prevent her from ever playing basketball again. Zelda had been a scholarship athlete in basketball at the college and was considered to be a certain high draft selection for the newly formed women's professional basketball league when she graduated. She brought an action against Christine for several million dollars in damages. Which of the following is the best defense Christine could assert against Zelda's claim?

- (A) There was no consideration supporting her promise to Zelda to make good any losses.
- (B) She did not intend to offer to pay Zelda for the loss of her professional career when she said she would make good any losses.
- (C) She was in error when she assumed that her father's heart attack was the cause of the accident.
- (D) She did not know that Zelda would not be able to play basketball when she offered to make good any losses.

128. Assume for purposes of this question only that, after treating Zelda for her injuries until she recovered, Dr. Winston sent Christine a bill for services rendered. When Christine refused to pay, Dr. Winston brought an action to recover the amount of her bill. Who will prevail?

- (A) Dr. Winston, because she gave medical treatment to Zelda after receiving Christine's letter.

- (B) Dr. Winston, because Christine's promise to pay Zelda's medical expenses was in writing.
- (C) Christine, because there was no consideration for her promise to Dr. Winston.
- (D) Christine, because she derived no benefit from the medical services rendered to Zelda.

**Questions 129-130** are based on the following fact situation:

Ben and Sandy, brother and sister, received a \$50,000 inheritance from their deceased father. By mutual agreement, they used the money to purchase a 10-acre parcel of land. Ben and Sandy took title as joint tenants. Three years after the purchase, Ben suggested to Sandy that they build an apartment house on the property. Sandy rejected this idea. Ben then asked if he could build an apartment house on his half of the property; Sandy agreed. Ben then built an apartment house on the eastern five acres of the property. Six months later, Sandy gave permission to the Boy Scouts of America to use the western half of the property as a site for weekend camping trips. Two years later, Ben died, leaving his entire estate to his son, Steven.

129. In an appropriate action to determine the respective interests of Sandy and Steven in the property, if Steven is judged to be the owner of the eastern five acres of the property, the most likely reason for the judgment will be that:

- (A) Sandy's conduct during Ben's lifetime estopped her from asserting title to the eastern half of the property.
- (B) The taking of title as joint tenants does not conclusively presume that the property is held as joint tenants.
- (C) The joint tenancy was terminated by the oral agreement of Ben and Sandy at the time it was made.

## 184. MIXED SUBJECTS

- (D) A joint tenant may will away his interest in property, provided it is passed on to a lineal descendant.
130. In an appropriate action to determine the respective interests of Sandy and Steven in the property, if Sandy is adjudged to be the owner of all of the property, the most likely reason for the judgment will be that:
- (A) The Statute of Frauds prevents the enforcement of Sandy's oral agreement.
- (B) The record title of the property as joint tenancy can be changed only by a duly recorded instrument.
- (C) Ben could not unilaterally sever the joint tenancy.
- (D) Ben's expenditure of funds in building the apartment house in reliance on Sandy's oral promise estops her from denying the oral permission.

### Question 131

The state legislature of Nevada enacted legislation prohibiting the use of tractor-trailer rigs weighing more than 100,000 pounds gross, after lengthy hearings demonstrated to the legislators' satisfaction that superheavy trucks rapidly degrade the state's roadways and pose a greater safety danger than smaller trucks. Western States Freight, a trucking firm that frequently uses Nevada highways for trips between Colorado and California, has recently purchased several tractor-trailer rigs weighing over 100,000 pounds when loaded. Most of its equipment may still be legally used in Nevada, but the firm does not want to have to exclude the superheavies from the California runs and plans to gradually replace its older trucks with larger models. Western brings an action for declaratory relief in federal court in Colorado, seeking to have the Nevada legislation declared unconstitutional. The state of Nevada asserts that the legislation is justified as an exercise of the state's police power based upon safety considerations, and that the court may not second-guess the state

legislators as to this subject. None of the evidence presented at the legislative hearings is produced in court. Western presents expert testimony that the heavier trucks are no less safe than smaller models.

The trial court should rule:

- (A) That the legislation is an unconstitutional violation of Western's Fourteenth Amendment rights to due process of law.
- (B) That the legislation is unconstitutional because it violates the Commerce Clause.
- (C) That the legislation is a valid exercise of the state's police power to regulate highway safety.
- (D) That the evidence of the damage done to the state's highways by the superheavy trucks is sufficient to uphold the legislation independently of the safety argument.

**Questions 132-133** are based on the following fact situation:

Baxter was heavily in debt and was concerned that his home was about to be repossessed. To try to generate money to satisfy his creditors, Baxter promised to pay his friend Dunn \$100 if Dunn would enter Baxter's house that evening and take his expensive color television and stereo. Baxter explained that he would then report the items as being stolen to the insurance company and collect a settlement from them. Baxter gave Dunn directions to his home, which was one of several tract houses in a fairly new development. Baxter told Dunn to arrive at approximately 9 p.m. and to enter through a window at the rear of the house that Baxter would leave ajar. Dunn knew that since Baxter lived alone, there was no possibility that he might find someone within the house when he arrived at the appointed time. Dunn arrived at the location at approximately 9 p.m., but due to the darkness of the evening and the fact that all of the homes in the development looked the same, he mistakenly entered the house belonging to Baxter's neighbor. He found a window ajar at the rear of the neighbor's home and pushed it

open. He entered and took the neighbor's television set and stereo. When he returned to the bar where Baxter was waiting for him, both men were arrested by the police.

132. If Baxter and Dunn are tried for conspiracy, the court will most likely find them:

- (A) Not guilty, because Dunn failed to take Baxter's property.
- (B) Not guilty, because Dunn, being in the wrong house, could not take Baxter's property.
- (C) Guilty, because they actually took the neighbor's property.
- (D) Guilty, because they intentionally agreed to defraud the insurance company.

133. If Dunn is charged with burglary, his best argument for acquittal would be that:

- (A) He acted under a mistake of law.
- (B) There was no breaking.
- (C) There was no entry.
- (D) He reasonably thought that he was in Baxter's home.

**Questions 134-135** are based on the following fact situation:

Allan invited all of his neighbors to a July 4th party in his backyard. Practically the entire neighborhood showed up, except for Clem, who lived next door. Clem was an elderly man with a known heart condition who chose not to participate in neighborhood social functions. That evening, after a full day of festivities and much beer drinking, someone at the party suggested, "We ought to set off some fireworks!" Bob, another guest, thereupon produced a large skyrocket, which he lit. However, the skyrocket failed to climb properly and crashed into Clem's garage, starting a fire. Clem rushed out of his house and attempted to put out the flames, but

he suffered a heart attack and was rendered unconscious. The garage burned to the ground before the fire department arrived. Fortunately, however, the firefighters were able to revive Clem, and he has since recovered from the heart attack. A local ordinance made it a misdemeanor to sell fireworks within the city limits.

134. If Clem sues Allan for the damage to his garage, the theory on which he is most likely to prevail is that:

- (A) Allan failed to exercise due care to control the acts of his guests.
- (B) Allan is strictly liable for harm resulting from ultrahazardous activities performed on his land.
- (C) Clem had been invited to Allan's party; as an invitee, Allan owed him a duty to discover and guard against activities on his land involving an unreasonable risk of harm.
- (D) Allan is liable on a negligence per se theory because of the local ordinance banning the sale of fireworks within the city.

135. If Clem sues Bob for the damage to his garage on a theory of negligence, which of the following arguments, if sustained by the facts, would be most helpful for Bob to avoid liability?

- (A) The setting off of skyrockets on July 4th is an accepted custom in the community.
- (B) The skyrocket was aimed by Bob to avoid crashing into Clem's garage.
- (C) The fire that started would have burned itself out but for the fact that Clem's garage was built out of sub-standard, highly flammable material.
- (D) Bob was a guest on Allan's property and entitled to the same restricted scope of liability as Allan.

## 186. MIXED SUBJECTS

### Question 136

Vincent, who operated a local neighborhood liquor store, was robbed by a man wielding an unusual knife with a pearl-studded handle. Davis was arrested and charged with armed robbery of Vincent. At trial the prosecution calls Wilma to testify that, three days after the robbery of Vincent, she was robbed by Davis with a knife that had a pearl-studded handle.

The court will most likely hold that Wilma's testimony is:

- (A) Admissible, as showing habit.
- (B) Admissible, as establishing an identifying circumstance.
- (C) Inadmissible, because it is improper character evidence.
- (D) Inadmissible, because its probative value is substantially outweighed by the danger of unfair prejudice.

### Question 137

A state penal statute makes it a misdemeanor to "willfully shut off the gas, electricity, or any other form of power for cooking, heating, or illumination to an inhabited dwelling" unless strictly outlined procedures for notice and hearing are met. Shelley owned several small, single-family residences in City, which she rented to various student groups and families. One such rental, a small, furnished two-bedroom house located in one of the poorer sections of City, had been rented to a young married couple for several months when Shelley failed to receive the monthly rent check. She drove by the house several times for two weeks and received no answer to her knocks. Neighbors told her that they had not seen the couple for at least three weeks. Finally, Shelley used her keys to enter the house. She discovered that the old set of dishware and utensils she had permitted the couple to use was still in the kitchen, but that there was no food in the house and all but a few old items of clothing had been removed from the closets. Concluding that the couple had abandoned

the rental without paying the last month's rent, Shelley called the power company and had the electricity and gas shut off until she could find another tenant.

A week later, the couple returned from an extended visit to the young wife's sick mother in Mexico. When they found that their power had been turned off, they reported this to the authorities and Shelley was prosecuted under the misdemeanor statute. At trial, it was established that the couple had inadvertently failed to place the proper postage on the rent check, which they had mailed from Mexico, and it had eventually been returned by Mexican postal authorities to the wife's mother's residence.

Shelley will probably be:

- (A) Convicted, because the charged crime is violation of a public safety statute, and she is strictly liable for her action in turning off the power.
- (B) Convicted, because she did not undertake a more thorough inquiry or wait a more reasonable length of time before concluding that the house had been abandoned.
- (C) Acquitted, if the trier of fact concludes that Shelley was reasonable in believing that the house had been abandoned.
- (D) Acquitted, if the trier of fact concludes that the young couple was negligent in not placing proper postage on the rent check mailed from Mexico.

### Question 138

When Sandra graduated from high school, her elderly Aunt Mildred asked her to come and live with her in the large, three-story brownstone owned by Mildred in Manhattan. Mildred had recently had hip replacement surgery and could no longer attend to even minor household activities, and needed assistance in caring for the several thousand orchids she cultivated in her rooftop greenhouse. Mildred said to Sandra, "I probably have about five years left, so if you will live here and take care of me and my

flowers for the rest of my life, this house and the flowers will be yours." Sandra agreed, and moved from her parents' home in Yonkers to the brownstone in Manhattan.

Mildred lived for eight years after Sandra came to live with her. Sandra attended to Mildred's personal needs, an increasing necessity as Mildred grew more frail. Sandra also maintained the household, did the shopping, cooking, etc., and cared, with less and less assistance from Mildred, for the numerous orchids. Mildred's moderate income from her investments provided the money necessary to support the household.

No further discussion was ever had between Mildred and Sandra regarding conveyance of the brownstone and its contents. Shortly after Mildred died, Sandra was contacted by a Mr. Cramer, who identified himself as Mildred's lawyer and stated that he was in possession of Mildred's last will and testament and would seek to have it admitted to probate. In the subsequent proceedings, it was revealed that Mildred had devised her orchids to a Nero Wolfe, also residing in Manhattan, and her investments, the house, and the remainder of her estate, to her daughter who lived in California and whom Mildred had not seen or heard from in over 15 years. When Sandra refused to vacate the brownstone or surrender the orchids, Cramer, now representing Mildred's daughter, brought action for possession of the house.

If Sandra prevails in the action brought by Mildred's daughter, it will be because:

- (A) She can successfully assert the doctrine of "unclean hands" to prevent Mildred's daughter from pressing her claim under the will.
- (B) The Statute of Frauds need not be satisfied as between family members.
- (C) The Statute of Frauds will not bar enforcement of Mildred's promise because her promise induced Sandra to perform, and injustice can be avoided only by enforcement.

- (D) The Statute of Frauds will not be applied where there has been part performance and where that performance is such as can be explained by the existence of the asserted contract and in no other way.

#### **Question 139**

Hines and West had been dating for many years. They decided to live together and some day, should things work out, get married. Since each earned a sizable income, they decided to invest some of their money in real estate. They purchased Blackacre for \$100,000, each contributing half the purchase price from savings. They took title as joint tenants with right of survivorship. Two years later, Hines and West were married. One year after that, the parties separated. Hines then quitclaimed all of his interest in Blackacre to his brother, Brown, who duly recorded the deed. The jurisdiction has no applicable statute.

Blackacre is now held by:

- (A) West and Brown, as joint tenants with right of survivorship.
- (B) West and Brown, as tenants in common.
- (C) Hines and West, as tenants by the entirety.
- (D) Hines and West, as joint tenants with right of survivorship.

#### **Question 140**

Sonny was arrested for shoplifting. As Sonny was being booked at the police station, Sonny's mother, Betty, arrived at the station. As she was talking with Sonny, Photog, a reporter for the *Daily News*, took Betty's picture. The photograph of Betty appeared on the front page of the next day's edition of the *Daily News*. The story of Sonny's arrest appeared just below it. A caption to the photograph identified Betty as Sonny's mother. Later that week, Betty lost her job as a result of the story in the *Daily News*.

If Betty asserts a claim against the *Daily News* for invasion of privacy, Betty most likely will:

## 188. MIXED SUBJECTS

- (A) Recover, if she was not involved in the events that led to Sonny's arrest.
- (B) Recover, because the photograph and news story caused Betty to be discharged from her employment.
- (C) Not recover, since Betty's photograph was taken in a public place.
- (D) Not recover, because the caption was accurate.

### Question 141

In which of the following situations is Defendant most likely to be guilty of common law murder?

- (A) As a joke, Defendant trips Tom as he walks by. As a result of the fall, Tom hits his head on the corner of a desk and dies immediately.
- (B) During a heated argument, Ed punches Defendant in the stomach. Angered, Defendant responds by stabbing Ed with a knife and killing him instantly.
- (C) While driving home from work late one night, Defendant falls asleep behind the wheel of his automobile. His car drifts across the middle of the road, strikes a car, and the other driver is killed instantly in the collision.
- (D) Angered because his neighbor is playing his stereo at a very high volume, Defendant fires a gun into the neighbor's house. The bullet strikes and kills neighbor's wife.

### Question 142

The United States General Accounting Office issued a call for competitive bids for a contract to supply the National Park Service with 3,000 four-wheel drive utility vehicles; the detailed specifications for the vehicles were included in the announcement. Auto Modifiers, Inc., of the state of Midwest won the contract as low bidder and began manufacture of the vehicles. Midwest

statutes require that automobiles manufactured in that state be equipped with certain antipollution devices and have a maximum displacement of 2,500 cubic centimeters. The specifications of the federal contract require Auto Modifiers to manufacture the utility vehicles without the antipollution devices and with engines with a displacement of 4,000 cubic centimeters. When the president of Auto Modifiers learns that the Midwest Attorney General's office is investigating the manufacture of the government vehicles, he instructs his legal department to take affirmative action to protect the company. Auto Modifiers then files suit in state court for declaratory relief, seeking a judicial declaration that the state statute prescribing antipollution devices and engine size may not be enforced as to it.

The court should rule:

- (A) The statute may not constitutionally be applied to Auto Modifiers in this instance because to do so would violate the Supremacy Clause.
- (B) The statute may not constitutionally be applied to Auto Modifiers because to do so would violate the Contracts Clause.
- (C) The statute may not constitutionally be applied to Auto Modifiers because to do so would violate the Commerce Clause.
- (D) All of the above.

**Questions 143-144** are based on the following fact situation:

Driver knew that children frequently played in the street along Elm Street. As Driver was operating his vehicle along Elm Street, he saw a ball roll into the street. A few seconds later, Child darted out into the street after the ball. Pedestrian, a passerby, saw Driver's vehicle bearing down on Child. Concerned that Child would be hurt, Pedestrian rushed into the street to try to save Child. Just as Pedestrian reached Child, Pedestrian tripped and fell down in the street. Driver's car struck both Pedestrian and Child, and both were injured. The jurisdiction follows traditional contributory negligence rules.

143. Assuming that Child is four years old, will Child prevail in a personal injury suit against Driver?

- (A) Yes, because Driver knew that children played in Elm Street.
- (B) Yes, unless Driver was going no faster than the posted speed limit.
- (C) No, because Child negligently darted into the street.
- (D) No, because Child's parents were negligent in not properly supervising Child.

144. If Pedestrian sues Driver for personal injuries, who will prevail?

- (A) Driver, because Driver could not have expected an adult to run into the street.
- (B) Driver, if he was traveling no faster than the posted speed limit.
- (C) Driver, because Pedestrian was unrelated to Child.
- (D) Pedestrian, if Driver had the last clear chance to avoid the accident.

#### Question 145

Howard and Wendy were engaged and looking for a lovely lot on which to build their dream house. They fell in love with Blueacre at first sight and purchased it, taking title as joint tenants with right of survivorship. Before construction of the dream house could begin, Howard discovered that Wendy was having an affair with Claude, and the engagement was called off. Wanting to obtain the money to run off with Claude, Wendy wanted to sell Blueacre. Howard refused to sell. Wendy put Blueacre up for sale anyway, and when Tim agreed to purchase it, Wendy forged Howard's signature on the deed conveying Blueacre to Tim.

Who owns Blueacre?

- (A) Howard only.
- (B) Tim only.
- (C) Howard and Tim as tenants in common.
- (D) Howard, Wendy, and Tim as tenants in common.

#### Question 146

The large metropolitan areas of East Rabbit's Foot and West Rabbit's Foot, Wyoming, lie adjacent to each other on the county line separating, respectively, Pecos and Tuscaloosa Counties, each city being entirely within its respective county. Wyoming state law grants each county great autonomy in setting the health standards governing the preparation, packaging, transportation, and sale of foodstuffs. The Pecos County council recently enacted an ordinance, valid under the constitution and statutes of Wyoming, prohibiting the packaging and sale of any food item in any nonbiodegradable material; the ordinance defines nonbiodegradable and specifically lists as prohibited all forms of plastics, cellophane, or similar materials. The ordinance specifically exempts from its terms sales of food to public institutions such as hospitals, jails, and schools.

Snak-Mart, a retail food seller in East Rabbit's Foot, files an appropriate court action attacking the Pecos County ordinance on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment. The court should rule:

- (A) For Snak-Mart, because the state's interests could be effectuated by alternative methods less intrusive upon Snak-Mart's constitutional rights.
- (B) For Snak-Mart, because no compelling state interest is served by the challenged ordinance.
- (C) For Pecos County, because the state may regulate in this area as Congress has not entered the field.
- (D) For Pecos County, because the ordinance is rationally related to a legitimate state interest—the health and safety of its citizens.

## 190. MIXED SUBJECTS

**Questions 147-148** are based on the following fact situation:

On January 1, Fred executed and delivered a deed to his daughter, Diane, conveying his avocado ranch as follows: "To Diane for life, but if Diane dies survived by her spouse and children, then to Diane's spouse for life, with the remainder in fee simple to Diane's children; but if Diane dies survived by her spouse and no children, then to my son Sam in fee simple."

On June 15, Diane married George and as a wedding gift Fred quitclaimed his interest in the avocado ranch to George. Assume that the jurisdiction does not follow the doctrine of destructibility of contingent remainders.

147. On December 1, Diane died without children and without a will. The applicable law of intestate succession provides that George is Diane's only heir. Sam claims that George has no interest in the land. Title to the avocado ranch is held by whom?

- (A) George, because of the doctrine of merger.
  - (B) George, because Diane died intestate and her fee simple passed to him as her intestate heir.
  - (C) Sam, because the interest granted to Diane's spouse is void under the Rule Against Perpetuities.
  - (D) Sam, because Diane, although survived by her spouse, died without children.
148. Assume for the purposes of this question only that Diane died survived by George and two children, Ann and Bradley. Bradley dies intestate two days after Diane, leaving one child, Curtis, as his only heir. What are the respective interests of George, Ann, and Curtis in the avocado ranch?
- (A) George has a life estate, Ann has an absolutely vested remainder, and Curtis has nothing.

- (B) George has fee simple ownership of the ranch, and Ann and Curtis have nothing.
- (C) George has a life estate, and Ann and Curtis have absolutely vested remainders.
- (D) George has a life estate, and Ann has a vested remainder subject to open.

### Question 149

Nimrod, who held a hunting license issued by the state of West, was hunting deer and elk in that state. After two days of fruitless hunting, Nimrod spied an elk. Nimrod was hunting on private land, but the elk was 200 yards away, inside a fence that surrounded a federal military base. Nimrod shot the elk from where he was standing, but entered the military base to retrieve the carcass. Nimrod took the carcass away and had it dressed and frozen for Nimrod's meals through the winter. A federal statute prohibits the removal of wild animals or the carcasses thereof from United States military bases. Nimrod is prosecuted under the statute.

The best argument in favor of upholding the statute as constitutional would be based on:

- (A) The Supremacy Clause.
- (B) The Army and Navy Clause.
- (C) The Commerce Clause.
- (D) The Privileges and Immunities Clause of the Fourteenth Amendment.

**Questions 150-151** are based on the following fact situation:

Cheryl is on trial for fraud, it having been alleged that she participated in an illegal scheme in which her victims were invited to become local distributors for a supposed cosmetics manufacturer. The victims were given bonus payments, after they had made a large initial "investment," for additional distributors who they would bring to the manufacturer. Cheryl's

defense is that she knew nothing of the scheme. She claims she was brought into the scheme by the purported head of the manufacturer's sales department and was just following instructions to bring additional distributors into the sales force.

150. The prosecution intends to call Darryl, who will testify that Cheryl had talked him into making an investment in a similar scheme involving household products, rather than cosmetics, five years ago. Should the trial court admit this evidence over Cheryl's objection?

- (A) No, because evidence of other acts or wrongs is not admissible to prove character and action in conformity therewith.
- (B) No, because it is irrelevant.
- (C) Yes, because it is evidence of Cheryl's character for dishonesty.
- (D) Yes, because it is evidence of Cheryl's state of mind.

151. The prosecution calls Zeke as a witness. Zeke is a former business associate of Cheryl's, and he testifies that her reputation in the community is for frequently participating in very questionable transactions, usually resulting in heavy losses for her investors. He testifies further that he thinks she is dishonest. Should the trial court admit this evidence over Cheryl's objection?

- (A) No, because the prosecution cannot initiate evidence of the accused's character.
- (B) No, because use of Zeke's opinion is improper.
- (C) Yes, because it is evidence of Cheryl's character for dishonesty.
- (D) Yes, because it is evidence of habit.

**Questions 152-157** are based on the following fact situation:

In early January 2004, representatives of MacDougall Corporation, makers of the famous "MacDougall Dog" hot dog and related convenience foods sold through thousands of owned and franchised "MacDougall's" restaurants, met with representatives of Time Management, Inc. ("TM"), a firm specializing in time-and-motion studies of labor intensive industries. After extensive negotiations, it was orally agreed that TM would redesign the food production area of MacDougall's restaurants, including modification of cooking equipment, if necessary, so that, using existing MacDougall's food products, savings in labor costs through reduction in restaurant cooking staffs would result. Lawyers for MacDougall's subsequently drafted a written agreement, sent it to TM, whose lawyers modified the draft, and returned the modified draft to MacDougall's. This modified writing, signed by both parties, stated in its entirety:

Provided that at least 2,000 work-hours per restaurant are eliminated, MacDougall Corporation will pay to TM within 90 days of installation of new food production systems at MacDougall's restaurants in Richmond a first installment of \$1 million. Upon installation of new food processing systems nationwide, MacDougall Corporation will pay to TM a second and final installment of \$1.5 million. Nationwide installation must be completed by January 15, 2005. Any amendments to this agreement must be in writing signed by both parties.

TM immediately began work on the restructuring of MacDougall's food processing methods. On September 5, 2004, a radical change in the layout of MacDougall's kitchen area and new personnel assignments had been designed, and TM demanded payment of the first installment payment of \$1 million. MacDougall Corporation refused, but negotiations conducted between the parties resulted in an oral agreement that MacDougall's would pay \$750,000 immediately and then the \$1.5 million second

## 192. MIXED SUBJECTS

installment as originally agreed, after nationwide installation of the new system.

The restructured food production system was installed and in operation in all Richmond MacDougall's restaurants on October 1, 2004. Subsequent audits revealed that the new system enabled MacDougall Corporation to eliminate 1,500 work-hours per restaurant, saving the corporation \$90,000 in labor costs for all Richmond restaurants. The new system required that MacDougall's increase the length of the famous "MacDougall Dog" by three centimeters and that the "Mother MacDougall Hot Apple Fritters" be made in a rectangular shape rather than the traditional round form. Nationwide installation of the new system in all MacDougall's restaurants was completed on January 30, 2005. The 1,500 work-hours per restaurant savings to MacDougall Corporation was projected at \$1.8 million per year. TM sent a certified letter to the chief executive officer of MacDougall Corporation requesting his certification that the new food production system was in place and operating as promised, and demanding the \$1.5 million second installment. The CEO refused to so certify and refused to make any payment, noting in his reply letter that the system had not been installed by January 15, 2005, and that it did not use existing MacDougall's food products, as promised by TM.

152. Was TM entitled to payment of the first installment when it completed design work on the new system on September 5, 2004?

- (A) No, because substantial completion of installation of the system in Richmond restaurants would be a constructive condition precedent to MacDougall's duty to pay.
- (B) No, because the phrase "within 90 days of installation" would be interpreted to mean within 90 days *after* installation.
- (C) Yes, because September 5 was "within 90 days of installation" of the food processing system on October 1, 2004.

(D) Yes, because TM had completed work on designing the new system and could expect to install it within 90 days.

153. Assume for the purposes of this question only that TM brings an action for breach of contract against MacDougall Corporation seeking as damages \$1.5 million. MacDougall's attempts to introduce the testimony of its chief negotiator describing the oral agreement with TM representatives that the new food processing system would use existing MacDougall's food products. TM objects, arguing that the parol evidence rule bars admission of this testimony. Which of the following is the best argument supporting admission of the testimony?

- (A) The memorandum signed by the parties was not a complete integration of their agreement.
- (B) The parol evidence rule does not bar evidence interpreting a written agreement.
- (C) MacDougall Corporation detrimentally relied on the oral agreement in signing the memorandum.
- (D) The parol evidence rule does not exclude misrepresentations.

154. Assume for the purpose of this question only that the new food processing system had eliminated 2,000 work-hours per restaurant when installed. Does the fact that nationwide installation was not completed until January 30, 2005, justify MacDougall Corporation's refusal to pay the second installment?

- (A) No, because the agreement did not contain a liquidated damage clause providing for delay in completion.
- (B) No, because neither party manifested an understanding that time was of the essence in the agreement.

- (C) Yes, because nationwide installation by January 15, 2005, was an express condition of the agreement.
- (D) Yes, because the doctrine of substantial performance does not apply to commercial contracts.
155. Was the oral agreement that MacDougall Corporation pay \$750,000 to TM after September 5, 2004, a valid modification of the original agreement?
- (A) Yes, because the Statute of Frauds does not bar subsequent oral modification of a written agreement to which it is applicable.
- (B) Yes, because contracts for services may be orally modified, if consideration is present, despite the existence of a no-oral-modification clause.
- (C) No, because it was not in writing.
- (D) No, because it was not supported by consideration.
156. Assume for the purpose of this question only that the delay in completion of nationwide installation was not a breach by TM, that MacDougall Corporation could not rescind, and that the agreement that resulted in payment of \$750,000 to TM was a valid modification of the original agreement. If TM brings an action against MacDougall Corporation for breach of contract, what will be the likely outcome?
- (A) TM will recover on the contract, because it substantially performed under the agreement.
- (B) TM will recover on the contract, because its services saved MacDougall's \$1.8 million per year in labor costs.
- (C) TM will not recover on the contract, because savings of 2,000 work-hours was an express condition that was not fulfilled.
- (D) TM will not recover on the contract, because MacDougall's CEO would not certify that the new system was operating as promised.
157. Assume for the purpose of this question only that an express condition of MacDougall Corporation's duty to pay the contract price failed and that TM was in breach because it failed to complete nationwide installation of the food processing system by January 15, 2005. If TM brings an action to recover the *reasonable value* of its services, will it likely succeed?
- (A) No, because failure of an express condition precedent would excuse MacDougall Corporation of its duty to pay TM.
- (B) No, because a claim for reasonable value of services would be inconsistent with a claim by MacDougall Corporation against TM for breach of contract.
- (C) Yes, because MacDougall Corporation continued to use the new food processing system and was aware that TM expected to be paid for its services.
- (D) Yes, because MacDougall Corporation continued to use the new food processing system and would realize \$1.8 million per year as a consequence of the contractual relationship between the parties.

### Question 158

A federal statute provided for federal grants to cities that desired to reclaim and rebuild inner-city areas for multi-family residential housing. The city of Owenoak applied for funding to build housing and received a grant of \$2.5 million. After the area was prepared for construction, however, the city council decided it would greatly benefit the inner-city dwellers if, in addition to housing, commercial property was built. Thus, the Council decided to use \$1.5

## 194. MIXED SUBJECTS

million for housing and to “borrow” the remaining \$1 million from the housing fund to build a commercial mall. The city resolution provided that 30% of the rental from the mall each year would go to a fund for maintenance of the housing and for funds to build additional housing. Construction had started on two high-rise residential buildings and the commercial mall when the federal court, at the request of the federal government, froze the construction accounts containing the proceeds from the grant.

In a motion by the city to release the funds, the court would most likely:

- (A) Grant the motion, because the city’s plan for a fund to build more residential housing substantially complies with the terms of the grant.
- (B) Grant the motion, because the doctrine of preservation of state sovereignty prevents the federal government from interfering with the state’s discretion in this situation.
- (C) Deny the motion, because the federal government can control the expenditure of the funds since it provided the funds.
- (D) Deny the motion, since the doctrine of state sovereignty has no application in this situation since the action was by the city council and not the state legislature.

### Question 159

Thomas wanted to give his home to his brother, Ben. In 1995, Thomas executed a warranty deed conveying the home to Ben. Thomas then wrote a letter to Ben saying, “Dear Ben, My home is now yours.” He put the letter and deed in an envelope and wrote the following on the outside of the envelope: “Kenneth, you are to give this deed to my brother, Ben, when I die. Until then, you should safeguard this envelope and the documents inside. Signed Thomas.” Thomas delivered these items to his cousin Kenneth and continued to live in his home by himself.

In 1997, Thomas executed a will leaving all of his property to his sister Sally.

Thomas died in January 2004. Shortly thereafter, Kenneth delivered the envelope containing the deed to Ben, who promptly recorded the deed.

Thomas’s will has been admitted to probate and Xavier is the executor. Xavier has brought an appropriate action against Ben to determine the title to Thomas’s home.

The court should rule:

- (A) For Sally, because the deed was not effectively delivered before Thomas died.
- (B) For Sally, because the deed was not recorded before the grantor died.
- (C) For Ben, because the deed effectively conveyed title when it was executed.
- (D) For Ben, because Thomas no longer owned his home when he died.

**Questions 160-161** are based on the following fact situation:

Jesse was a member of an extreme right-wing, paramilitary organization. While out drinking with several fellow members one evening, Jesse got into an argument with a soldier from the nearby Army base and was bested in a brief exchange of punches. Feeling humiliated, he went to a different bar and drank a considerable amount of liquor. Vowing revenge on the soldier who had beaten him, Jesse and his friends drove out to the Army base. Using infiltration tactics practiced on weekends, they surreptitiously approached what they believed to be the barracks where the soldier slept. As Jesse was climbing through the window he had jimmied, a military police officer happened by and challenged him. In a tussle with the MP, Jessie struck the MP with his own baton, killing him. Still extremely intoxicated, Jesse abandoned the idea of finding and severely beating the soldier, and staggered to a nearby armored vehicle park. Since he was a heavy equipment operator, Jesse

was familiar with the operation of such vehicles, and soon was driving an armored personnel carrier through the streets of the base and then out into the city. A curious police officer followed the armored vehicle for a few blocks, then pulled alongside in an attempt to determine whether it was on official Army business. At that moment, Jesse swerved the armored personnel carrier to the left, crushing the police car as it ground to a halt. The police officer inside was killed.

The jurisdiction's statutes define murder as "the premeditated and intentional killing of another or the killing of another in the commission of robbery, rape, burglary, or arson." Manslaughter is defined as "the killing of a human being in a criminally reckless manner." Criminal recklessness is "consciously disregarding a substantial and unjustifiable risk resulting from the actor's conduct." The statutory definition of burglary is identical to the common law except that the prohibited conduct need not occur in the nighttime. The jurisdiction's statutes provide that intoxication is not a defense to a crime unless it negates an element of the offense.

160. Jesse is charged with the murder of the military police officer. At his trial on this charge, the court should instruct the jury on the issue of the defense of intoxication that:

- (A) Voluntary intoxication is a defense to the crime of murder if Jesse would not have killed the MP but for the intoxication.
- (B) Jesse is guilty of murder despite his intoxication only if the prosecution proves by clear and convincing evidence that Jesse acted with premeditation and intentionally.
- (C) Voluntary intoxication is no defense to the crime of murder.
- (D) Intoxication is a defense to the crime of burglary if it prevented Jesse from forming the intent to commit a crime inside the barracks, in which case he

could only be convicted of murder upon the requisite showing of intentional action and premeditation.

161. In a separate proceeding, Jesse is tried for manslaughter in connection with the death of the city police officer. The prosecution's best reply to Jesse's defense of intoxication in the charged manslaughter is that:

- (A) Whether Jesse was intoxicated is not the crucial issue; whether the manner in which he was operating the armored personnel carrier was criminally reckless is determinative.
- (B) Conscious risk taking refers to Jesse's entire course of conduct, including drinking with the knowledge that he might become intoxicated and perform an act that might severely injure or kill someone.
- (C) Intoxication is a defense to a crime only if the intoxication is involuntary.
- (D) Intoxication is not a defense to the crime charged, because at common law manslaughter is a general intent crime.

**Questions 162-163** are based on the following fact situation:

Jack, a 17-year-old high school student living at home with his parents, decided one day to try the old practical joke he had seen so many times on television and in movies where a bucket of water is balanced on a partially open door so that the next person to enter the room through that door is drenched. Knowing that his parents were giving a dinner party that evening, Jack obtained a bucket from the tool shed, filled it with ice water, and balanced it on the partially open door of the guest bedroom, knowing that his father would take the guests' coats and wraps in there and toss them on the bed. Later that evening, Walt, an invited guest of Jack's parents, mistakenly wandered into the guest bedroom in search of the bathroom. Jack's father had decided to keep all the guests' coats in the hall

## 196. MIXED SUBJECTS

closet, since there were only three couples coming to dinner. As Walt opened the door to the guest bedroom, the bucket of ice water plunged down upon him, opening a four-inch cut in his scalp. Walt was rushed to the hospital, where 12 stitches were required to close the head wound.

162. In an action by Walt against Jack and his parents for personal injuries, the court should determine Jack's culpability according to:

- (A) The presumption against negligence afforded to all minors.
- (B) The age, experience, and intelligence of an ordinarily prudent minor in circumstances similar to Jack's.
- (C) The standard applicable to adults, since Jack is nearly grown.
- (D) Strict liability, since the practical joke turned out to be so dangerous.

163. Assume for the purposes of this question only that the jury believes Jack's testimony that he did not mean to hurt anyone, and did not expect anyone other than his father to enter the room where the bucket trap was set. Jack may be held liable for:

- (A) Negligence only.
- (B) Negligence and recklessness only.
- (C) Negligence, recklessness, and battery.
- (D) Battery only.

### Question 164

Opal owned a large tract of land in fee simple and subdivided 100 acres into 250 lots. She obtained all the necessary governmental approvals, and between 1991 and 2003 sold 175 of the lots.

Preston, who purchased one of the lots to build a house, received a deed containing the

following provision, which was in all the deeds to these 175 lots:

It is agreed and covenanted by Opal that the property conveyed herein shall be used for a single-family dwelling only and that no structure, other than a single-family dwelling, shall be erected or maintained; further, that occupancy in any dwelling built on this property shall be by a single family for residential purposes only. This agreement is specifically made binding on the grantee and grantee's heirs, their assigns and successors.

In 2004, Opal contracted with Fun Spa to sell an additional 100 acres that she owned contiguous to these lots. As part of this agreement, Opal conveyed to Fun Spa the 75 lots she had not previously sold. Nothing in the deeds for these 75 lots restricted their use to single-family residences, and in fact, Fun Spa was planning to use all the property purchased from Opal for a resort and for multi-family dwellings.

If Preston brought suit against Opal to establish that all the original 250 lots, including the 75 she had agreed to sell to Fun Spa, had to be used only for single-family dwellings in a proper proceeding, what would be the most likely result?

- (A) Opal will prevail, because the provision in the deed only binds the grantee.
- (B) Opal will prevail, because the remaining 75 deeds did not contain this provision.
- (C) Preston will prevail, if he can show that a common development scheme had been established for the entire subdivision.
- (D) Preston will prevail, unless the evidence shows that Fun Spa was not aware of this provision at the time of its agreement with Opal.

### Question 165

The Bedford City Council enacted an ordinance regarding the right to parade in the streets

of Bedford. The ordinance provided that city officials should automatically issue a parade permit to any group filing the proper papers with city authorities, except in situations where a prior group had already received permission to parade on the same street at the same time on the same day. Another city ordinance prescribed fines for persons conducting a parade in the city of Bedford without a permit.

The Reverend Jim, leader of the Poor People's Association ("PPA"), filed appropriate papers with city officials to parade down Main Street in the city of Bedford at 1 p.m. on July 15. City officials checked their records and noted that they had already issued a parade permit to the Little League Baseball Supporters to conduct a parade on Main Street at 1 p.m. on July 15. The officials told Jim that he could not have a parade permit for the time and place requested and suggested that Jim select another day and/or location. Jim refused and told the city officials, "This is yet another insult to the poor from this administration. We poor people *will* march on Main Street any time we please, with or without your permits!" On July 15 at 1 p.m. both Little League and PPA assembled on Main Street and began to parade. There was much confusion. City officials asked Jim and his followers to desist, but they refused. Jim and other PPA supporters were arrested, convicted, and fined under the city ordinance.

If Jim and other convicted PPA members seek to have their convictions overturned by the federal courts, they will:

- (A) Lose, because Jim should have gone to federal court to secure PPA's rights before violating the ordinance.
- (B) Lose, because the Bedford ordinances are a reasonable restriction on time, place, and manner of speech and were not applied in a discriminatory manner.
- (C) Lose, because the Bedford ordinances represented the will of the people as expressed through the city council.

- (D) Win, because the Bedford ordinances, on their face, violate the free speech guarantees of the First Amendment.

#### Question 166

Which of the following would the court be *least likely* to take judicial notice of?

- (A) The birthdate of the plaintiff's son is June 14, 1974.
- (B) The defendant has filed 25 frivolous lawsuits in the same court in which the case is being tried.
- (C) It rained in the city in which the parties reside on March 28, 1987.
- (D) Independence Day is July 4, and it is a state holiday.

#### Question 167

Prentiss was a salesman and assistant manager of Pretty Petals, a retail florist. He was employed by Lilac, the owner of Pretty Petals. Lilac owned the land and building. A large wholesale nursery was located directly across the street from Pretty Petals. Although other effective fertilizers were available at comparable prices, Doreen, the owner of the nursery, liked to use "Chemgrow," a brand-name artificial fertilizer, to nourish her young plants and trees. She stored a large quantity of Chemgrow granules in a mountainous heap on an empty lot adjacent to the nursery office. The Chemgrow gave off fumes that caused Prentiss to suffer eye, lung, and sinus irritation. Occasionally, Prentiss's irritations became so bad that he had to take off from work and seek medical attention. After losing a few hundred dollars in wages and amassing a few hundred dollars in medical expenses, Prentiss sued Doreen for damages.

The court is likely to rule in favor of:

- (A) Prentiss, because Doreen had equally effective fertilizers available at comparable prices to Chemgrow.

## 198. MIXED SUBJECTS

- (B) Prentiss, because Doreen is strictly liable for injuries caused by emissions from her property.
- (C) Doreen, if the selection of Chemgrow was reasonable and it was stored in a reasonable manner.
- (D) Doreen, because Prentiss is merely an employee of Pretty Petals and does not own the property upon which the shop is located.

### Question 168

Bruno is on trial in federal court, charged with having sold cocaine to an undercover agent. Bruno calls Flossie to the stand, and Flossie testifies that she was with Bruno in another state on the date of the alleged drug sale. Following Flossie's testimony, the prosecution seeks to introduce the record of judgment of Flossie's seven-year-old embezzlement conviction. Bruno's attorney objects.

The court should rule the record of judgment:

- (A) Admissible, as going to Flossie's credibility.
- (B) Admissible, provided no appeal is pending.
- (C) Inadmissible, because the record is inadmissible hearsay.
- (D) Inadmissible, because, for impeachment, a specific act of misconduct cannot be shown by extrinsic evidence.

### Question 169

The United States entered into a treaty with Mexico whereby both countries agreed to ban hunting of the red tailed raccoon, a species of raccoon indigenous to both the United States and Mexico. The red tailed raccoon had been placed on the endangered species list of the International Wildlife Federation and other conservation groups. The raccoons tend to roam in small family groups in the semidesert lands of the western United States and northern Mexico.

The raccoons freely crossed state lines and the international boundary. Laws in Texas, Arizona, and New Mexico permitted hunting of the red tailed raccoons.

After the treaty was fully ratified by the United States and Mexico, a federal court would most likely hold that the state laws permitting hunting of the raccoons are:

- (A) Unconstitutional, because a treaty is the supreme law of the land.
- (B) Unconstitutional, because free roaming wildlife is federal property.
- (C) Constitutional, because wild animals are natural inhabitants of the state, and the federal government may not take state property without consent of the state.
- (D) Constitutional, under the rights reserved to the states by the Tenth Amendment.

### Question 170

Asa was an old man who had few friends and most of whose relatives had died. One day, while Asa was studying a chess problem at the senior citizens center, a young woman asked him if he would care to play a game. The woman had accompanied her grandmother to the center. Soon the woman, whose name was Stephanie, was visiting the center regularly to play chess with Asa. They became close friends and often visited each other's homes.

Asa decided that he would like Stephanie to have his only real asset, Oldacre, the single-family residence in which he lived. He wrote a note to Stephanie dated December 25, 2003, stating, "Because you have been such a good friend to a lonely old man, I want you to have this house and land." He then went to Lawyer and had Lawyer draft a deed conveying Oldacre to Stephanie. Asa validly executed the deed and gave both the note and the executed deed to the director of the senior citizens center telling him to give them to Stephanie upon his death.

Asa continued to live at Oldacre until his death in July of 2004. A will Asa had executed in 1987 was admitted to probate shortly thereafter; the will left all of Asa's property to a cousin in another state. When Stephanie received the note and deed from the lawyer prior to the probate of Asa's estate, she promptly recorded the deed, and after probate, she brought an appropriate action to quiet her title to the property conveyed by the deed.

In that action, the court should find for:

- (A) Stephanie, because the deed as delivered constituted a valid conveyance of Oldacre.
- (B) Stephanie, because Asa's note to her constituted a valid conveyance of Oldacre.
- (C) The cousin, because the deed conveying Oldacre to Stephanie was not recorded and thus was not effective until after Asa's death.
- (D) The cousin, because the fact that Asa remained in possession of Oldacre rendered the conveyance in the deed to Stephanie ineffective.

### Question 171

Under which of the following circumstances would the named defendant be *least likely* to be convicted of the charged offense?

- (A) Walter, a chemical engineer, painstakingly constructs an explosive device from readily available materials and secretes it beneath the house where his ex-wife and her boyfriend are living. He waits until he is sure both have had time to get home from their jobs, and then detonates the device by remote control, totally demolishing the house. Unknown to Walter, his ex-wife and her boyfriend had impulsively decided to spend the evening at a motel downtown. Walter is charged with attempted murder.
- (B) Yvette attempts to charge an expensive leather coat using a credit card that her boyfriend obtained when he stole a woman's purse. The store's electronic credit

reporting system indicates the account is defunct, and the store clerk refuses to complete the transaction. Yvette is charged with attempting to obtain property by false pretenses.

- (C) Hazel, seeing a well-heeled couple cross the park, decides to rob them and use the money for groceries. Hazel approaches the couple, pulls out a gun, and tells them to hand over all of their money and valuables. The couple was having an unusually bad day: they had just been mugged five minutes before and were on their way to notify the police when Hazel approached them. Consequently, they had no money or valuables. Hazel is charged with attempted robbery.
- (D) Farley, a married man who believes adultery to be a felony, begins a torrid affair with Edna, his best friend's wife. Unknown to either of them, the jurisdiction they reside in has a statute that expressly makes noncriminal any sexual act between consenting adults in private. Farley is charged with attempted adultery.

### Question 172

To protect the minor children living in the area, the Rock Creek Town Council enacted an ordinance that prohibited advertisements that include "a depiction of a nude person, whether male or female." Sylvester Screen owns and operates Rock Creek Video, a videotape rental shop. Screen often posts large posters to advertise movies he has available for rent. A substantial part of his business consists of the rental of "X-rated" movies. These adult tapes are kept in a separate part of the shop. In the adult tape room he hangs movie advertisements, many of them depicting nude or partially nude people. Screen does not allow minors to enter the adult tape room.

If Screen challenges the ordinance, and assuming that he has standing to sue, how will the court most likely rule?

## 200. MIXED SUBJECTS

- (A) For the town, because the ordinance is a valid exercise of the town's power to protect the morals of its minor citizens.
- (B) For Screen, because prohibiting the posting of the movie advertisements violates his First Amendment rights.
- (C) For the town, because the posters may appeal to a minor's prurient interest in sex.
- (D) For Screen, because not all nudity is obscene.

### Question 173

Penelope was injured when the car she was driving was struck by a truck owned by Deeco and driven by Deeco's employee, Albert. Albert was just finishing his deliveries for Deeco when the accident occurred. At the scene of the accident, Walter, a bystander, heard Albert say, "I can't believe it . . . I shouldn't have had all those beers." Penelope sued Deeco for her injuries and asked Walter to testify at trial as to Albert's statement.

Walter's testimony should be ruled:

- (A) Admissible, as a statement against interest.
- (B) Admissible, as an admission of a party-opponent.
- (C) Admissible, as an excited utterance.
- (D) Inadmissible, as hearsay.

### Question 174

Photog, a freelance professional photographer, went to Department Store to purchase some film. As he was leaving the store, he noticed that Actress, a well-known Hollywood starlet, was browsing through the women's clothing department in Department Store. Photog took a picture of Actress in the clothing department without Actress's knowledge. Several days later, Photog took the photograph to the manager of Department Store and sold him the picture, explaining that Actress had

agreed that Department Store could use the photograph in an advertising campaign. The manager enlarged the photograph and hung it above the main entrance to Department Store with a caption that read, "The store where Actress shops." One month earlier, Actress had entered into a contract with Hardware Store, the terms of which provided that Hardware Store had the exclusive right to use Actress's name and likeness for advertising purposes. As a result of the photograph's appearing at Department Store, Hardware Store canceled its contract with Actress.

If Actress asserts a claim based on invasion of privacy against Department Store, will Actress prevail?

- (A) Yes, because Department Store, without Actress's permission, used Actress's picture for profit.
- (B) Yes, because Photog had no right to take Actress's picture.
- (C) No, because Department Store believed it had permission to display Actress's picture.
- (D) No, because Actress would clearly qualify as a public figure.

**Questions 175-176** are based on the following fact situation:

Alice owned Red Acre, a tract of land with a one-story house on it. Alice leased Red Acre to Betty for a term of three years. Betty and her teenage son, Norm, planned to live in the house for this period. Norm was a star baseball player for the local high school team. To provide Norm with an adequate place to practice, Betty installed a fully operational batting cage in the backyard located on Red Acre. In addition to the batting cage, Betty installed an automatic pitching machine and electric lights so that Norm could practice at night. Six months after Alice leased the premises to Betty, Alice mortgaged Red Acre to State Bank to secure a loan. Betty was not notified directly of the mortgage but the mortgage was recorded. Six months before the three-year term was to end, Alice

defaulted on her mortgage payments, and State Bank began foreclosure proceedings, as it was entitled to do on the terms of the mortgage.

Although unaware of the mortgage proceedings, Betty knew that her lease with Alice was about to end; she therefore began to remove all of the equipment she had installed in the backyard. State Bank brought an action to enjoin the removal of the equipment, naming both Betty and Alice as defendants in the suit.

175. If the court refuses the injunction, it would be because:

- (A) The circumstances reveal that the equipment was installed for Betty's (Norm's) exclusive benefit.
- (B) The Statute of Frauds precludes the bank from claiming any interest in the equipment.
- (C) Betty was never given direct notice of the mortgage.
- (D) In the absence of a contrary agreement, a residential tenant is entitled to remove any personal property she voluntarily brings upon the premises.

176. If the equipment concerned had been installed by Alice, but the facts were otherwise unchanged, the effect of the State Bank's prayer for an injunction would be that the:

- (A) Likelihood of the State Bank's succeeding would be lessened.
- (B) Likelihood of the State Bank's succeeding would be improved.
- (C) Likelihood of the State Bank's succeeding would be unaffected.
- (D) Outcome of the litigation would depend on whether the mortgage expressly mentioned personal property located on the premises.

**Questions 177-178** are based on the following fact situation:

Civil service rules, which have been on the books in the city of Charlesville for many years, provide that any member of the police department must serve a one-year probationary period before he or she will be considered a permanent employee. In fact, this rule was enacted before Charlesville had a police academy, and now a prospective police officer spends six months in the academy before being hired by the city. Ruby, a graduate of the police academy, was with the city police department for eight months when she was terminated. There were no city ordinances or state laws that required that Ruby be given a reason for the termination or a hearing, and she was given neither.

177. Ruby brought suit against the city in the state court because of the termination of her employment. Which of the following would most likely give Ruby a constitutional basis to force the city to give her a statement of reasons for the termination of her employment and an opportunity for a hearing?

- (A) No police officer had ever been terminated during probation except where there was actual cause.
- (B) The six months she spent in the academy must be considered as part of her probation period.
- (C) The budget of the police department was recently increased to allow for the hiring of additional officers.
- (D) She was the only female police officer on probation and the only officer not given permanent employment.

178. Which of the following facts, if shown, gives the city of Charlesville the strongest argument for refusing to give Ruby a statement of reasons why her employment was terminated and for denying her the opportunity to contest the termination?

## 202. MIXED SUBJECTS

- (A) Ruby, as a female, did not perform as a police officer as well as her male counterparts.
- (B) Ruby had failed to include in her application the fact that during college she was a member of a radical student organization.
- (C) Ruby had not been granted permanent employment status.
- (D) Ruby had graduated in last place in her class at the police academy.

**Questions 179-180** are based on the following fact situation:

While it was parked on a side street, Driver's car was severely damaged by a hit-and-run accident. While the car was being repaired, Driver arranged to borrow a car from his friend, Lender, to drive until Driver's car was finished. Lender had an extra car that had not been driven for some time, which he gladly allowed Driver to use. However, when Driver picked up the car, Lender forgot to warn Driver that the brake fluid had a tendency to leak out of the brake system and needed to be replaced regularly. Lender telephoned Driver's wife, Rider, and warned her about the brake fluid problem. Rider, however, forgot to tell Driver. Shortly thereafter, Driver was driving Rider to work in the borrowed car. Driver was proceeding along at a reasonable rate of speed and within the posted speed limit. As he approached an intersection, another car, driven by Reckless, ran through the red light and into the intersection. Driver, upon seeing Reckless's car, stepped on the brakes, but the brakes failed and the two cars collided. If the proper amount of brake fluid had been in the brake system, Driver could have stopped in time to avoid the collision. Driver and Rider were injured. The jurisdiction has adopted "pure" comparative negligence.

179. If Driver asserts a claim against Reckless, Driver will:

- (A) Recover only a portion of his damages, because Rider was also at fault.

- (B) Recover the full amount of his damages, because Driver himself was not at fault.
- (C) Not recover, because Driver had the last clear chance to avoid the accident.
- (D) Not recover, because Rider was negligent in not telling Driver about the defective brake condition, and Rider's negligence would be imputed to driver.

180. If Rider asserts a claim against Reckless, Rider will:

- (A) Recover in full for her injury, because Driver, who was driving the car in which she was riding, was not himself at fault.
- (B) Recover a portion of her damages, based on the respective degrees of her negligence and that of Reckless.
- (C) Not recover, because Driver had the last clear chance to avoid the accident.
- (D) Not recover, because Rider was primarily at fault for the collision.

**Questions 181-183** are based on the following fact situation:

Joey escaped from prison and stole a car. He picked up a young woman hitchhiker, Jenny, and told her what he had done. Jenny was emotionally disturbed and of borderline mental retardation, but understood that the police were after Joey, and because she hated the police, she told Joey she would do anything she could to help him. To avoid the police, they drove to the mountains with Jenny doing much of the driving.

The following day, they were both very hungry. Toward evening, Joey saw Fisher camped by a stream nearby, and told Jenny, "Go down there and steal some food from his ice chest; he'll never even see you, but if he does, hit him with something heavy." When she hesitated,

Joey became angry and said, "Go on, or I'll just leave you here to starve!" Jenny went down to Fisher's campsite, and had just grabbed a sandwich out of his ice chest and taken a bite out of it, when Fisher, who was 6'6" tall and weighed 250 pounds, ran back from the stream and grabbed her arm. Jenny was terrified and picked up a heavy frying pan and hit Fisher on the head; he slumped to the ground apparently dead. Joey then ran up and said, "He's dead. We'd better put him in the stream so it will look like he drowned after slipping and falling." They thereupon put Fisher in the stream without attempting to determine if he was alive or dead. Later, a medical examination showed conclusively that the blow only knocked Fisher out; he died of suffocation due to water in the lungs.

181. With respect to the stolen car, at common law, Jenny is:

- (A) Liable as a co-conspirator to car theft.
- (B) Liable as an accessory after the fact to car theft.
- (C) Liable for compounding a felony.
- (D) Not liable for any common law crime.

182. If Jenny is charged with petit theft of Fisher's food, a misdemeanor, the court should rule that:

- (A) Jenny is not guilty because she was acting under the direction of Joey.
- (B) Jenny is guilty because an otherwise criminal act cannot be justified by threats of starvation.
- (C) Jenny is not guilty because there was no "carrying away" of Fisher's food, and hence no completed theft crime was committed.
- (D) Jenny is not guilty if a reasonable person would have regarded the theft as essential to avoid starvation.

183. Assume for purposes of this question only that Joey is charged with causing the death

of Fisher. If the jury believes his story that he thought Fisher was already dead before he and Jenny put the body in the stream, although he had made no effort to determine if Fisher was alive, the killing was:

- (A) Excusable homicide.
- (B) Voluntary manslaughter.
- (C) Involuntary manslaughter.
- (D) Murder, if the jury finds that a reasonable person would have determined whether Fisher was alive.

#### Question 184

In which of the following situations would Defendant's claim of intoxication most likely result in a finding of not guilty?

- (A) Defendant is charged with battery after wounding Hal by shooting him. Defendant claims that he was too drunk to realize that anyone was in the house into which he shot.
- (B) Defendant is charged with manslaughter when he hit and killed a child while riding his motorcycle. Defendant claims that he was so drunk he did not see the child in time to avoid hitting her.
- (C) Defendant is charged with larceny. Defendant claims that when he took the car he was too drunk to realize that it was not his.
- (D) Defendant is charged with involuntary manslaughter after her unsupervised four-year-old child was killed in a fire at their home. Defendant claims that she was at the corner bar, drunk, when the fire occurred.

#### Question 185

Mom, a wealthy woman, wished to buy her son, Sylvester, an expensive Rolls-Royce for a wedding present. She visited Dealership, a Rolls-Royce dealer, several times, looked at many cars, and discussed possible sales prices

## 204. MIXED SUBJECTS

with Huck, a salesman. On May 15, after much discussion, Huck and Mom signed a writing that stated, "If we can agree on price on or before June 1, Mom agrees to buy and Huck, for Dealership, agrees to sell one yellow Rolls-Royce Silver Streak, serial number XO857623." On May 20, Mom dispatched a letter to Huck stating, "I will buy the Rolls-Royce for \$150,000." On the same day, Huck dispatched a letter to Mom, stating, "I will sell the Rolls-Royce for \$150,000."

Has a valid contract been formed between Dealership and Mom?

- (A) Yes, because the May 15 writing constitutes a contract with a missing price term, and that term was filled by the crossing offers.
- (B) Yes, because when two crossing offers are identical in import, one will be treated as an offer and the other as an acceptance.
- (C) No, because there were two crossing offers and no acceptance; hence there was no mutual assent.
- (D) No, but the result would be different if Mom were a merchant.

### Question 186

The legislature of State Yellow passed a "Fairness in Elections" statute. A major provision of the statute stated that "no newspaper in this state shall publish a political endorsement or an editorial favoring one political candidate or party over another on either the day of election or the day preceding the day of election." The stated purpose for the legislation was to prevent unfair attacks on candidates and to ensure that they would have time to respond to or rebut any published article prior to the election. The *Yellow Press* was the leading newspaper published in State Yellow. It had a high reputation regionally and was also distributed in states bordering on Yellow. The *Yellow Press* filed suit in federal court seeking to enjoin enforcement of the statute.

The newspaper's best argument for the invalidity of the statute is which of the following?

- (A) The statute unduly burdens interstate commerce, because the *Yellow Press* is circulated in other states.
- (B) The statute unduly interferes with the *Yellow Press*'s property interest in distributing newspapers.
- (C) The statute unduly restricts the *Yellow Press*'s freedom of speech.
- (D) The statute violates the Equal Protection Clause, because restrictions are imposed merely on the basis of the day the newspaper is printed, while the same material can be printed on other days.

### Question 187

Moms operated a corner drugstore. One afternoon she heard a screeching of brakes and Moms immediately rushed out of the store. She saw a car speeding off into the distance and found a badly injured Victor lying in the street. Victor gasped to Moms, "I'm going to die. The car that hit me had license number DD666!" Victor then lapsed into unconsciousness. Moms gave her information to the police, including a description of the car and Victor's comment on the license plate. Police traced the registration to Dick Devilish. Victor recovered from his injuries but now suffers permanent disabilities. Victor filed suit against Devilish for his injuries. At the trial, Victor wants to have Moms testify as to Victor's statement regarding Devilish's license number.

The court should rule that such testimony by Moms is:

- (A) Inadmissible, because it is more prejudicial than probative.
- (B) Inadmissible, because it is hearsay not within any recognized exception to the hearsay rule.

- (C) Admissible, as a declaration made in belief of impending death.
- (D) Admissible, as an excited utterance.

**Question 188**

Mary boarded a city bus. The bus prominently displayed a sign stating "No Smoking. Violators Will Be Prosecuted." Mary was tired after a long day at work, and deciding that she could not wait until she got home, she lit a cigarette. The bus driver shouted, "Read the sign, lady; put that out or get off my bus!" Mary told the bus driver, "I've had a rough day; you can go to hell," and walked to the back of the bus and took a seat. The bus driver flagged down a passing police officer and told him that Mary was smoking on the bus (which was the misdemeanor of "disorderly conduct"). Mary, meanwhile, quickly extinguished the cigarette and put the butt in her purse so that by the time the police officer had boarded the bus, she was sitting there innocently chewing a breath mint. The officer told Mary that she was charged with disorderly conduct, and then he searched her purse and the coat that she was carrying. The officer found not only the recently extinguished cigarette butt, but also a marijuana cigarette in the coat pocket. Mary was then charged with possession of a controlled substance.

At Mary's trial for possession, should the marijuana cigarette be admitted over Mary's objection?

- (A) Yes, because it was obtained in a search incident to a valid arrest.
- (B) Yes, because the coat was within Mary's "wingspan" or reach.
- (C) No, because the arrest was invalid.
- (D) No, because the police officer did not give Mary *Miranda* warnings.

**Question 189**

Shelley and Herman decided to get married. Both were in their final year of high school;

Shelley was one month short of her 18th birthday, and Herman was 19. They went to a local jeweler and looked at gold wedding bands, but saw nothing that appealed to them. When they discovered that the jeweler was himself a goldsmith and could make rings to order, they described what they were interested in and signed a purchase order for two rings; a woman's band for \$500 and a man's for \$650.

Three weeks later, the jeweler called Shelley and informed her that the rings were ready. In the meantime, she and Herman had broken up and Herman had enlisted in the Marines and been sent to another state for training. The day after her 18th birthday, Shelley went to the jeweler and told him that they would not be needing the rings. When he protested that they were custom-made and would probably not sell to anyone else, Shelley said, "All right, I've got \$400 in my savings account. I'll take my ring, but you'll have to find Herman about the other one." The jeweler had Shelley sign another purchase order for the woman's band at \$400, payment to be made by the end of the month.

When the jeweler did not hear from Shelley after another month, he brought an action for breach of contract against her. Evidence produced at trial established that the market value of the rings was \$500 and \$650 for the woman's and man's, respectively, and that the age of majority in the jurisdiction was 18.

Is the jeweler entitled to recover against Shelley?

- (A) Yes, in the amount of \$1,150.
- (B) Yes, in the amount of \$500.
- (C) Yes, in the amount of \$400.
- (D) No.

**Question 190**

Lynn entered into an enforceable written agreement to sell her home to Werner for

## 206. MIXED SUBJECTS

\$150,000. The agreement provided that escrow would close on March 31, and on that date Lynn would provide good and marketable title to the house, free and clear of all encumbrances. On March 10, Lynn was notified by her insurance company that she had to renew her insurance policy by March 15. Lynn immediately notified the company that she did not want the insurance renewed at that time. Consequently, when the house was destroyed by fire on March 25, it was uninsured.

On March 31, Werner refused to close and Lynn immediately brought an action against him for specific performance. In this jurisdiction, which has no applicable statute to govern this situation, the most probable result of this action would be:

- (A) Werner prevails, because an implied term of all conveyances is that the property at the time of closing will be in substantially the same condition as it was at the time the contract was entered into.
- (B) Werner prevails, because as the house was destroyed, Lynn would have nothing to "sell" and, therefore, could not convey marketable title.
- (C) Lynn prevails, because under the doctrine of equitable conversion, the risk of loss was on Werner.
- (D) Lynn prevails, but since the house was destroyed, she is only entitled to recover the fair market value of the land itself.

**Questions 191-192** are based on the following fact situation:

Donald is being tried for the murder of Vincent, which occurred during the burglary of Vincent's house.

191. In its case-in-chief, the prosecution seeks to offer evidence that Donald, who was arrested several days after the crime, had

been caught with 50 grams of cocaine in his car. This evidence will most likely be:

- (A) Inadmissible, because Donald has not offered evidence of good character.
- (B) Inadmissible, because it has limited probative value and is unduly prejudicial.
- (C) Admissible, because it tends to show what Donald did with the money he stole.
- (D) Admissible, because it tends to show that Donald is capable of committing serious crimes.

192. Wilson, who knew Donald, is called to testify that on the day after the robbery he saw Donald buying some groceries, and when Donald removed a large roll of money, Wilson had asked, "You didn't steal that from someone, did you?" Donald nodded. This evidence is:

- (A) Admissible, as an excited utterance.
- (B) Admissible, because it is not hearsay.
- (C) Inadmissible, because it is hearsay not within any exception.
- (D) Inadmissible, because Donald had no reason to respond to this statement.

### Question 193

The state police of New Lancashire wished to infiltrate the Aryan Consciousness Movement ("ACM"), a racist organization devoted to the goal of creating an "All White America." The New Lancashire police decided to create a new undercover position for the person who would infiltrate the ACM. The pay was substantially better than the salary of ordinary officers. Dimer, the chief personnel officer of the New Lancashire State Police, put out a memo inviting all white New Lancashire police officers to apply for the undercover position. Pendergrass

had been a New Lancashire State Police officer for eight years and had received many citations for efficiency, bravery, and public service. However, Pendergrass is black, and Dimer refused to even accept his application for the undercover position, even though Pendergrass told Dimer that he was very desirous of obtaining the position.

If Pendergrass sues to require Dimer to give serious consideration to his application, should the court rule that Dimer has acted in a manner in accordance with the principles of the United States Constitution?

- (A) Yes, because the state has a rational basis for using race as a qualification for the job.
- (B) Yes, because the state has a compelling interest in infiltrating ACM, to promote the general welfare of its citizens.
- (C) No, because Dimer's actions were discriminatory per se.
- (D) No, if there is a chance that Pendergrass might be able to win the confidence of ACM leaders.

**Questions 194-195** are based on the following fact situation:

Baker had a contract with City to supply City with five computers a month for seven months. At the start of the fourth month, Baker realized that his supply of computers had dwindled to one. Baker called his normal supplier of computers but was informed that the supplier was out of computers. Baker immediately sent a fax to Stevens explaining the situation and asking for "a price quote for 20 computers to be delivered before the first of next month." Stevens responded by fax: "I can deliver 20 computers from my present stock at a cost of \$2,000 per computer." Baker responded the next day with a fax that stated: "I will buy 20 computers at a cost of \$2,000 per computer."

194. Assume no further communications between the parties. At this point has a contract been formed?

- (A) Yes, because Baker's fax ordering the computers was an acceptance of Stevens's offer.
- (B) Yes, because Stevens's fax was an acceptance of the offer in Baker's first fax.
- (C) No, because the fax sent by Baker was an offer that was never accepted by Stevens.
- (D) No, because none of the communications were worded in such a way as to be definite and certain enough to be offers.

195. Assume for the purpose of this question only that a contract exists between the parties for the sale of the 20 computers. The payment provisions are \$20,000 upon acceptance of the contract, \$10,000 upon delivery of the computers, and \$10,000 when Baker receives his last payment from City. City defaults on its payments to Baker. Is Baker liable for the last payment of \$10,000 to Stevens?

- (A) Yes, because the provisions only set a reasonable time for payment.
- (B) Yes, because a buyer may not delegate the duty of payment.
- (C) No, because an express condition for payment to Stevens has not occurred.
- (D) No, because Baker has not received sufficient funds to make the payment to Stevens.

#### Question 196

On January 1, 2000, Red leased Whiteacre from Blue for a period of 10 years. On January 1, 2005, the state took title to Whiteacre under proper eminent domain proceedings. Which of the following statements are correct concerning the rights of Red?

## 208. MIXED SUBJECTS

- I. Red may continue to occupy Whiteacre, as eminent domain proceedings will not affect lessees.
  - II. Red may not continue to occupy Whiteacre, is relieved from his obligation to pay rent to Blue, and will not share in the condemnation award.
  - III. Red may not continue to occupy Whiteacre, and is entitled to share in the condemnation award based on the value of the remaining five years less rent that would have been paid during that period.
- (A) Only I. is correct.
  - (B) Only II. is correct.
  - (C) Only III. is correct.
  - (D) None of the above are correct.

### Question 197

The Social Security Act provided that surviving spouses and stepchildren would be denied benefits unless the decedent wage-earner spouse had been married at least nine months prior to death. Sal married her husband, who was in apparent good health, five months before his death. Sal was denied survivor benefits by the Social Security Administration. She now brings an action to compel the Social Security Administration to award her benefits.

The decision of the court should be that:

- (A) Sal should be awarded benefits, because the nine-month period is arbitrary, capricious, and without any rational justification.
- (B) Sal should be awarded benefits, because the classification is an invidious scheme and violates her rights to equal protection.
- (C) Sal should not be given benefits, because the nine-month period in question is reasonably calculated to achieve a permissible governmental end.

- (D) Sal should not be awarded benefits, because it would be an undue burden on the public treasury to allow all wives survivor benefits.

### Question 198

Pops, owner of a street corner candy store, heard several gunshots and rushed out in the street. He found Velma lying on the sidewalk, bleeding profusely. She gasped to Pops, "I'm going to die. Danny Deft shot me." Velma lapsed into unconsciousness and died on the way to the hospital without uttering another word. Danny Deft was arrested and charged with the murder of Velma. At Deft's trial, the prosecution seeks to have Pops testify as to Velma's statement.

Such testimony should be ruled:

- (A) Inadmissible, because it is more prejudicial than probative.
- (B) Inadmissible, because it is hearsay not within any recognized exception to the hearsay rule.
- (C) Admissible, as a declaration made in belief of impending death.
- (D) Admissible, as an excited utterance.

### Question 199

A construction crew for the Municipal Telephone Company was sent out to install new fiber optic cables at a downtown intersection on a vacant lot where an old building that had been demolished had stood. The telephone workers had to dig out the old copper cables, install new sheathing, and then connect and insert the new cables. Because they ran into some portions of the old sidewalk that had been in front of the old building and that had been buried over the years, the excavating took much longer than planned, and by the end of the day they had just finished removing the old copper cables. The foreman of

the crew put up a couple of wooden barriers around the trench, which was about 12 feet deep, 6 feet wide, and 30 feet long, and posted signs on each of the barriers reading, "Open trench, do not approach."

Marcus and a few friends had been playing basketball after they got out of their seventh grade classes and passed by the excavation on their way home. Marcus could not quite make out what the signs on the barriers said in the deepening dusk, so he walked over to the nearest one and read it. His friends, who had continued walking, called for him to hurry along, and as he ran toward where they had moved ahead on the street, the soft edge of the excavation gave way and Marcus fell into the trench, severely injuring himself.

If Marcus's mother brings an action against the telephone company, what will be the probable outcome of her litigation? Assume that the jurisdiction follows traditional contributory negligence and assumption of risk rules.

- (A) She will lose, because the construction foreman posted a warning notice that Marcus read and understood.
- (B) She will lose, because Marcus assumed the risk of injury when, after reading the warning notice, he carelessly ran along the trench after his friends.
- (C) She will win, if the trier of fact concludes that the construction crew was negligent in leaving the open trench without additional protection for passersby.
- (D) She will win, because the telephone company is strictly liable for the injuries to Marcus.

### Question 200

Breeze was arrested for carrying a concealed weapon in violation of his parole. The police had reason to believe that Breeze was part of a group that had been stripping automobiles and selling the stolen parts. The police interrogated

Breeze continually for 10 hours. Finally, the police threatened to have Breeze's parole revoked if he did not cooperate. Fatigued from the lengthy interrogation and afraid of going back to jail, Breeze confessed to being a member of the group involved in the theft of automobile parts. Breeze gave the police the location of a friend's garage where the stolen parts were located. Based on this confession, the police obtained a search warrant to search the garage, where they discovered a large quantity of stolen automobile parts. Breeze was prosecuted for conspiracy to sell stolen automobile parts. Before trial, he moved to prevent use of the stolen parts as evidence.

The court will most likely rule that the evidence should be:

- (A) Admitted, because it was obtained pursuant to a warrant.
- (B) Admitted, because Breeze had no standing to object to the search of the garage.
- (C) Suppressed, because the uncorroborated statements of a criminal suspect are not a sufficient basis for a warrant.
- (D) Suppressed, because it is the fruit of Breeze's involuntary statements.



**ANSWER KEY AND SUBJECT MATTER KEY**

<b><u>Answer</u></b>	<b><u>Subject Matter</u></b>	<b><u>Answer</u></b>	<b><u>Subject Matter</u></b>
1. A	Torts	50. B	Real Property
2. B	Torts	51. B	Criminal Law/Procedure
3. C	Real Property	52. C	Constitutional Law
4. A	Evidence	53. B	Torts
5. C	Constitutional Law	54. A	Contracts
6. A	Contracts	55. B	Torts
7. C	Criminal Law	56. B	Evidence
8. C	Real Property	57. C	Criminal Law
9. C	Evidence	58. B	Evidence
10. C	Torts	59. B	Evidence
11. B	Torts	60. D	Evidence
12. A	Constitutional Law	61. C	Criminal Law
13. B	Torts	62. D	Constitutional Law
14. A	Constitutional Law	63. A	Constitutional Law
15. B	Criminal Law/Procedure	64. D	Real Property
16. C	Contracts	65. C	Contracts
17. B	Contracts	66. C	Contracts
18. C	Real Property	67. A	Real Property
19. B	Torts	68. B	Real Property
20. B	Evidence	69. C	Constitutional Law
21. C	Constitutional Law	70. B	Criminal Law/Procedure
22. C	Criminal Law	71. C	Evidence
23. A	Real Property	72. B	Torts
24. B	Evidence	73. C	Torts
25. A	Criminal Law/Procedure	74. A	Constitutional Law
26. C	Constitutional Law	75. A	Criminal Law
27. C	Evidence	76. C	Contracts
28. C	Criminal Law	77. B	Contracts
29. D	Torts	78. B	Real Property
30. B	Evidence	79. C	Evidence
31. B	Contracts	80. C	Criminal Law
32. D	Contracts	81. C	Criminal Law
33. C	Real Property	82. A	Constitutional Law
34. C	Evidence	83. A	Real Property
35. B	Constitutional Law	84. D	Torts
36. B	Evidence	85. A	Constitutional Law
37. C	Real Property	86. C	Contracts
38. B	Criminal Law	87. A	Criminal Law
39. A	Real Property	88. C	Torts
40. A	Evidence	89. D	Torts
41. B	Criminal Law	90. C	Real Property
42. A	Real Property	91. B	Constitutional Law
43. C	Constitutional Law	92. B	Constitutional Law
44. B	Contracts	93. A	Evidence
45. A	Contracts	94. C	Contracts
46. B	Contracts	95. C	Criminal Law
47. C	Torts	96. D	Criminal Law
48. C	Torts	97. D	Real Property
49. C	Contracts	98. C	Real Property

## 212. MIXED SUBJECTS

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

**Answer to Question 1**

- (A) If U-Pump-It prevails, it will be because the court follows the Cardozo approach to duty questions. Under Cardozo's approach in *Palsgraf v. Long Island Railroad*, a plaintiff can recover for the defendant's breach of duty only if she can establish that a reasonable person would have foreseen a risk of injury to her in the circumstances; *i.e.*, that she was located in a foreseeable zone of danger. Here, even assuming that Timmy breached a duty by parking his truck on the street, Bonnie was not within a foreseeable zone of danger and would not be able to recover damages under this view. (B) is incorrect because Timmy's stopping for a cup of coffee after making deliveries does not take him outside the scope of the employment relationship. Hence, if Timmy breached a duty to Bonnie, U-Pump-It would be vicariously liable for her injuries. (C) is incorrect because even if Oswald were a legal (proximate) cause of Bonnie's injuries, that would not preclude Timmy and U-Pump-It from being a legal cause as well. (D) is wrong because the fact that Timmy violated company rules by parking on the street would not prevent U-Pump-It from being liable for Timmy's actions, because he was still acting within the scope of his employment relationship.

**Answer to Question 2**

- (B) Olivia will recover the fair market value of the machine because Scarlet is liable for conversion. Conversion is the intentional interference with the plaintiff's right of possession in the chattel that is serious enough to warrant that the defendant pay the full value of the chattel. Conversion will be found if the defendant was using the chattel without permission and it was accidentally damaged, as in this case. The remedy for conversion is the fair market value of the chattel at the time and place of conversion. Thus, (B) is correct and (A) is incorrect. (C) is incorrect because that would be the remedy for trespass to chattels, which is a less serious interference than conversion. Here, an unauthorized use that resulted in damages equaling almost half the chattel's original cost is too serious an interference in nature and consequences to be only trespass to chattel. (D) is incorrect because Scarlet's lending the sewing machine without permission satisfies the intent requirement. Even though the damage was accidental, Scarlet is liable for conversion.

**Answer to Question 3**

- (C) Under a race-notice statute such as the one in this question, a subsequent purchaser is protected only if he purchases without notice of prior conveyances and records first. However, even though Madonna had notice of Presley's deed and was therefore not a bona fide purchaser, and could not have prevailed against Presley, that does not mean that a bona fide purchaser from her would not prevail against Presley. Fats was a subsequent bona fide purchaser from Madonna and recorded before Presley. Thus, Fats would prevail over Presley. Chubby, who had notice of Presley's deed when he subsequently acquired his deed from Fats, will also prevail over Presley. This is due to the "shelter doctrine," which is applied to the recording acts. Under that doctrine, once a bona fide purchaser enters the chain of events, she can subsequently deed the land to a party who had notice of the prior deed and that party is also accorded the status of a bona fide purchaser. Thus, once Fats, a bona fide purchaser, enters the picture and gets the protection of the act, he can sell to Chubby, who gets the protection of the act even though he purchased with notice. Chubby comes under the shelter doctrine. The theory behind the shelter doctrine is that it extends full protection to bona fide purchasers in that it does not limit their ability to market the property. Otherwise, if they could not sell to parties with notice, their ability to market the property would be impaired. The exception to the shelter doctrine is that it does not apply to the first purchaser with notice—Madonna. Thus, if Fats had subsequently sold to Madonna, she would not have been accorded the status of a bona fide purchaser. The reason for the exception is obvious—to

## 214. MIXED SUBJECTS

discourage fraud. Note also that because Chubby has a deed from Fats, he prevails over Fats. Therefore, (A), (B), and (D) are all incorrect.

### Answer to Question 4

- (A) The testimony of a surprise witness is not inadmissible if the party against whom the testimony is offered is granted a continuance to prepare for cross-examination. Therefore, the evidence in (A) will likely be admitted. The evidence in (B) is less likely to be admitted because it is of a subsequent remedial measure which is generally inadmissible and cannot be justified in this case as showing ownership when the defendant has conclusively admitted such ownership. (C) is wrong because most likely the judge will find that the probative force of the evidence is substantially outweighed by its prejudicial effect. (D) is not the best answer. While the evidence offered in (D) is clearly relevant, an acceptable reason for excluding the evidence would be that its probative value is substantially outweighed by needless presentation of cumulative evidence. It is possible that the evidence in (D) would be admitted, but it is not as likely to be admitted as the evidence in (A).

### Answer to Question 5

- (C) Although the First and Fourteenth Amendments severely limit the states' right to regulate public speech, reasonable regulations based on time, place, and manner are constitutionally permissible. (D) is thus wrong. (A) is wrong because the fact that the civic center is a place normally used for demonstrations of this type does not bar the city from restricting the demonstration; that is exactly why the city sought to impose certain limitations on these demonstrations. (B) is also incorrect, because a municipality does have the limited right to place certain limitations on a citizen's right of free speech in these circumstances, even when there is absolutely no reason to believe that the demonstration will be anything but peaceful and quiet. However, any such regulation by the city cannot be substantially overbroad (*e.g.*, censor protected speech) or vague (*i.e.*, be so unclear as to what is prohibited that a demonstrator is required to censor himself). The statute's provisions for terminating a parade and arresting demonstrators are too overbroad and vague to meet any legitimate state purpose. Absent any court decisions that have limited construction of the regulation so as to remove the threat to constitutionally protected expression, the statute's imprecise terms could be applied to protected speech and do not provide persons with reasonable notice as to what speech is prohibited.

### Answer to Question 6

- (A) June will win because consideration generally is required for modification of a contract, and Carol's preexisting debt cannot serve as valid consideration. Consideration generally is necessary to modify a contract. Payment of a smaller sum than due will not be sufficient consideration for a promise by a creditor to discharge a debt unless the consideration is in some way new or different (*e.g.*, payment before maturity or to one other than the creditor) or the amount of debt is subject to an honest dispute (and so the parties are giving up the right to litigate the amount, which is consideration sufficient to support a modification in and of itself). Here, nothing indicates that Carol gave anything new or different in exchange for the lower payment. Moreover, the amount was not in dispute. Therefore, there is no consideration supporting the modification, so the modification is unenforceable. (Note that even if the money was owed on a contract under the U.C.C., which permits modification without consideration, the modification still would be unenforceable because the modification must still have a good faith purpose and nothing in the facts indicates that the modification was made in good faith.) (B) is incorrect because the agreement

was not supported by consideration. As discussed above, consideration is required to support Carol and June's agreement. Payment by Carol of a smaller sum than due is not sufficient consideration. Therefore, June is not bound by the agreement, and she may recover the \$10,000. (C) is incorrect because accord and satisfaction require that the amount of the debt be in *dispute*. A contract may be discharged by an accord (an agreement, supported by consideration, to accept some other performance in lieu of the performance required under the existing contract) and satisfaction (the performance of the accord agreement). A partial payment of an original debt will suffice for an accord and satisfaction where there is a "bona fide dispute" as to the claim. However, because the amount of Carol's debt was not in dispute, her payment of \$80,000 was not valid consideration for an accord agreement. Therefore, Carol's original debt has not been discharged by an accord and satisfaction, and June may recover the \$10,000. (D) is incorrect because it is irrelevant. A contract can be modified before or after the date of performance if the modification is supported by consideration. As discussed above, Carol's payment of a preexisting debt is not valid consideration for the new agreement. Therefore, June is entitled to the \$10,000 owed from the original contract, even though she agreed after the due date to settle for \$80,000.

#### **Answer to Question 7**

- (C) Parafun will not be guilty of *manslaughter* because at common law a corporation is not responsible for the criminal acts of its employees. Common law took the position that since the corporation had no mind, it could not form the mens rea necessary for a traditional crime, and since the corporation could not be imprisoned, there was no criminal liability imposed on the corporation for the common law crimes committed by its agents. While the common law rule has been changed by statute in many jurisdictions, the question does not indicate the existence of such a statute. Absent a statute, Parafun will not be guilty of manslaughter. (A) is wrong because, as stated above, at common law a corporation would not be liable for a common law crime. In addition, at common law an employer is not responsible for the unauthorized criminal conduct of his employees. (B) is wrong. Even if criminal liability could be imposed on Parafun for the crimes of Silk, there would have to be a showing that Silk was at least *reckless* in causing the death. (B) seems to impose liability on Parafun without regard to the mental state of Silk. (D) is wrong. The fact that there was only a 1% chance of parachute failure would be a factor for the jury to consider in deciding whether a person acted "recklessly"; it would not as a matter of law negate criminal liability.

#### **Answer to Question 8**

- (C) There are many types of deeds that can be used to convey real property, some of which contain no covenants at all, such as quitclaim deeds. Thus, if Farley can show that the power of attorney did not include the power to convey a deed containing covenants, Glenda would not prevail. Thus, (A) is wrong. (D) is incorrect because although Farley did not make any specific covenants, Milton did. Farley will be held to those covenants if it is found that the power of attorney was intended to grant Milton the power to convey a deed containing covenants. (B) is incorrect because Glenda could have a claim for breach of the covenant of title and right to convey even if Farley's former wife did not bring a claim against her. The fact that she may have to defend such a suit is sufficient breach to entitle Glenda to institute an action.

#### **Answer to Question 9**

- (C) This answer can best be understood by examining the permissible questions first. (A) asks about a prior conviction for forgery. Under Federal Rule 609, prior convictions of crimes requiring proof or admission of an act of dishonesty or false statement may be inquired into if they are less

## 216. MIXED SUBJECTS

than 10 years old. This crime is one of dishonesty and is not too old; therefore, the question is proper. (B) is also a proper question. It goes to bias, which is always a permissible line of inquiry. (D) relates to prior bad acts for which there is no conviction. Federal Rule 608(b) permits cross-examination concerning prior bad acts if, in the discretion of the court, they are probative of truthfulness. Cheating a business partner is dishonest, and Winston is a witness not a party; therefore, this question is proper. That leaves alternative (C). If the ability to observe, relate, or recall were at issue, then this question could be a permissible line of inquiry, especially since Winston is not a party and is not likely to be prejudiced by the question. On the other hand, the probative value of the other questions is obvious. Since the other questions are all obviously right, this is the one most likely to be ruled improper.

### Answer to Question 10

- (C) Arthur's statements I and III were false representations of material facts and therefore actionable. To establish a *prima facie* case of intentional misrepresentation (deceit), a plaintiff must establish (i) a misrepresentation made by the defendant, (ii) scienter, (iii) an intent to induce plaintiff's reliance on the misrepresentation, (iv) causation (*i.e.*, actual reliance), (v) justifiable reliance, and (vi) damages. Usually, there is a requirement that the false representation be of a material past or present fact; whether the restoration was accomplished with genuine or handmade parts (statement I), or whether it contained original equipment (statement III), are statements of fact that would be very material to a potential buyer of classic cars. Hence, assuming that all the other elements of deceit are proved, both of these statements can be the basis of Arthur's claim. Statement II, on the other hand, will not support Arthur's misrepresentation claim because he cannot show justifiable reliance on the statement. As a general matter, reliance on false statements of opinion, value, or quality will be viewed as unjustified. Bud's claims that this is the "finest" restoration and "one of the two best" are statements of opinion as to quality. An exception to this rule might apply if Arthur were purchasing the car to enter into competition, or if Bud had superior knowledge of the subject matter, but here there is no indication what Arthur's plans are, and Arthur's experience with classic cars would make his reliance on Bud's opinion unjustified. Thus, (C) is correct; only statements I and III will support Arthur's claims.

### Answer to Question 11

- (B) Under the "avoidable consequences" rule, a plaintiff has a duty to mitigate damages to avoid further injuries from the defendant's conduct. Since Herder's property was damaged in this situation, Herder's claim would be based on strict liability. As such, simple contributory negligence would not be a good defense in jurisdictions following traditional contributory negligence rules. (C) is therefore incorrect. But if the plaintiff discovers the existence of the danger and fails to act reasonably to prevent further harm from occurring, the defendant would have a good defense. (A) is incorrect because there is no balancing of utility and risk where ultrahazardous activities are involved. (D) is incorrect because Herder would have had to have known of and appreciated the risk involved when he purchased the property to constitute assumption of the risk. Thus, (B) is the only correct answer.

### Answer to Question 12

- (A) As a general rule, a state may not retroactively alter a contract to which it is a party. While that prohibition is not absolute, legislation that reduces the contractual burdens on the state will be strictly scrutinized. Here, the legislature is simply making a choice about how to distribute resources to meet competing needs, and the impairment will be stricken. A state may repeal its own enactments, but may not do so when repeal violates a constitutional prohibition. Thus, (B) is

incorrect. Sovereign immunity is not a constitutional doctrine, nor is equitable estoppel, except as subsumed in the Due Process Clause in a manner not as directly applicable under these circumstances as the impairment of contracts doctrine. Therefore, (C) and (D) are incorrect.

#### **Answer to Question 13**

- (B) Sandra, acting at Cole's direction, has the same privilege as Cole to make a felony arrest if there are reasonable grounds for doing so. The fact that Cole announced himself as a police officer, and that as a newspaper reporter, Sandra may have been familiar with police techniques, tends to show that her mistake, if any, would probably be reasonable. (A) is wrong; this is a misstatement of law. Since the facts indicate that Cole was a police officer, the reasonableness of her belief is irrelevant. (C) is wrong; Sandra need not have been a witness to make an arrest for a felony. (D) is wrong; this would deny Sandra the benefit of Cole's privilege to make an arrest if he has reasonable grounds to believe that a felony has been committed. In a case such as this, the citizen is privileged to the same extent as an officer.

#### **Answer to Question 14**

- (A) The ordinance is probably unconstitutional because it violates free speech rights under the First Amendment. The Supreme Court has held that a charitable appeal for funds involves a variety of speech interests protected by the First Amendment. In one case, an ordinance that prohibited door-to-door solicitation by organizations that did not use at least 75% of their receipts for charitable purposes was struck down by the Court. The present ordinance would probably run afoul of the same rule, since in effect it prohibits all charitable solicitation absent relatively burdensome compliance with its registration provisions. The ordinance is also vulnerable because it limits the right of solicitation to those who belong to "a recognized charitable organization." (B), while a correct statement of law, does not apply in these circumstances. The question is directed toward the challenge George would mount, not one that a religious organization might pursue. (C) is incorrect. Since the First Amendment rights at issue here are fundamental, a "reasonable balance" is not enough; the government ordinance is a direct, content-based regulation, and will be subjected to strict scrutiny. (D) is incorrect because even if the prevention of fraud is a compelling state interest, the statute is not narrowly tailored to achieve that interest, which is required under the strict scrutiny standard.

#### **Answer to Question 15**

- (B) The motion to suppress the evidence will be granted because the police did not have probable cause to search the car. When the police place the driver of an automobile under arrest, there are a number of alternatives with respect to a search of the car: (i) Regardless of the crime for which the defendant is arrested, the police can search the entire passenger area of the car as a search incident to an arrest. However, the search incident to an arrest must be conducted at the time of the arrest. (ii) If the police have probable cause to search the car—*i.e.*, reasonable grounds for believing that a legitimate item of seizure is in the car—a search of the entire car can be made without a warrant. The search based on probable cause can be made at the time of the arrest or at a later time. (iii) If the police take the car under their control for an administrative reason (such as to get the car off the highway), they can "inventory" the items in the car under certain circumstances. In this question, the search of the car at the police station would have been valid *if* the police had probable cause to search the car. The question does not provide any facts that could form the basis for probable cause to search. Thus, the motion to suppress will be granted because of the lack of probable cause. (A) is wrong for two reasons: The search could not be justified as a search incident to an arrest since the arrest had been completed. Also, when conducting a valid

## 218. MIXED SUBJECTS

search incident to an arrest, the police *may* open up a closed container within the arrestee's "wingspan." (C) is wrong because, as stated, a search incident to an arrest must occur at the time of the arrest. (D) is wrong. The police can conduct an administrative inventory if the car has been impounded by the police, and the police are, in fact, conducting an inventory of the items in the car. In this question, the car had not been impounded by the police, nor would it need to be since Dolly could drive it home. Also, it is clear from the facts that a traditional search was taking place.

### Answer to Question 16

- (C) Sam's unconditional promise to sell created a contract even if Bob knew of Winnie's interest. When a promise is unconditional, the failure to perform according to its terms is a breach of contract. By not making his promise conditional on Winnie's consent to convey her interest, Sam impliedly undertook to obtain her consent. Therefore, the contract is enforceable. (Note that this does not necessarily mean that Bob will be able to get the car; he may have to settle for damages because of Winnie's interest.) (A) is incorrect although partially true. It is true that Sam cannot sell Winnie's half of the car without her consent; however, that does not make the contract here unenforceable. As stated above, by making his promise unconditional, Sam undertook a duty to obtain Winnie's consent to sell the car. His failure to do so is a breach of contract, but a breach does not negate a contract; it merely gives the nonbreaching party a right to certain remedies. Therefore, the contract is enforceable, even if Winnie refuses to sell her interest. (B) is incorrect because Bob's knowledge of Winnie's interest is irrelevant to the issue of the contract's enforceability. As discussed above, Sam's unconditional promise implied that Sam would obtain Winnie's consent to convey her interest in the car. Therefore, the contract is enforceable regardless of whether Bob was aware of Winnie's interest at the time he signed. (D) is incorrect because "prospective inability" is not a ground for discharge. Prospective failure of consideration occurs when a party has reasonable grounds to believe that the other party will be unable or unwilling to perform when due. The prospective inability of performance does not discharge the contract; rather, it allows the innocent party to suspend further performance until he receives adequate assurances that performance will be forthcoming. Therefore, the contract between Sam and Bob is not discharged because of prospective inability of performance.

### Answer to Question 17

- (B) Bob can recover from Sam because Sam's statement to Bob that Winnie would not go along with the sale should reasonably be interpreted as a repudiation. Anticipatory repudiation occurs where a promisor, prior to the time set for performance, unequivocally indicates that he cannot or will not perform when the time comes. Anticipatory repudiation gives the nonrepudiator the option of suspending his performance and waiting to sue until the performance date, or to sue immediately. Here, Sam unequivocally stated that he could not deliver the car for \$25,000 because of Winnie's refusal to convey her interest. This repudiation excused Bob's tender on the date set for delivery, and gave rise to an immediate action for damages. (A) is incorrect because Bob's duty to tender \$25,000 on the date set for delivery was excused by Sam's repudiation. As discussed above, Sam's statement that Winnie would not agree to a \$25,000 sale was an anticipatory breach. Therefore, Bob's duty to tender the \$25,000 was excused, leaving Sam without a cause of action for breach. (C) is incorrect because Sam's repudiation the day after the contract was signed gave rise to an *immediate* action for damages. As discussed above, Sam's statement about Winnie's refusal to sell for under \$40,000 was an anticipatory repudiation. This repudiation excused Bob's duty to tender the \$25,000 and gave him the right to immediate recovery from Sam for breach of contract. (D) is incorrect because the contract was not terminated. As discussed above, Sam's statement about Winnie's unwillingness to sell the car for \$25,000 was an anticipatory breach.

This repudiation excused Bob's duty to tender the \$25,000 and gave rise to an immediate action for damages. Therefore, Bob's failure to tender the \$25,000, which he no longer had a duty to do, did not terminate the contract.

#### **Answer to Question 18**

- (C) It seems clear that Clara intended her grandchildren to inherit the property at some time, and that the only thing she desired was that Truman be able to live there as long as he wanted. Since Truman could conceivably live there all his life, this devise would be deemed a life estate in Truman, with a vested remainder in Sam. Sam's interest would, however, be subject to open (partial defeasance) since it was possible that Truman could have other children. At Truman's death, Sam's interest became indefeasibly vested. (A) is incorrect because the language of the will clearly does not express an intent that Truman take a fee simple absolute. (B) is incorrect because however many children Truman may have, his life would be the measuring life, and the grandchildren would inherit upon his death. Thus, this would not violate the Rule Against Perpetuities. (D) is wrong because Sam's interest was vested on his birth. It is true that it was subject to open and the time of possession was contingent on Truman's decision to live in the house, but Sam's basic remainder interest was always vested.

#### **Answer to Question 19**

- (B) To prevail, Prole must show evidence of actual injury. When a defamatory statement involves a matter of public concern, the plaintiff must provide competent evidence of actual injury (*i.e.*, presumed damages are not permitted absent a showing of knowledge of falsity or reckless disregard of truth). Actual injury is not limited to out-of-pocket loss; it may include impairment of reputation, personal humiliation, and mental anguish. Here, the reasons for the firing of the chief operating officer of a town's largest employer, and the financial health of that employer, are matters of public concern for the readership of the *Middletown Herald*. Hence, Prole will have to prove actual injury to prevail. (A) is incorrect because pecuniary damages are not necessary in libel cases. If not for the fact that a matter of public concern was involved, damages would be presumed. (C) is wrong even though it is a true statement. The common law rule of presumed damages is supplanted by the constitutional rules because a matter of public concern is involved. (D) is wrong because even if Prole is not a public figure, the article involved a matter of public concern, so damages will not be presumed.

#### **Answer to Question 20**

- (B) The court should rule for the defendant and allow the treatise to be read and considered by the jury as substantive evidence. Although the treatise constitutes hearsay because it is an out-of-court statement offered to prove the truth of the matter asserted (that the surgical procedure was accepted), it falls within one of the exceptions to the hearsay rule. Under Federal Rule 803(18), information in treatises can be read into evidence if the treatise is: (i) relied upon by the expert or is called to his attention during cross-examination, and (ii) is established as reliable by the witness, another expert, or judicial notice. The treatise itself is not admitted into evidence, but rather the relevant section is read in. Thus, (B) is correct and (D) is incorrect. (A) is incorrect because the Federal Rules allow such evidence to be used substantively and do not limit the information to impeachment, as a number of state courts do. (C) is incorrect because the information in a learned treatise is admissible as long as it is established to be reliable; however, if the opposing party did rely on the treatise, the offering party need not otherwise establish reliability.

## 220. MIXED SUBJECTS

### Answer to Question 21

- (C) The strongest possible argument here is (C) because equal protection claims are made against the federal government pursuant to the Fifth Amendment's Due Process Clause. The Supreme Court has held that this provision implicitly includes a requirement for equal protection. Although Portman has little chance of prevailing because only a rational basis test is used for age discrimination claims, this answer is the only possible basis for challenging the law. (A) is wrong because both constitutional provisions referring to privileges and immunities apply to *state* government conduct and are never used against the federal government. The Fourteenth Amendment provides that no state shall deny any citizen the privileges or immunities of national citizenship. Article IV provides that no state shall deny citizens of other states the privileges and immunities it accords its own citizens. (B) is wrong because a "just compensation" claim will only provide him compensation for his loss of property. Even if his job is considered to be a property right, the just compensation claim would not provide him the relief he wants, which is reinstatement in his job. (D) is wrong because even though there is no express provision in Article I, Section 8, concerning this legislation, it certainly is within congressional powers.

### Answer to Question 22

- (C) The jury should find Diana not guilty of murder. Even though Diana was the initial aggressor, she reacquired her right to self-defense because Velma responded to Diana's use of nondeadly force with deadly force without giving Diana a chance to withdraw. (B) is therefore incorrect. (A) is incorrect because the majority of jurisdictions do not require a party to retreat. Furthermore, even in those jurisdictions that follow the retreat rule, a person is not required to retreat unless she can do so with complete safety. (D) is incorrect because a defendant can be guilty of murder even if she did not premeditate.

### Answer to Question 23

- (A) Because Beta recorded prior to the subsequent conveyance, Beta has the superior right to title regardless of the type of recording statute. A conveyance that is recorded can never be divested by a subsequent conveyance through operation of the recording statutes. By recording, the grantee gives constructive (or "record") notice to everyone. Hence, proper recording prevents anyone from becoming a subsequent BFP. Since Alpha's conveyance to Beta was recorded at the time of Alpha's conveyance to Gamma, Gamma cannot prevail. Gamma will clearly lose under a pure race statute because Beta recorded first. Gamma will also lose under notice and race-notice statutes because the conveyance to Beta was recorded at the time of the conveyance to Gamma. Gamma, therefore, had record notice and cannot claim the protection that these types of statutes provide for subsequent purchasers for value who take *without* notice. Thus, (A) is correct and (B) is incorrect. The fact that Beta is merely a donee rather than a bona fide purchaser does not mean that her recording has no effect. It is only the *subsequent* taker who has to be a BFP rather than a donee to utilize the recording statute. The prior grantee, regardless of her status, protects her interest by recording because it prevents anyone from becoming a subsequent BFP. (C) is incorrect because, as noted above, Beta will prevail under any type of recording act, but not necessarily because she recorded prior to Gamma's recording. If the jurisdiction has a notice statute, whether Beta recorded prior to Gamma's recording is irrelevant. Rather, it is the fact that Beta recorded prior to Gamma's *purchase* that gives Beta superior title in a notice jurisdiction, because Gamma would have record notice of the conveyance and thus would not qualify as a bona fide purchaser. (D) is incorrect because the quitclaim/warranty deed distinction does not affect who has title to Greekacre; that status merely affects the parties' respective causes of action and ability to recover against Alpha.

**Answer to Question 24**

- (B) Any person can testify to the authenticity of another's signature as long as that witness has seen the person's signature and can express an opinion regarding its authenticity. There is no requirement that the witness have seen the signature recently, and thus (A) is not the best answer, even though the length of time since the witness last saw the signature in question may go to the weight that should be given the witness's testimony. Nor is it decisive that the witness testifying regarding the signature has only seen it once. Under this circumstance, the witness's testimony may lack reliability, but that is a fact for defense counsel to bring out. Thus, (C) is incorrect. The testimony is of sufficient reliability to permit its admission. Thus, (D) is wrong.

**Answer to Question 25**

- (A) In order to issue a valid search warrant, the magistrate must determine that there exists reasonable grounds to believe that a legitimate item of seizure is located at the place to be searched, *i.e.*, "probable cause to search." However, a finding that the warrant was invalid because it was not supported by probable cause will not entitle a defendant to exclude the evidence obtained under the warrant if the police reasonably relied on the warrant's facial validity. Hence, (A) is correct. (B) and (D) are wrong because once the police are in the defendant's apartment with a facially valid search warrant, it is immaterial that they are unable to find the items for which the search warrant was issued, and if in their legal search they turn up other contraband, evidence of this discovery is admissible. (C) is incorrect. It is true that the length of time between the time an informant observed some facts and the time this information is given to the police is important, because the greater the time, the less chance that the facts still remain the same and, therefore, there is less probable cause to believe that the designated items are still in the place where the informant says they are. However, as discussed above, a determination that probable cause is absent will not necessarily require that the evidence be excluded.

**Answer to Question 26**

- (C) Larson has more than an abstract interest in redressing his grievance. His right to redress, guaranteed by the state through its statutory enactment, is itself a property right. Although the legislature may elect not to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. [Logan v. Zimmerman Brush (1982)] Thus, the state statute cannot be applied so as to deprive Larson of his property interest in using the statutory procedure for possible redress of unfair employment practices without at least affording him an opportunity for an appropriate hearing. It follows that (A) and (B) are incorrect, both because they state the wrong result and because they misstate the applicable rules. As indicated, Larson has a property interest and thus (A) is wrong. (B), in turn, describes a valid general rule but does not describe this case. The state can enact specific procedures, expect Larson to follow them, and bar the claim if he fails to do so. That is, however, not what happened here. Rather, the state itself failed to act in a timely manner, and the statutory time limit operated indiscriminately to extinguish Larson's claim. Finally, (D) is incorrect because it is too general. What happened to Larson was "unfair" because it deprived him of a property right, not because the state is required to provide any remedy, or a specific remedy.

**Answer to Question 27**

- (C) This question involves an admission—*i.e.*, a statement by a party (Deborah) being offered against her. An admission is ***not considered a hearsay statement***. [Fed. R. Evid. 801(d)(2)] Thus, (C) appears to be correct—that Walter's testimony about Deborah's statement will be admitted

## 222. MIXED SUBJECTS

because it is not hearsay. (C) is not an ideal answer, though, because it is so incomplete. The fact that an item of evidence is nonhearsay does not automatically render it admissible. For example, if nonhearsay evidence is irrelevant, it would not be admissible. Thus, deciding whether (C) is the **best** answer requires a thorough assessment of the alternatives. (D) can be quickly discarded as incorrect. Impeachment evidence is not admissible until *after* the witness to be impeached has testified. It would be improper to admit Walter's testimony for the purpose of impeaching Deborah's **expected** testimony as to the result of her own investigation of the accident. (A) is tempting, but it is also incorrect. Normally, an out-of-court statement of a declarant, like the in-court testimony of a witness, is admissible only if it was made **with personal knowledge**. This requirement, however, does not apply to admissions. Thus, although Deborah's statement ("Ned just got hurt because I forgot to do my yard work") was made without personal knowledge, it will be admissible. As a party, Deborah will have ample opportunity to explain why she made the statement even though she lacked personal knowledge about the accident that injured Ned. The persuasiveness of her explanation will determine whether the jury takes her admission seriously. (B) is also incorrect. The common law requirement that lay witnesses were not permitted to give opinions, but only allowed to state facts, has been rejected in favor of a **helpfulness standard**. For example, Rule 701 allows lay witnesses to give testimony in opinion form as long as it is helpful to a clear understanding of the testimony or the determination of a fact in issue. Similarly, an admission is not rendered inadmissible merely because it is in opinion form. For example, a party's statement that "I was negligent" or "It was all my fault" will be admitted into evidence as an admission. Therefore, although (C) is not an ideal answer, it is basically correct, and (A), (B), and (D) are clearly incorrect.

### Answer to Question 28

- (C) This question requires analysis of each of the fact patterns. (A) would not be first degree murder. There was no premeditated and deliberate killing, and battery is not one of the listed crimes. Common law murder does include the situation where the actor, with the intent to cause serious bodily harm, causes the death of another person, but that would be second degree murder under the State Red statute. (B) would not be first degree murder. Here again there was no premeditated and deliberate killing and DWI is not one of the crimes listed. Common law murder does include the fact situation where the actor causes death under circumstances demonstrating an extreme indifference to the value of human life, but that would be second degree murder under the statute. (D) would not be first degree murder. Killings that take place during the heat of passion after sufficient provocation are manslaughter at common law and would not be considered a premeditated and deliberate killing under the statute. Being assaulted by another would be sufficient provocation. (C) would probably be considered first degree murder. There was premeditation and deliberation. Finding one's spouse in a sex act with another is considered sufficient provocation and, if the killing had occurred immediately (no cooling off period) while the defendant was in a rage, the crime would have been manslaughter. In (C), however, the killing did not take place immediately—the defendant purchased a gun. (C) might be debatable but it is clearly the fact situation that is most likely to be first degree murder.

### Answer to Question 29

- (D) The trial court's decision should be overturned. The prevailing rule is that in performing services of designing and constructing improvements on property eventually deeded to the city, a developer must accept responsibility for prededication negligence. Hence, the trier of fact should be permitted to consider evidence of Filmont's negligence. To hold otherwise would allow the developer to avoid liability merely by dedicating the grounds to a city. Thus, (A) and (B) are

incorrect. (C) is incorrect because presenting evidence of a bad motive on Filmont's part is not necessary to find him liable.

#### **Answer to Question 30**

- (B) This question raises several different issues: competency of witnesses, use of leading questions on cross-examination, the proper scope of cross-examination, and the probative value/prejudicial impact balancing test. Through a process of elimination, (B) emerges as the correct answer. (D) is incorrect. Under the Federal Rules, *virtually all* witnesses with personal knowledge are competent to testify. [Fed. R. Evid. 601] A witness is not rendered incompetent simply by having served on a jury in a prior case involving a party to the current suit. Such prior jury service might render the witness's testimony *unpersuasive*, but it would not make it *inadmissible*. (C) is incorrect because ordinarily, leading questions are permitted *on cross-examination*. [Fed. R. Evid. 611(c)] The prosecutor's question is a leading question, but that is perfectly permissible, especially in a case like this, where the alibi witness, Warren, is not "friendly" toward the prosecution. (A) is incorrect because cross-examination is generally limited in scope to the subject matter of the direct examination *and matters affecting the credibility of the witness* [Fed. R. Evid. 611(b)], and the prosecutor's question is, in a roundabout way, an attempt to impeach Warren's credibility. The implication behind the question is that if Warren had served on a jury that acquitted Drew of another criminal charge, Warren would be inclined to think Drew innocent of the pending charge. Alternatively, the implication behind the question could be that Warren is the kind of person who is "soft on crime" and for that reason is not a credible witness. In either event, since the question is an attempt to impeach Warren's testimony, it is within the proper scope of cross-examination. This leaves (B) as the remaining correct answer. (B) is not unquestionably correct, because the probative value/prejudicial impact balancing test found in Rule 403 is weighted heavily toward admission of evidence. For evidence to be excluded under this balancing test, its probative value must be substantially outweighed by its prejudicial impact. Nevertheless, in this case, a plausible reason for sustaining an objection to the prosecutor's question is that the probative value of the answer would be substantially outweighed by its tendency to mislead. The question and answer would inevitably let the jury know that Drew had been previously charged with a crime. This information could be highly prejudicial to his defense. Since the question and answer have little probative value (the negative inferences pertaining to Warren's credibility being very weak), it is reasonable to sustain an objection to the question on the basis that its probative value is substantially outweighed by its prejudicial impact.

#### **Answer to Question 31**

- (B) Quack will be able to recover a reasonable price for his services. While the parties failed to agree on a material term, most courts today will imply reasonable terms if they are consistent with the parties' intent as otherwise expressed. Terms that can be supplied by a reasonableness standard include a price term for the performance of services. Unless the parties have shown at the time of contracting that they do not want a contract until they agree on a price, a reasonable price will be implied. (A) is wrong because Quack's fee is not necessarily reasonable although the court will take into account Quack's normal fee when it determines the reasonable fee. (C) is wrong because it fails to take into account that a court will imply a reasonable price term. (D) is wrong because it is irrelevant. In contract, a party need not prove that the "performing" party actually caused the performance. Mary received the performance she bargained for here—a cure.

#### **Answer to Question 32**

- (D) Since there was consideration for Stu's promise, his promise is enforceable and Quack has a right to recover \$25,000. (A) is wrong because a promise to pay \$25,000 is a legal detriment. (B) is

## 224. MIXED SUBJECTS

wrong because the preexisting duty rule does not apply since Stu was looking for additional consideration from Quack: Under the Quack-Mary contract, Quack agreed only to *treat* Mary; under the Quack-Stu contract, Quack would be paid only if he *cured* Mary. Moreover, it is not clear that Quack was under a duty to continue treating Mary when Stu approached Quack. (C) is incorrect because a court will not change the price agreed upon by the parties just because one party agreed to pay more than the reasonable value of the consideration that he was to receive. Furthermore, the facts do not establish that the value of Quack's services was in fact less than \$25,000.

### Answer to Question 33

- (C) In a race-notice jurisdiction such as West Dakota, a subsequent purchaser must have taken *without notice* of the earlier sale and must have been the first to record. Otherwise the recording act will not apply. Clyde was indeed the first to record, but he took with notice that the property had been sold before. It does not matter how the subsequent purchaser learns of the earlier sale; if that person knows about it, he loses. Since the recording act does not apply to protect Clyde, the common law rule of first-in-time, first-in-right gives title to Keith. Thus, (C) is correct, and (B) is wrong. (A) is not as good an answer as (C) because if the recording act did apply, Keith's receiving a deed before Clyde would not give him superior rights to Steppeacre. (D) is wrong because recording does not cure the problem of Clyde taking with notice.

### Answer to Question 34

- (C) When the existence of a presumed fact is submitted to the jury in a criminal case, the judge must instruct the jury that it *may* regard the basic facts as sufficient evidence of the presumed fact, but that it is not *required* by law to do so. If, as here, the presumed fact (intoxication) is an element of the offense, its existence must be proved beyond a reasonable doubt. Thus, the judge should have instructed the jury that it may regard a blood alcohol concentration of .10 or more as sufficient evidence of intoxication, not that it must do so. The instruction appears to relieve the prosecution of its burden of proving intoxication beyond a reasonable doubt. It follows that (A) is incorrect. (B) is incorrect because a jury should be instructed on the applicable law—*e.g.*, permissible inferences as to intoxication. (D) is incorrect because an instruction is supposed to inform the jury of the law, not be probative. The term “probative” applies to relevance of evidence, not jury instructions.

### Answer to Question 35

- (B) Substantially overbroad or vague statutes regulating First Amendment rights are void on their face, and persons may not be prosecuted for their violation even if their conduct might otherwise be subject to valid regulation. Conversely, statutes that reasonably regulate the time, place, and manner of speech in public forums may be unconstitutional if applied in situations where the First Amendment activity is unreasonably infringed. Here, the statute is a valid time, place, and manner restriction because it is content neutral, it is narrowly tailored to serve a significant government interest, and it leaves open alternative channels of communication. However, it is being applied to circumstances that do not provide any reasonable basis for regulation of the speech. Thus, (B) is correct: while Roger's conduct can be regulated, it is the threat by the farmer that triggers Roger's arrest, not his violation of the statute. (A) and (D) are incorrect since the statute itself is valid on its face. (C) is incorrect, in turn, because it wrongly asserts that Roger may be prosecuted under these circumstances.

**Answer to Question 36**

- (B) Since Woody did not take the stand, this evidence is not being offered for impeachment and, thus, the 10-year time limit does not apply. Evidence of other crimes is admissible against an accused in a criminal case if it is relevant to some issue other than the defendant's character or disposition to commit the crime charged. Where, as here, the crime charged is embezzlement, evidence that the defendant committed embezzlement before might be admissible to establish fraudulent intent. The crimes in (A), (C), and (D) are not relevant to any issue other than character and propensity to commit a crime; therefore, they are inadmissible. The fact that (A) and (D) are felonies would be important only if this were impeachment evidence, which it is not.

**Answer to Question 37**

- (C) The original grant by Myrtle to Cyrus was a license, which is a personal privilege to go upon the land belonging to the licensor. When Cyrus expended a substantial sum of money in reliance on the license, the license became irrevocable under the doctrine of estoppel. (A) is wrong because Myrtle was estopped from terminating the license, not just from preventing Cyrus from coming onto her land. (D) is wrong because the duration of the irrevocable license is based on what the parties contemplated would be the duration when the oral license was granted and the facts do not indicate that they intended it to exist until Cyrus acquired another source of water. (B) is wrong because the estoppel is based not on the mere construction of the ditch but the expenditure of a substantial sum of money in reliance on the license. Therefore, (C) is a better answer than (B).

**Answer to Question 38**

- (B) It will be most relevant to determining Delbert's guilt or innocent if he was unaware that the building he broke into was a dwelling. An element of the crime of common law burglary is that the breaking and entering be of the dwelling of another; hence, awareness of the building's use as a dwelling is a component of the mens rea for the crime. Delbert's ignorance or mistake regarding the building's use as a dwelling may negate the mens rea for that element of the crime of burglary. (A) is incorrect because it is not necessary that Delbert's mistake as to the identity of the computer be reasonable. Ignorance or mistake as to a matter of fact will affect guilt only if it shows that the defendant did not have the state of mind required for the crime. While courts have required that a mistake offered to negate the existence of a general intent be reasonable, *any* mistake of fact, reasonable or unreasonable, is a defense to a specific intent crime. Here, burglary requires the specific intent to commit a felony inside the dwelling at the time of entry. Delbert may not have had the intent to commit a felony if he believed that he was just retrieving his own computer that had been stolen. If so, the fact that his belief was unreasonable is irrelevant; it still negates the specific intent to commit a felony. (C) is incorrect because his realization that the computer was not his after he had broken into the shop is not relevant for purposes of burglary (although he may have committed larceny under those circumstances). The intent to commit a felony must have existed at the time of entry. If the intent is formed after the entry is completed, burglary is not committed. (D) is wrong because, as discussed above, Delbert's ignorance of the building's status as a dwelling may be a defense.

**Answer to Question 39**

- (A) The gift in trust to Rockville University is a valid charitable trust. To be valid, a charitable trust must have an indefinite group of beneficiaries. The beneficiaries must be reasonably numerous and not individually identified. The trust may be for the benefit of an established charity or for a

## 226. MIXED SUBJECTS

group of persons, as long as it is for a charitable purpose. Here, a trust for the benefit of a university to pay for the educational expenses of residents of a city qualifies as a charitable trust. Thus, (A) is correct and (C) is incorrect. (B) is incorrect because the doctrine of cy pres applies only when the purposes of a charitable trust are impossible to fulfill, are illegal, or have been completely fulfilled, allowing a court to redirect the trust to a different purpose that is as near as may be to the settlor's original intent. Here, because the trust purposes can be fulfilled, the doctrine does not apply. (D) is incorrect because the gift to Rockville University is certain to vest within the perpetuities period. The Rule Against Perpetuities applies to the equitable future interests of the beneficiaries in a private trust just as it does to legal future interests. Seth's three children are lives in being at the time the trust becomes effective, which is Seth's death. The executory interest in trust held by Rockville University is certain to either take effect or fail during those lives in being.

### Answer to Question 40

- (A) This question involves testimony by a witness, Harriet, whose recollection has been refreshed by reference to a document (her diary). Under the Federal Rules, any materials can be used to refresh one's recollection, and the Rules do not prohibit the use of such materials before trial. Thus, (A) is correct. (B) can quickly be discarded as incorrect. The contents of Harriet's diary are not remotely protected under the work product rule. The work product rule involves a product, such as a document, *prepared in anticipation of litigation or preparation for trial*, by or on behalf of *a party*. Harriet is not a party, and her diary was not prepared in anticipation of litigation or preparation for trial. It is, presumably, merely a collection of private thoughts transcribed for Harriet's personal edification. (D) is also incorrect. The best evidence rule does not literally require a party to produce the best evidence possible to prove a point. Rather, it requires the production of the original document *when attempting to prove the contents of a document*. [Fed. R. Evid. 1002] Although Harriet used a document to refresh her recollection and enable her to testify, her testimony concerned the details of an auto accident, *not the contents of the document*. Since Harriet was testifying about an event, as opposed to the contents of her diary, her testimony was proper, notwithstanding the failure to produce the diary. (C) is a tempting answer, but ultimately incorrect. If a witness's recollection has been refreshed prior to trial by reference to a document, the court has discretion to require that the document be disclosed to the opposing party. [Fed. R. Evid. 612] The court is not *required* to order disclosure. In this case, there is no indication that the court ordered disclosure of the diary or that Plee failed to comply with an order to produce the diary. All that is known is that, upon learning through cross-examination of Harriet that she had consulted her diary the night before, Def's attorney immediately moved that Harriet's testimony be stricken from the record. Since there is nothing improper about a witness's refreshing her recollection prior to trial, Def's motion should be denied and Harriet's testimony should remain on the record.

### Answer to Question 41

- (B) Burglary requires a breaking and entry of a dwelling of another at nighttime with the intent to commit a felony therein. Here, Defendant entered his brother's home at night with intent to take the television. A mistake as to application of the criminal law does not excuse a violation of that law. In (A), the defendant would not be guilty of burglary. There is no indication of a breaking and entering, the office would probably not be a dwelling, and, most important, defendant's belief that he owned the briefcase would negate the intent to commit a larceny or other felony. In (C), the defendant would probably not be guilty of burglary. At common law, an honest belief that you were entitled to take the property of another as repayment for a debt negated the intent

necessary for larceny. In (D), the defendant would not be guilty of burglary. The garage would probably not be a dwelling and, most important, the defendant did not have the “intent to permanently deprive” necessary for larceny.

#### **Answer to Question 42**

- (A) Both damages and an injunction would be in order. School has a life estate *pur autre vie* while Owens's children have a vested remainder subject to open. Absent an “open mine” in existence at the creation of the life estate and remainder, a life tenant cannot extract minerals from the land because it depletes the corpus and constitutes waste. Thus, the remainderman could recover damages and obtain an injunction for the unlawful waste. (B) is wrong since School's action did not terminate its interest. School's interest is not a defeasible one at all since the language that purports to restrict its use to educational purposes is only precatory and provides for no termination or forfeiture if School fails to comply. (C) is wrong because it is entirely unnecessary for Owens and Wilma to be parties since neither of them has any interest in the land. (D) is wrong because the injury to the land is permanent and therefore should be prevented by an injunction.

#### **Answer to Question 43**

- (C) The general principles of intergovernmental immunity prevent federal interference with state governmental functions. Though there is not a great deal of bite left in the Tenth Amendment under current case law, particularly with regard to congressional conditions on expenditures of federal money, this is still the best argument presented. (B) is not the best answer because it goes too far; the doctrine of federalism relates to the *functions* of state government, not to all the *actions* of the state government. Clearly, the federal government could prevent the state from exercising its power in such a manner as to deprive its citizens of their federal rights, including those rights with regard to public education. (A) is obviously wrong, because the doctrine of federal preemption prevents the states from interfering with the effect and purposes of federal law. (D) is wrong because it is too narrow. Aside from the problem of separation of church and state, there are many reasons why the federal government could limit a state's rights in this area.

#### **Answer to Question 44**

- (B) A contract can be reformed to reflect the original intent of the parties where there has been a mutual mistake in the integration. The plaintiff's negligence is not a bar to reformation. Here, both parties were unaware that the written contract did not reflect their agreement. (A) is not as good an answer as (B) because it fails to mention the mutual mistake element. (C) is wrong because the parol evidence rule does not apply in an action for reformation; if it did, contracts could rarely be reformed. (D) is wrong because the mistake here was not unilateral.

#### **Answer to Question 45**

- (A) The grounds for rescission would be the intentional misrepresentation by Quinn that the second agreement was the same as the first. (B) is incorrect because reformation requires that the agreement not reflect the intention of the parties. Here, there was never any intent on the part of Quinn to agree to the terms of the old agreement. (C) and (D) would not apply to this fact situation.

#### **Answer to Question 46**

- (B) The parol evidence rule does not bar prior statements when the cause of action is for misrepresentation, which is essentially a tort action. Thus, (A) and (D) are wrong. While (C) is true, it is

## 228. MIXED SUBJECTS

not as good an answer as (B) because the statements could be admitted even if the lease was not proved to be an incomplete agreement.

### Answer to Question 47

- (C) To recover on a theory of strict tort liability, Walter must show that his injuries were caused by an unreasonably dangerous defect in the boat that existed when the boat left City Marine's control; (C) is the only alternative that reflects this requirement. A *prima facie* case in products liability based on strict tort liability consists of: (i) a strict duty owed by a commercial supplier; (ii) breach of that duty; (iii) actual and proximate cause; and (iv) damages. Examples of commercial suppliers include manufacturers, retailers, wholesalers, and assemblers. Breach of duty is established by proving that the product is in a defective condition unreasonably dangerous to users. A plaintiff need not prove that the defendant was at fault in selling or producing a dangerous product. To prove actual cause, a plaintiff must trace the harm suffered to a defect in the product that existed when the product left the defendant's control. Here, if the steering failed due to a defect present when the boat left the manufacturer, that defect must also have been present when Walter bought the boat from City Marine, the retailer. This defect rendered the boat unreasonably dangerous to users such as Walter. By selling the boat in such condition, City Marine breached its strict duty, and this breach actually and proximately caused Walter to incur severe personal injuries. Thus, given the additional fact in (C), Walter will prevail. (A) is incorrect because any inspection of the boat by City Marine prior to sale would be relevant to a *negligence* action, but not to one based on strict liability. Even if City Marine had conducted a reasonable inspection of the boat, strict liability will still lie if the boat left City Marine's control with a defect that rendered it unreasonably dangerous. (B) is incorrect because ordinary contributory negligence is not a defense in strict liability actions in jurisdictions that retain traditional contributory negligence rules. To the extent that Walter is "misusing" the boat by weaving in and out of the pylons, it is a reasonably foreseeable misuse that the commercial supplier must take into account. To avail itself of Walter's conduct as a defense, City Marine must show that Walter voluntarily and unreasonably encountered a known risk. The facts herein do not indicate any such knowing assumption by Walter of the risk of harm from the defective steering mechanism. (D) is incorrect because it does not establish the causation element. City Marine's strict tort liability depends on whether the steering mechanism failed because of a defect present at the time it sold the boat to Walter. If the boat was not defective at the time of sale, or if any defect that was present had nothing to do with the failure of the steering mechanism, City Marine will not be liable for a subsequent failure of the steering mechanism from some other cause.

### Answer to Question 48

- (C) Watersports, Inc. will be liable for negligence if it should have discovered the defect in the steering mechanism. To establish a *prima facie* case for negligence in a products liability case, plaintiff must show the existence of a legal duty owed by the defendant to that particular plaintiff, breach of that duty, actual and proximate cause, and damages. To prove breach of duty, plaintiff must show (i) negligent conduct by the defendant leading to (ii) the supplying of a defective product by the defendant. The call of the question indicates that Watersports, Inc. supplied a defective product. If the defect could have been discovered by Watersports, Inc. in the exercise of reasonable care, it was negligent in not discovering the defect and preventing the boat from being sold. Choice (A), which addresses the duty element, is incorrect because a manufacturer of boats such as Watersports, Inc. is a "commercial supplier" owing a duty of due care to any foreseeable plaintiff. Although Tom did not purchase the boat (and so was not in privity with Watersports, Inc.), he was a friend of the owner of the boat and was using it when he was injured; he is therefore a foreseeable plaintiff. (B) is incorrect because Walter's negligence would be imputed to

Tom only where he and Walter stand in such a relationship to each other (*e.g.*, an employer-employee relationship) that the courts would find it proper to charge Tom with Walter's negligence (such that Tom would be vicariously liable for Walter's negligent conduct if a third party had sued Tom). Here, the facts do not indicate any relationship that would warrant imputing Walter's negligence to Tom. Choice (D), which addresses the causation element, is incorrect because an intermediary's negligent failure to discover a defect is foreseeable negligence and therefore **not** a superseding cause. Watersports, Inc., the defendant whose original negligence created the defect, will still be liable.

#### **Answer to Question 49**

- (C) Under the "perfect tender rule" Buyer may reject the entire shipment (III.). This power to reject is tempered by the U.C.C.'s provisions allowing Seller to "cure" defects. Although "cure" is not mentioned as an option, (C) remains a better answer than the others because I. and II. are not permissible options for the buyer at this time. With regard to I., the contract's delivery date has not yet arrived and Seller must be given an opportunity to "cure" before the Buyer seeks "cover." II. is not an option because the delivery date has not yet arrived and there is no reason to anticipate that Seller will not make good before the date in question. There is no breach until the delivery date, and an anticipatory breach situation does not exist. Hence, (A), (B), and (D) are incorrect.

#### **Answer to Question 50**

- (B) Absent any anti-deficiency statutes, Olman remains personally liable to pay for any shortfall arising from the foreclosure sale. Proceeds from the sale are used to satisfy the senior interests first. Hence, all of the proceeds (\$6,000) went to Exbank. Thus, Olman must pay the balance still due Exbank (\$4,000) and the entire amount of the Wybank mortgage (\$2,000), which is terminated by the foreclosure of the senior mortgage. (A) is wrong because foreclosure sales are not allotted proportionally between senior and junior interests. (C) is wrong because foreclosure does not extinguish the underlying debt. (D) is wrong because Wybank's mortgage does not remain on the land after foreclosure of the senior mortgage; hence, Olman is liable for that debt as well.

#### **Answer to Question 51**

- (B) Burglary is the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony inside the house. The prosecution must prove every element of the offense, including intent, beyond a reasonable doubt. Since the trial court's instructions placed the burden of proving lack of intent on Donald, they were in error. Thus, (B) is correct, and (D) is incorrect. (A) is incorrect because it focuses on the standard of proof, when the burden of proof is the issue. (C) is incorrect because it is impossible to make the harmless error analysis without knowing more about the state of the evidence, and the test for constitutional error is "harmless beyond a reasonable doubt," not by a preponderance, as suggested by the answer.

#### **Answer to Question 52**

- (C) Congress's power over interstate commerce is broad, and the federal statute is clearly authorized by that power. The Court's 5-4 decision has no bearing here, since it was simply explaining what the standard was in the absence of any express congressional action. (A) is wrong because the fact that a state regulation does not burden interstate commerce in the absence of federal regulation does not preclude the federal government from subsequently enacting conflicting regulations which void the state law. (B) is wrong because the Fourteenth Amendment does not bind the

## 230. MIXED SUBJECTS

federal government, and because a regulation of interstate commerce would rarely be classified as violating equal protection as to intrastate commerce. (D) is not the best answer because the Supremacy Clause alone does not speak to the validity of a federal statute, merely to its precedence over conflicting state enactments. The Supremacy Clause would operate, accordingly, only *after* the new statute is enacted, and would render the West Rabbit Foot ordinance invalid.

### Answer to Question 53

- (B) Eric cannot recover because the cause of his injury was not a highly dangerous concealed artificial condition. Generally, the owner or occupier of land does not owe a duty to an ordinary trespasser to warn of dangerous conditions on the land or to make the land safe. Where the trespasser is an anticipated trespasser—*i.e.*, where the landowner knows that people habitually intrude upon a particular part of her land—a duty to warn of or make safe highly dangerous concealed artificial conditions known to the landowner arises. However, there is no duty to warn of conditions so apparent that the trespasser should be able to discover them himself. Here, even though Eric qualifies as an anticipated trespasser, the wheelbarrow and shovel were neither concealed nor highly dangerous. Thus, (B) is correct. (A) is incorrect because it would be irrelevant whether the landowner created the artificial condition if she were otherwise liable because she allowed the condition to remain on her land. (C) is incorrect because mere knowledge of the dangerous condition does not impose a duty to warn. (D) is incorrect because, as stated above, Shelley had no duty to warn of obvious artificial conditions.

### Answer to Question 54

- (A) Murray cannot obtain specific performance against Tom because the absence of a written memorandum signed by Tom and containing the essential terms of an agreement between Murray and Tom means that there is no enforceable contract. To obtain specific performance, there must be an enforceable contract between the parties. Pursuant to the Statute of Frauds, a contract for the sale of land is not enforceable unless it is evidenced by a writing signed by the party sought to be bound. In addition to this signature, the writing should contain a recital of consideration, the terms and conditions of the agreement, the identity of the party sought to be charged, and an identification of the contractual subject matter. Murray is attempting to obtain specific performance of a contract to purchase Tom's house. Thus, Murray must show the existence of a contract through a writing sufficient to satisfy the Statute of Frauds. The only writings mentioned in the facts are Murray's written offer to purchase the house and the real estate listing agreement between Tom and Fred. The latter reflects only an agreement between Tom and Fred as to the terms of Fred's services as a broker in connection with the sale of Tom's house. This in no way constitutes written evidence of an agreement between Tom and Murray. Murray's written offer was never signed by Tom and was, in fact, rejected by Tom in a manner consistent with its terms. Thus, this writing does not memorialize an agreement between Tom and Murray for the sale of Tom's house; no agreement was ever reached. Therefore, there is no enforceable contract that can be the subject of specific performance. (D) is incorrect because, as explained above, there is no memorandum signed by Tom that lists the essential terms of an agreement between Tom and Murray. In fact, there was never any such agreement, much less a writing reflecting its terms. (B) is incorrect because a purchaser of land is almost always deemed to have an inadequate remedy at law. Each parcel of land is always considered unique; *i.e.*, unlike any other that could be purchased with the same sum of money. Thus, if Murray did have a cause of action against Tom, he would not have an adequate remedy at law. (C) is incorrect because the facts do not indicate that Fred and Tom intended that Murray or any other third person benefit by their agreement. Application of the factors that courts use to determine whether a third party is an intended beneficiary

who can enforce a contract between the contracting parties or an incidental beneficiary who has no rights under the contract indicates that Murray is not an intended beneficiary. The agreement did not: (i) expressly designate a third party; (ii) indicate that performance was to be made directly to a third party; or (iii) state that a third party had any rights under the contract. Also, there is no relationship between Murray and either Tom or Fred from which it could be inferred that either Tom or Fred wished to make the agreement for Murray's benefit. Thus, Murray is not an intended beneficiary of the agreement between Tom and Fred and cannot recover on that agreement.

#### **Answer to Question 55**

- (B) A public nuisance exists when a property owner is using his property in such a manner that it creates an unreasonable risk to the public in general. The owner need not be violating a specific statute in order to be a public nuisance; hence, (D) is incorrect. Nor is it determinative that the owner has a permit to engage in the activity if the owner's use otherwise constitutes a public nuisance. (Albeit, in many cases it would be hard to show a public nuisance if the owner did have a permit to use his property in a certain manner. But the facts of this case show that Evan had not complied with the provisions of the permit.) Evan would be correct in arguing that it is not a nuisance *per se* in storing the flammable liquids on his property since this is not a residential neighborhood; however, (C) is not the best answer because it still could be shown that under this particular situation it was a nuisance. Nevertheless, it is generally the duty of the local district attorney to bring actions to enjoin public nuisances, and private citizens will generally have no standing to bring such suit unless the private citizen can show that he suffers some special injury in addition to that sustained by the general public. The facts in this case fail to show such special injury, so (B) would be Evan's best defense.

#### **Answer to Question 56**

- (B) Under the best evidence rule, in proving the terms of a writing, where the terms are material, the original writing must be produced. Secondary evidence of the writing, such as oral testimony regarding the writing's contents, is permitted only after it has been shown that the original is unavailable for some reason other than serious misconduct of the proponent. Here, the value of the house is of major importance, and the contents of the document are closely related to this central issue. Consequently, Nora, whose only knowledge of this significant litigated issue comes from having read the document, is precluded from testifying as to the contents of the document unless the unavailability of the writing is established. Destruction of the original without fault of the party offering the secondary evidence constitutes a satisfactory explanation for nonproduction of the original and justifies the admissibility of secondary evidence. Thus, (B) is a better answer than (C). (A) is incorrect because personal knowledge of the contents does not in and of itself justify admissibility of the testimony. (D) is incorrect because the appraisal document, personally prepared by Harry, constitutes an admission by a party-opponent; *i.e.*, a prior acknowledgment by a party of one of the relevant facts. Under the Federal Rules, such statements are nonhearsay.

#### **Answer to Question 57**

- (C) Joe's actions with respect to Egbert never rose to the level of attempt under either the traditional "proximity test" or the modern Model Penal Code test; here, there is no evidence that Egbert was even present. Thus, I. is incorrect, and so (A) is incorrect. Even though Joe thought Ira was Egbert, he intended to kill the person at whom he aimed (Ira). His actions with regard to Ira fulfill the test for attempt under every approach. Therefore, Joe could be convicted of the attempted murder of Ira, and II. is correct. Furthermore, Joe's intent to kill Ira is transferred to Gladys, making Joe guilty of murder. Thus, III. is correct. Therefore, choice (C) is correct, and (B) and (D) are incorrect.

## 232. MIXED SUBJECTS

### Answer to Question 58

- (B) Under Rule 801 of the Federal Rules, prior identification can be admissible and the sketch could be deemed a prior identification. However, to be admissible, the witness must be there to testify at trial and be subject to cross-examination. The witness in this case is unavailable; hence, this exception does not apply. (D) is therefore incorrect. (A) applies to documentary evidence and has no relevance to this question. (C) is likewise not applicable, because this exception applies only to information within the *personal knowledge* of the public employee. In this case the public employee gained the knowledge from the hearsay statement of an absent witness.

### Answer to Question 59

- (B) Prior consistent statements are admissible to rebut a charge that the witness is lying or exaggerating because of some motive; however, since the facts in this question do not indicate that such a charge has been made against Justin, the statement is no more than hearsay. Hence, (D) is wrong. (C) is wrong because an out-of-court statement made by a witness is hearsay without regard to who made the statement. (A) is wrong because all evidence given by a witness in his own defense should be self-serving. This may go to the weight of the evidence, but it has nothing to do with its admissibility.

### Answer to Question 60

- (D) Justin has taken the stand in his own defense, and therefore the prosecutor can attack his credibility as a witness. Under Federal Rule 609, evidence of conviction of a crime requiring proof of an act of dishonesty or false statement can always be used to attack a witness's character for truthfulness. (A) is incorrect because even if fraud were probative of the tendency to commit violence, evidence of other crimes is not admissible to prove that a person has a propensity to commit criminal acts. (C) is incorrect for the same reason. (B) is incorrect because no foundation is needed to show a prior conviction for impeachment purposes.

### Answer to Question 61

- (C) Conviction of the defendant in (A) would violate the constitutional proscription against ex post facto laws. (B) is an example of attempting, with criminal intent, to do an act which is not itself a crime. (D) is an example of a person prosecuted for guilty thoughts, which is unconstitutional. The defendant in (C) could be found guilty under either of two theories. The statute could be interpreted as a strict liability statute. Under that interpretation, the defendant would be guilty because he engaged in the prohibited behavior. Alternatively, the statute could be interpreted as requiring a mens rea. Under that interpretation, he could be guilty upon a determination that he intentionally put water in a container that had held chlorine bleach.

### Answer to Question 62

- (D) Action having the purpose and effect of altering the legal rights, duties, and relations of persons, including executive branch officials, must be subjected to the possibility of presidential veto. [Immigration & Naturalization Service v. Chadha (1983)] Although the President (or his predecessor) had the opportunity to veto the statute, the adoption of a joint resolution that shortens the time that the President may use the troops would have the purpose and effect of altering the rights and duties of the President, which accrue to him by virtue of his rather extensive military

powers, and would not be subject to a presidential veto. For this reason the statutory provision may be an unconstitutional legislative veto of executive action. It follows that (A) and (C) are therefore incorrect. (B) is incorrect because the President does not have *exclusive* power over matters relating to war. Such power is shared with Congress.

#### **Answer to Question 63**

- (A) Congress may delegate many of its powers to executive agencies, provided adequate standards are established to govern exercise of the delegated power. The power was properly delegated to the Secretary of Commerce because the statute “outlines” the “management efficiency standards” to be followed. (B) is incorrect because Congress has sole authority over foreign commerce; the authority is not shared with the executive branch. (C) is incorrect because the delegation is proper if adequate standards are established; as determined above, there are adequate standards here. (D) is incorrect because there is no executive impoundment here, merely a refusal to grant funds based upon standards established by Congress. Such standards are proper where, as here, Congress acts pursuant to its spending power and the standards are specified in advance.

#### **Answer to Question 64**

- (D) Norris paid a fair price for Goldacre and had no knowledge of Briggs’s claim to Goldacre at the time he purchased the property. He would thus qualify as a bona fide purchaser for value and, since he was the first to record, he would have priority over Briggs. (A) and (B) are incorrect because the recording act determines priority among purchasers of property while the Statute of Frauds deals only with the validity of an individual contract. (C) is incorrect because Strobe’s signing the contract, which contained the same terms and conditions as Briggs’s offer, constituted an acceptance, which became effective upon dispatch under the “mailbox rule” of contract law.

#### **Answer to Question 65**

- (C) Wes will prevail because Luke was a gratuitous assignee of the contract between Wes and Jane, and Jane had expressly reserved the right to stop the payments at any time, which she did by making a subsequent assignment of the right to Zack. (A) is wrong because Luke had rights under the contract that he could enforce against Wes until Jane revoked the assignment. (B) is wrong because the facts do not show a change in position in reliance upon Jane’s actions. (D) is wrong because Luke’s right to receive the funds was limited to the period in which Jane told Wes to send the funds.

#### **Answer to Question 66**

- (C) Jane had reserved the right to reassign the proceeds at any time, and had assigned them to Susan before she died. Zack’s initial interest in the proceeds was subject to Jane’s right to revoke by a subsequent assignment, which Zack had acknowledged. During the time Funco sold back the hotel and obligations to Wes, the proceeds were assigned to Susan; therefore, Zack’s rights were not vested. (A) and (B) are wrong because there was no vesting when Funco was an obligor. Zack was not a third-party beneficiary of the original agreement between Jane and Wes; he was a subsequent assignee of Jane’s rights. While he may have been a third-party beneficiary of the agreement between Wes and Funco, he did not assent to it or change his position in reliance on it; hence, his rights did not vest. (D) is wrong because the contract between Funco and Wes expressly required Funco to assume Wes’s obligations. Zack was an intended beneficiary of that agreement, but his rights did not vest before they were extinguished by the subsequent assignment.

## 234. MIXED SUBJECTS

### Answer to Question 67

- (A) The language in the deed from McWilliams to Stone creates an express easement with Leftacre as the servient estate and Rightacre as the dominant estate. As such, Sandberg has no right to obstruct O'Toole's use of the easement. (B) is incorrect because O'Toole has an express easement, not an easement by necessity. While it is true that, in the absence of an express easement, Stone may have had a claim of an easement by necessity, an easement by necessity will not be implied when an express easement is provided. (C) is incorrect because a change in conditions and/or circumstances will not terminate an express easement. (D) is incorrect because injunctive relief is possible where a property right is involved.

### Answer to Question 68

- (B) The grant was for use of a dirt path, not for a 24-foot-wide paved road, and a court could easily find this burden excessive. (A) is incorrect because the easement involved is an express easement, not an easement by necessity. (C) is an incorrect statement of law; the owner of a servient estate does not have the obligation to maintain an easement and cannot unilaterally control the nature of its improvement. (D) is incorrect because a surcharging of the easement does not terminate it; it merely gives the owner of the servient estate the right to stop the additional use.

### Answer to Question 69

- (C) The only plaintiff who would have standing is the Society. The Society has standing because the statute causes injury to the Society itself. Disclosure of membership would affect the ability of the Society to keep and obtain members in violation of the First Amendment. Thus, it has standing to sue. I. is wrong because taxpayers have no standing to challenge federal expenditures unless the taxpayer alleges that the challenged measure was enacted under Congress's taxing and spending powers and that it exceeds a specific constitutional limitation on those powers. Here, the taxpayer made no such allegations and probably could not show that the spending violated a specific constitutional limitation. Thus, (A) is incorrect. (B) is wrong because standing cannot be based on a claim to the public at large; the group must allege some specific injury to itself or its members. IV. is wrong because general financial inability to buy is not sufficient injury; the plaintiff must show that absent the zoning, there would be a substantial probability that he could buy a home. (D) is therefore incorrect.

### Answer to Question 70

- (B) Double jeopardy does not prohibit the imposition of cumulative sentences for two or more statutorily defined offenses specifically intended by the legislature to carry separate punishments, even though constituting the "same" crime under the *Blockburger* test (*i.e.*, each offense does not require proof of some additional fact that the other does not) when the punishments are imposed at a single trial. Absent a clear intention, it is presumed that multiple punishments are not intended for offenses constituting the same crime under *Blockburger*. Here, it is clear that Congress, in enacting SOCA, intended that certain offenses, such as interstate distribution of cocaine, be subject to separate punishments. (B) is the only alternative that expresses the view that Dalton may be sentenced under both statutes. Thus, it is the correct answer, and (A), (C), and (D) are incorrect.

### Answer to Question 71

- (C) Statements in a document affecting an interest in property are admissible, pursuant to Federal Rule 803(15), if they are relevant to the purpose of the document. Thus, (B) is incorrect. (A) is

incorrect because properly authenticated copies of recorded writings may be used in lieu of originals. [Fed. R. Evid. 902(4)] (D) is incorrect because the trust instrument cannot qualify as a recorded recollection; there is no witness testifying that he made or adopted the writing while the events were fresh in his mind and he has no present recollection.

#### **Answer to Question 72**

- (B) (B) is correct because the swearing out of a complaint that was proper at the time may not serve as a basis for a false imprisonment action despite the failure to cancel the complaint (although in some circumstances such swearing out may give rise to an action for malicious prosecution). Thus, (C) is incorrect. (A) is incorrect because the reasonableness of Hotel's belief that Parker stole services is irrelevant. Even if Hotel's belief was unreasonable, it does not establish the intent required for false imprisonment. (D) is wrong because the absence of an adequate number of cashiers is not an act confining one within fixed boundaries, as required for false imprisonment.

#### **Answer to Question 73**

- (C) It is a defense to false imprisonment that the police acted under a *valid* arrest warrant. The warrant was valid here, and that should serve as a complete defense. Mere statements by a defendant that he is innocent do not compel the police to follow the defendant's suggestions. It follows that (A) is incorrect. (B) is incorrect because the police acted under a valid warrant and are not charged with knowing whether Parker actually committed the crime with which he was charged. (D) is incorrect because the reasonableness of Hotel's actions will not affect the liability of the police. Even if Hotel did not have reasonable grounds for signing the complaint, the police will not be liable because they acted pursuant to a valid warrant.

#### **Answer to Question 74**

- (A) Congress has the power, under the Commerce Clause, to regulate any activity that, taken cumulatively, has substantial economic or commercial effect on interstate commerce. Although there are limits on the power of Congress to regulate commerce, in only a few cases has the Court invalidated a federal law as exceeding the scope of Congress's commerce power. Since Congress has concluded that the animal is important to the region's tourism industry, and given the comparative weakness of the other answers, (A) is the strongest argument. (B) is incorrect because the Necessary and Proper Clause must be linked with another constitutional power of Congress. Here it is presented by itself, not in connection with another power, and thus it is incorrect. (C) is incorrect because there is no federal police power. (D) is wrong. The facts of this question do not offer any facts suggesting that the animals are on federal lands. Thus, the power to regulate federal lands is irrelevant.

#### **Answer to Question 75**

- (A) Larceny is the taking and asportation of the personal property of another by trespass and with the intent to permanently deprive the person of his interest in the property. Here, the moving of the mower to the loading dock constituted the taking and carrying away. Since Manfred did not have express or implied permission to move merchandise in this way, it was trespassory. Clearly, he intended to permanently deprive Gardenshop of its interest in the mower. Thus, the larceny was complete when Manfred moved the mower to the loading dock, and (B) and (D) are therefore incorrect. (C) is incorrect because to be guilty of embezzlement, Manfred would have had to have been in possession of the mower when he converted it. Since Manfred did not have especially

## 236. MIXED SUBJECTS

broad power over the mower and it was not given to him by a third party, he merely had custody, not possession, of the mower.

### Answer to Question 76

- (C) Norman must accept Kurt's performance. A contract for paving would not be regarded generally as involving a personal subject matter, thus Zelda could delegate the duties to another competent contractor without Norman's consent and Norman must accept performance. Thus, (A) and (B) are wrong. (D) is a misstatement of law; Zelda need not supervise.

### Answer to Question 77

- (B) The delegator remains personally liable for performance of the agreement even though the delegatee is performing the contract. Hence, (A) is incorrect. (C) is incorrect because although Norman and Kurt are not in privity of contract, Norman is a third-party beneficiary of the agreement between Kurt and Zelda. When there is a delegation of duties, both the delegator and the delegatee are liable for performance of the agreement. (D) is wrong because if the services to be performed are not personal, the obligee has no choice but to accept performance, and it would be unfair that if by accepting performance, the obligee waives his rights as against the delegator.

### Answer to Question 78

- (B) The plat is only intended to be a representation of the actual survey as made upon the land itself. The plat is in the nature of a certified copy of an instrument that will be controlled by the original. Where a survey as made and marked upon the ground conflicts with the plat, the survey prevails. Thus, Andrew had a right to rely on the surveyor's stakes as establishing the boundaries of Lot 20. Thus, (B) is correct, and (C) is incorrect. (A) is incorrect because priority in purchase would not entitle Andrew to take land that was not part of Lot 20. (D) is incorrect because, while it is true that the adverse possession period has not run, Andrew need not rely on adverse possession to prevail.

### Answer to Question 79

- (C) The record on appeal must show that a specific objection was made and that the challenged evidence was inadmissible on that ground, before the trial court's action can be considered error. (A) is wrong because the defense counsel's objection did not state specific grounds for the objection; counsel merely said, "objection." (B) is wrong; the court is never required to state the reason for overruling an objection. (D) makes no sense at all. The objection was overruled and the evidence was received. "Offers of proof" are sometimes made when evidence is held inadmissible.

### Answer to Question 80

- (C) Battery is a general intent crime that can be established with a mental state of recklessness. In addition, all crimes require a voluntary act on the part of the actor. The epileptic seizure would negate both the voluntary act and the culpable mental state. In (A), the defendant would probably be guilty of battery. Intoxication is not a defense to a general intent crime, and the defendant's behavior would probably be classified as reckless. In (B), the defendant *might* be found guilty of battery. If Davis reasonably believed he was under attack, he would be justified in punching Verne; it would be a jury question as to whether his belief was reasonable. While under the facts of (B) it is possible that Davis would be not guilty, it is not as good an answer as (C), where it is

clear there would be no criminal liability. In (D), the defendant would be guilty of battery. The facts do not justify a self-defense claim.

#### **Answer to Question 81**

- (C) An attempt requires both a specific intent to commit the crime and an overt act in furtherance of that intent. Since Dag intended to enter Vance's property and was apprehended just before doing so, both requirements for attempt can be established. (A) is incorrect because Dag is not being charged with the attempt to commit violence, but with the attempt to enter onto the property. (B) is also wrong because clearly it is Dag's actions that are prohibited and not just the state of his mind. (D) is a poor answer because Dag cannot be convicted unless it is proved that he committed the offense with which he has been charged, and this answer does not require that the elements of the crime be proved.

#### **Answer to Question 82**

- (A) As a direct tax upon the federal government, the sales tax is invalid unless Congress has consented to such a tax. (B) is wrong because the tax is on all autos purchased in the state, regardless of their source, and thus, there is no burden on interstate commerce. (C) is wrong because direct state taxation of the federal government is invalid whether or not discriminatory, absent the consent of Congress. (D) is wrong because, as stated, unless Congress consents, a direct tax on the federal government is invalid. Thus, the fact that there is a rational basis and that the tax is not a penalty does not matter: the question is one of the *power* to tax, not whether the tax itself is appropriate.

#### **Answer to Question 83**

- (A) In a partial condemnation case, the landlord-tenant relationship continues, as does the tenant's obligation to pay the entire rent for the remaining lease term. (B) is wrong because, while the tenant generally is obligated to return the premises in the same condition as when received, that obligation would not be considered breached by the actions of a third party such as the government. (C) is wrong because the covenant of quiet enjoyment can be breached only by actions of the landlord and not those of a third party, such as the government. (D) is wrong because the law of landlord and tenant traditionally refuses to recognize frustration of purpose as grounds for termination of a lease.

#### **Answer to Question 84**

- (D) Tyrone and Dennison are joint tortfeasors who are each jointly and severally liable for Pryor's injuries. As such, either may be sued for the entire amount of damages suffered. (C) is therefore incorrect. However, if Dennison is found to be liable to Pryor, he may seek contribution from Tyrone to force Tyrone to pay a portion of the recovery. He would have no right to indemnity because he is actively negligent in causing Pryor's injuries. (B) is therefore incorrect. (A) is incorrect because Dennison was a substantial factor in causing Pryor's injuries.

#### **Answer to Question 85**

- (A) The Constitution prohibits the impairment of contractual obligations by a state except in certain narrow circumstances. The sort of "emergency" normally required for such state action is arguably present here, given the loss in tax revenues. But it is unlikely that the state would prevail since the termination of annual cost-of-living adjustments is permanent, and appears to be the

## 238. MIXED SUBJECTS

sort of self-interest driven choice to reduce the state's contractual burdens that the Court has found suspect in comparable cases. (B) is wrong because federal courts do not have the jurisdiction to decide questions regarding an individual state's own constitution. (C) is wrong because the Eleventh Amendment does not bar suits against state officials unless retroactive relief is sought. (D) is wrong because although a state may amend its own statutes, it cannot do so in such a manner as to violate constitutional prohibitions.

### Answer to Question 86

- (C) The general rule is that a court will not enforce a contract if its subject matter or consideration is illegal; the court will leave the parties as it finds them. Here, the subject matter of the contract, placing gambling bets, is illegal in the state. Thus, (A) is wrong because Steve's performance is irrelevant. (B) is wrong because the court will refuse to help either party to an illegal contract, even where the other party has gained unfairly. (D) is wrong because the court will not put the parties back into the position they were in prior to entering into the contract, but rather will leave them where they stand.

### Answer to Question 87

- (A) When Doris took the coat, knowing it was not her own, she committed a trespassory taking. However, she was not then guilty of larceny because she did not have an intent to "steal" the coat (*i.e.*, to permanently deprive the owner of the coat). However, under the continuing trespass doctrine, her possession continued to be trespassory, and when she later formed the intent to steal, her actions became larceny. Therefore, (D) is incorrect. Doris is not guilty of common law burglary. Her entry was effected shortly after lunchtime; *i.e.*, during the day, and burglary requires a nighttime entry. Also, Doris did not intend to commit a felony when she entered the house, since she believed the coat was her own. Thus, (B) and (C) are also incorrect.

### Answer to Question 88

- (C) Paula was a trespasser in Otto's cabin because she entered the cabin without permission or privilege. A landowner generally owes no duty to an undiscovered trespasser. However, if a landowner discovers or should anticipate the presence of a trespasser, he must exercise ordinary care to warn the trespasser of or to make safe concealed, unsafe, artificial conditions known to the landowner that involve a risk of death or serious bodily harm. Here, it is true that Otto owed no duty to Paula. However, had he known of or had reason to anticipate the presence of someone in the cabin, he would have owed a duty to warn of or to make safe the fireplace. Thus, (C) is a better answer than (D). (A) is wrong because Otto's knowledge of the defect is important only if he owed a duty to Paula, which he did not. (B) is wrong because, as stated, he had no duty to warn Paula because he did not know of her presence.

### Answer to Question 89

- (D) The reasonableness of Patty's apprehension of immediate harmful or offensive contact is determined by the reasonable person standard. Thus, although it may be a close question here because of Darryl's appearance and the authentic appearance of the gun, the fact that four other homeowners had not been frightened by Darryl's routine indicates that a reasonable person would have recognized that this was just a youngster engaging in traditional Halloween activity. Since all of the other choices are clearly wrong, (D) is the best option. (B) is wrong because if Patty's apprehension of immediate harm was unreasonable, there is no cause of action for assault. Furthermore, Darryl did not have the requisite intent for assault. While he may have intended to momentarily

startle the person answering the door, he did not intend to cause apprehension of immediate harmful or offensive contact. (A) is wrong because there is no cause of action for intentional infliction of emotional distress; dressing up as a bandit and carrying a toy gun while trick or treating is not extreme and outrageous conduct so as to transcend all bounds of decency. (C) is wrong because minors may be liable for their intentional torts.

#### **Answer to Question 90**

- (C) Grant's interest would be void under the Rule Against Perpetuities since his interest could (and most likely would) vest more than 21 years after a life in being. Hence, the instrument would be read as if the executory interest to Grant did not exist. Clara's interest is a fee simple determinable; thus, the grantor, Dawn, retains a possibility of reverter. (A) is therefore incorrect. (B) is incorrect because a possibility of reverter rather than a reversion arises upon a conveyance of a fee simple determinable. (D) is incorrect because the estate created was a fee simple determinable, not a fee simple subject to a condition subsequent. Moreover, rights of entry must be expressly raised in the conveyance.

#### **Answer to Question 91**

- (B) Since Congress's power to regulate interstate commerce is plenary, Congress has the right to prohibit completely the transportation of "harmful" substances in the channels of commerce. Congress could also otherwise regulate the manufacture and use of harmful drugs as part of its regulation of commerce. (A) is wrong because this Act has nothing to do with Congress's right to expend federal tax revenues, and the general welfare power has to do with Congress's spending power. (C) is incorrect because the constitutional right of privacy does not include the right to ingest harmful drugs. (D) is incorrect because this Act is a restriction on property use that is considered harmful to the public health and welfare; consequently, it is considered regulation and not a taking within the meaning of the Fifth Amendment, and no compensation would be required.

#### **Answer to Question 92**

- (B) A tax, even though enacted for a regulatory rather than a revenue-raising purpose, can be upheld as a "necessary and proper" exercise of Congress's power to tax under Article I, Section 8, Clause 1. This will be especially true if the revenues derived from the measure are used to cover the expenses associated with the federal regulatory scheme. Since the question does not involve the attempted exercise of a state's sovereignty, there is no issue of the Supremacy Clause, and (A) is wrong. (C) is incorrect because Congress has broad power to regulate commerce, and the sale of the drug could probably be said to have a substantial economic effect on interstate commerce even if it was not actually being sold in interstate commerce. (D) is wrong because the states do not have the exclusive right to tax within their boundaries.

#### **Answer to Question 93**

- (A) Leading questions are allowed on the direct examination of a "hostile" witness. There is no rule that allows leading questions on the direct examination of a "disinterested" witness. A leading question is normally permitted on cross-examination whether the witness is a lay person or an expert. (C) is, therefore, wrong. (B) is wrong because leading questions may be asked of very young or very old witnesses at the discretion of the court. (D) is wrong because a leading question may be asked of any witness on preliminary matters not in dispute.

## 240. MIXED SUBJECTS

### Answer to Question 94

- (C) Margo assigned part of her claim against Oscar to Percy, and, as a general rule, the assignee is subject to the same defenses that the obligor has against the assignor. If Margo, the assignor, had not done the work properly, Oscar would have a defense against her, hence he can use this defense against Percy. (A) is immaterial, because this is not a third-party beneficiary agreement, but an assignment of the right to receive money. Thus, (B) must also be ruled out. (D) is wrong because an assignment of a future claim is not inoperable.

### Answer to Question 95

- (C) The only value his tickets will have to anyone is if they are used for admission to the All-Star game. Consequently, since Dennis did not intend to return the tickets to Tom until after the game, Dennis intended to permanently deprive Tom of the value of the tickets and most likely would be found guilty of larceny. (A) is not a correct answer because, although the intent to return the tickets may be a valid defense in some situations, in this situation Tom would have been permanently deprived of their value when they were returned, and therefore Dennis's intention would not be a valid defense. (B) is a tempting answer, but it is not the most likely. There are no facts that indicate the relative value of the tickets to the money that Dennis claims Tom owes him. (D) is not the most likely answer, because the intent to return may be a valid defense in some instances.

### Answer to Question 96

- (D) Attempted murder is a specific intent crime. Although it is true that a defendant can be found guilty of murder when his actions demonstrate a very high degree of recklessness, if the charge is *attempted* murder, it must be shown that the defendant committed an act with the *intention* of killing someone. If the jury believed that Seth had no intention of killing either Larsen or Carver, he cannot be convicted of attempted murder of either. Thus, (D) is correct, and (A), (B), and (C) are wrong.

### Answer to Question 97

- (D) Although the language in Maude's will uses the word "jointly," the grant also states "as tenants in common." Since no right of survivorship is mentioned, the court will most likely find that this language establishes a tenancy in common, rather than a joint tenancy. Lisa can pass her interest in the property by will, and thus Estelle now holds the property as a tenant in common with Louis. (A) is wrong; Louis's management of the use of the farm does not entitle him to an exclusive interest in it. (B) is wrong because the interest created by Maude's will was a tenancy in common, not a joint tenancy. (C) is wrong because the unities only apply to a joint tenancy.

### Answer to Question 98

- (C) Louis had the right to possess and enjoy the whole of the farm subject to the equal right of Lisa to do the same. The fact that Lisa chose not to exercise her right does not make Louis's possession wrongful. Therefore, an accounting is not warranted here. (A) is wrong because, as stated, Louis may enjoy the whole of the property. (B) is wrong; there is nothing in the facts to indicate an ouster. (D) is wrong because Louis cannot take by adverse possession unless there has been an ouster; his possession was not hostile to Lisa's interest.

**Answer to Question 99**

- (A) This is a question requiring precise knowledge of the U.C.C. The problem is governed by U.C.C. sections 2-615 and 2-616. A crop failure resulting from an unexpected cause excuses a farmer's obligation to deliver the full amount as long as he makes a fair and reasonable allocation among his buyers. George has done this by allocating pro rata between Walter and Vinnie. Nevertheless, under U.C.C. section 2-616 the buyer may either accept the proposed modification or terminate the contract. Thus, (B) is wrong. (C) is wrong because even though alternative sources are available, George is not obligated to use them because the contract was tied to a designated parcel of land—"my [George's] ranch." (D) is wrong because it is contrary to the provision of U.C.C. section 2-615, which permits the farmer to make an allocation.

**Answer to Question 100**

- (D) Parents are not vicariously liable at common law for the intentional torts of their children (although many states have imposed limited liability for certain conduct by statute). However, a parent (or anyone else having care or custody of a child) can be held liable for injuries caused by the child where the parent herself was negligent. For example, the parent may be liable for failing to exercise reasonable care to protect against the child's known dangerous tendencies. Here, pursuant to statute, Sister Mary stood in loco parentis to Dieter. Thus, Sister Mary could be held liable if she knew that Dieter had dangerous propensities, and failed to take appropriate measures (*e.g.*, keeping a closer watch on Dieter). Sister Mary then would be liable for her own negligence, not vicariously liable for Dieter's intentional tort. (D) is the only alternative that mentions the important factor of Sister Mary's knowledge regarding Dieter's dangerous propensities. (A) is incorrect because it ignores the fact that Sister Mary's liability depends upon her knowledge of any dangerous propensities on the part of Dieter. (B) is incorrect because neither raising children generally nor operating a home for developmentally disabled children are abnormally dangerous activities giving rise to strict liability. (C) is incorrect because it assumes that Sister Mary's liability, if any, will be based on vicarious liability.

**Answer to Question 101**

- (D) Clearly this statute burdens interstate commerce by diverting purchases which would otherwise be made from interstate businesses to intrastate suppliers and by imposing a tax on interstate suppliers. Both requirements have the purpose and effect of imposing a direct burden on interstate commerce and, especially in the case of the tax, do so in a facially discriminatory manner. As such, they would be subjected to strict scrutiny, and would fail. (D) is therefore the best answer. (A) is incorrect because the measures involve economic and social matters and would, under the usual due process analysis, be subjected to rational basis scrutiny, which they would survive. (B) is wrong because there is a rational basis for the classification and no suspect classification or fundamental right is involved. (C) is wrong because, while a corporation as a legal entity may be considered a person for some purposes, corporations are not citizens for the purposes of the Article IV Privileges and Immunities Clause.

**Answer to Question 102**

- (C) Daniel's statement is an admission—an out-of-court statement by a party being offered into evidence by an opposing party. [Fed. R. Evid. 801(d)(2)] Since it is not considered hearsay evidence and is obviously relevant to the underlying question of who committed the battery against Paul, it would be admissible. (A) is incorrect because the "statement against interest" exception to the hearsay rule provides that a declarant's out-of-court statement is admissible *if it*

## 242. MIXED SUBJECTS

*is against the declarant's interest when made.* [Fed. R. Evid. 804(b)(3)] Daniel's out-of-court statement ("I haven't been out of the country in five years") was not clearly against his interest when it was made. It is vastly different, for example, than if Daniel had confided to Walter that he had beaten Paul; that would be a statement against interest at the time the statement was made. That Daniel's actual statement to Walter was ultimately used against Daniel does not qualify it as a statement against interest. Also, and equally important, (A) is incorrect because the "statement against interest" exception to the hearsay rule comes into play only *if the declarant is unavailable to testify* (e.g., because the declarant is dead or cannot be found). [Fed. R. Evid. 804(a)] The question makes clear that Daniel not only is available to testify, but he actually does testify. Hence, the "unavailability" requirement of the "statement against interest" exception has not been satisfied. (B) is a plausible answer, but not as good as (C) because it contains several ambiguities. The answer is ambiguous as to the purpose for which Daniel's prior inconsistent statement is offered into evidence. If offered for the purpose of proving the truth of the matter asserted in the statement, it would be inadmissible hearsay evidence; it would not meet the specific requirements of Rule 801(d)(1)(A) to qualify as nonhearsay evidence: Daniel's prior inconsistent statement was not made *under oath at another proceeding*. If offered for the purpose of impeaching Daniel's testimony, however, the prior inconsistent statement might be admissible. Proving the prior inconsistent statement of a witness is a well-accepted method for impeaching the testimony of that witness. In this case, though, *extrinsic evidence* (the testimony of another witness, Walter) is being offered to prove Daniel's prior inconsistent statement. Extrinsic evidence can be used to show a prior inconsistent statement of a witness, for purposes of impeachment, only if the inconsistency goes to a *material* issue in the case. It would, at best, be a judgment call as to whether Daniel's not having left the country in five years is a material issue in Paul's suit against Daniel for battery. Thus, (C) is a better answer than (B). (D) is incorrect because, since Daniel's statement is an admission, its admissibility is not dependent on Daniel's having the opportunity to comment on it. Moreover, even if Daniel's statement were analyzed solely from the standpoint of being a prior inconsistent statement offered to impeach, (D) would be incorrect. The Federal Rules have abolished the common law requirement that a witness be given an opportunity to explain a prior inconsistent statement *before* extrinsic evidence of the statement can be admitted; the opportunity may be provided after introduction of the statement.

### Answer to Question 103

- (D) (A) is not the most likely answer, because the facts indicate that Defendant believed himself to be in danger. Even if it is found that his belief was unreasonable, at most he would be guilty of voluntary manslaughter. (B) is not the most likely answer either, because there is no showing that Defendant intended to kill anyone, or that when he fired the pistol it was likely that he would kill anyone. The fact that the bullet which killed Al ricocheted appears to make this killing a result of, at most, gross negligence. Thus, under this fact situation, Defendant most likely would be guilty of involuntary manslaughter. The facts in (C) do not indicate that Defendant would be charged with a crime at all since he did not intend to shoot at George and had no real reason to believe that George would be endangered by his conduct. At most, Defendant could be charged with negligent homicide if he were charged with a crime at all. In (D), Defendant would probably be charged with murder because, although it is arguable that the death of the customer was "accidental," it occurred during the commission of a dangerous felony, and under common law, would be subject to the felony murder rule.

### Answer to Question 104

- (B) But for Drago's negligent act of colliding with Pitts's car, Pitts would not have been injured. Drago is thus a cause in fact of Pitts's injuries. (A) is incorrect because Stratton's negligence

would not qualify as an intervening act since it occurred earlier in time than Drago's. (C) is incorrect because the failure of the latch is not the type of intervening force that would relieve Drago from liability. (D) is incorrect because the "but for" test is used to establish liability in concurrent cause cases, not limit another's liability.

#### **Answer to Question 105**

- (B) Pitts's claim against Stratton would be based on strict liability in tort. As such, she would only need to establish that the car was dangerously defective in order to recover. (A) is incorrect because Pitts's failure to discover the defect would be, at best, contributory negligence, which is not a defense to strict liability in tort in jurisdictions retaining traditional contributory negligence rules. (C) is incorrect because Drago's negligence would qualify as a foreseeable intervening force which would not relieve Stratton from liability. (D) is incorrect because Stratton is strictly liable even if it did not know or have reason to know of the defect.

#### **Answer to Question 106**

- (C) Standing requires an allegation of such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. Abstract injury is not enough; the plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct. The injury or threat of injury must be real and immediate, not conjectural or hypothetical. Here, the potential plaintiffs in (A) and (B) are merely thinking about selling or buying used cars in State B. Thus, any injury or threat of injury to them is strictly hypothetical and abstract. Consequently, the potential plaintiffs in (A) and (B) are unlikely to have standing. Likewise, the out-of-state manufacturer in (D), who *might* be required to indemnify its dealers in State B, is at this point able to assert merely a hypothetical injury, not one that is real and immediate. On the other hand, the potential plaintiff in (C), who already has a contract to sell used cars to a State B dealer, is immediately in danger of sustaining a direct economic injury as a result of the statute—*i.e.*, costs associated with testing each car and bringing up to standard those cars found to be deficient.

#### **Answer to Question 107**

- (D) A private nuisance action requires a showing that defendant's interference with the use and enjoyment of plaintiff's property was unreasonable. To be characterized as unreasonable, the severity of the inflicted injury must outweigh the utility of defendant's conduct. Here, the fact that the pesticide is the only means of preventing destruction of the state's principal agricultural product would be the most persuasive additional fact for Growit's defense. (A) is incorrect because coming to the nuisance is generally not a good defense to a nuisance action. (B) and (C) are incorrect even though they state factors which may be considered by a court in determining whether an injunction should be issued. The main question is whether the severity of the injury outweighs the utility of defendant's conduct, and these two factors do not speak as well to this point as (D).

#### **Answer to Question 108**

- (C) Walter's testimony of three instances of reckless driving by Doug would be considered character evidence. Character evidence is not admissible in a civil case if offered to show that a party probably acted in conformity with that character. Character evidence is admissible in a civil case when the character of a person is an issue in the case. Peter is suing Olivia on a negligent entrustment theory, and thus Doug's character as a safe driver is in issue in the case against Olivia, but

## 244. MIXED SUBJECTS

not in the case against Doug himself. (A) is wrong; as stated, Doug's character is in issue in determining whether Olivia was negligent. (B) is wrong because specific instances of conduct may be used to prove character when character is an issue in the case. [Fed. R. Evid. 405(B)] (D) is wrong because this is not a criminal case.

### Answer to Question 109

- (D) Peter's objection should be overruled. Harry's testimony is a classic example of evidence regarding habit, and Olivia's habit is relevant to the issue of negligent entrustment. (A) is wrong because neither the Federal Rules nor the prevailing common law requires the corroboration of habit evidence. (B) and (C) are wrong because the testimony is evidence of habit, not character.

### Answer to Question 110

- (B) Prevention of performance by an irresistible, superhuman cause is an excuse for nonperformance of a contract, unless the parties stipulate to the contrary. The destruction of the lot by the forces of nature rendered performance impossible, so Builder need not perform. (A) is wrong because destruction of the property does not make the contract void; it merely discharges Builder. (C) is a misstatement of law. (D) is wrong because there was no mutual mistake.

### Answer to Question 111

- (D) The general rule is that a contractor is responsible for destruction of the premises under construction prior to completion. Once the residence is completed, risk of loss shifts to the owner. Builder must perform the original contract without compensation for the work that was destroyed by the storm. Thus, (D) is correct and (C) is wrong. (A) is wrong because the subject matter was not destroyed; and even if it were, the contract would not be void. (B) is wrong because performance is not impossible; he can rebuild the residence.

### Answer to Question 112

- (C) Modern courts recognize that impracticability due to excessive and unreasonable difficulty or expense is a defense to breach of contract for nonperformance. Since the cost to Builder to perform under the original contract would exceed more than double what he would be paid, under the modern view, he would be excused from performance by commercial impracticability. Unlike destruction of the building itself before completion, which will not discharge a contractor's duty, the erosion of the lot, which destroys the means of performing the contract, will generally not be one of the risks that a contractor will be deemed to have assumed. Thus, (D) is wrong. (A) is wrong because Builder's bankruptcy is irrelevant for this purpose. (B) is wrong because there is no mutual mistake here.

### Answer to Question 113

- (C) Performance is excused where prevented by operation of law, despite any stipulation to the contrary. Because governmental interference made performance of the contract as contemplated illegal, Builder is excused from performance, even though some performance is possible. Thus, (C) is correct, and (D) is incorrect. (A) is incorrect because there was no mutual mistake when the contract was formed. (B) is wrong because Owner did not breach the contract.

### Answer to Question 114

- (C) On the happening of the prohibited event (using Blackacre for other than residential purposes), Brian's fee simple determinable automatically came to an end, and Owner was entitled to present

possession. Not having claimed possession within the applicable seven-year period, and with Brian's possession being open, notorious, continuous, and adverse, any action by Owner or his heirs is now barred by adverse possession. Thus, (A) and (B) are incorrect. (D) is incorrect because a possibility of reverter becomes possessory automatically upon termination of the prior determinable estate. Unlike a right of entry, a grantor does not have to assert a possibility of reverter in order for a cause of action to arise.

#### **Answer to Question 115**

- (B) Under the facts of this case, to support a finding of murder, the trial court would have to find that Bob acted either intentionally or with malice aforethought. The facts clearly indicate that Bob did not know of the car, so it cannot be said that he shot at it intentionally, and therefore (A) is not correct. "Malice aforethought" has several definitions, one of which is that the defendant is acting in a "wanton" state of mind. There is little question that shooting a rifle through a front door can be considered "wanton." Thus, the question is whether Bob's intoxication was sufficient to negate this state of mind. If a defendant's lack of awareness results from *voluntary intoxication*, his conduct will nevertheless be deemed wanton. (C) is not a correct analysis of the issue, because his intentional act was firing the rifle, not shooting at the car. (D) is not the best answer, because although there is the possibility that Bob might have been able to show only gross negligence, there is sufficient evidence to support a finding of malice aforethought and murder.

#### **Answer to Question 116**

- (B) This situation presents a possible violation of the Equal Protection Clause. A state may not favor established residents over new residents. To do so in an area that affects a person's ability to engage in his livelihood impedes migration from state to state. Interstate travel is a fundamental right, and a classification that burdens it would trigger a strict scrutiny analysis. In any case, the classification would be subjected to something more than the mere rationality test. (A) is incorrect because this is not an area reserved to the states, and even if it were, the United States Constitution would take precedence over state law. (C) is wrong because the Fifth Amendment applies only to federal, not state, government action. (D) is wrong because the Privileges and Immunities Clause does not apply to aliens.

#### **Answer to Question 117**

- (C) The statutes violate the Privileges and Immunities Clause of Article IV, which prohibits discrimination against nonresidents with respect to essential activities (*e.g.*, pursuing a livelihood) unless (i) the discrimination is closely related to a substantial state purpose, *and* (ii) less restrictive means are not available. Here, other controls could be placed on fishing without discriminating against out-of-state fishermen. (A) is wrong because, even though Congress has not acted in this area, the statutes would still be unconstitutional in light of the negative implications of the "dormant" Commerce Clause. Congressional silence is, therefore, irrelevant. (B) states a due process test which, even if applicable, would not preclude a finding of unconstitutionality on other grounds. (D) is wrong because the activity here does not involve foreign commerce—this is a dispute between one state and a citizen of another state.

#### **Answer to Question 118**

- (A) The grant is valid because Oliver Jr. was a life in being when the interest was created. (B) is incorrect because a reversionary interest is an interest remaining in the grantor. (D) is incorrect

## 246. MIXED SUBJECTS

because a possibility of reverter is the interest left in the grantor after a conveyance of a fee simple determinable. Here, Oliver Sr. did not create such an estate. (C) is obviously incorrect, since the language of the deed clearly shows that Oliver Sr. was not giving Melinda the complete interest in this property; she received a fee simple subject to divestment by Oliver Jr.'s executory interest.

### Answer to Question 119

- (D) In a criminal case, other crimes and wrongs of the defendant may be admissible even though they are not charged, but they are not automatically admissible. There are two basic ideas: other crimes or wrongs are not admissible to show that the defendant is a bad person, nor are they admissible to show the defendant is a person of the type likely to commit this crime. Other crimes or wrongs may be admissible if they are relevant to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, unless the judge determines that the probative value is substantially outweighed by prejudice. (A) and (B) are therefore wrong. (C) is wrong because extrinsic evidence of specific crimes is not admissible to rebut evidence of good character. While (D) calls for a judgment on the part of the trial judge and could be debated, it is the best answer because (A), (B), and (C) are incorrect statements of the law.

### Answer to Question 120

- (C) (B) is wrong. Under Federal Rule 801, prior identification can be admissible. The description is in the nature of prior testimony or prior identification. To be admissible, however, the declarant must testify at the trial and be subject to cross-examination. Since the night watchman died, this requirement cannot be satisfied. On these facts, there are no exceptions to the hearsay rule that would make the description admissible. (A) is wrong because before a document can be admitted as a past recollection recorded, the person whose statement appears in the document must be on the witness stand. (D) would have no bearing on the admissibility of the description.

### Answer to Question 121

- (B) Since the question involves a crime of dishonesty, and the conviction is less than 10 years old, the question is proper on cross-examination because it goes to Fred's credibility. Evidence is not admissible to show general bad character or propensity to commit crimes; (A) is therefore wrong. (C) is wrong because this crime has plenty of probative value on the issue of credibility and because most courts hold that impeachment with a crime requiring proof or admission of an act of dishonesty or false statement cannot be excluded as too prejudicial. (D) is wrong because similarity to the crime charged is not required by the federal rules.

### Answer to Question 122

- (D) The prosecutor is required by the Due Process Clause to prove each and every element of a crime beyond a reasonable doubt. One of the elements of larceny is an intent to permanently deprive a victim of his or her property, and the instructions in this case put the burden of proof on Dennis to show that there was no such intent. This relieves the prosecution of its burden because it implies that there is a presumption that Dennis intended to permanently deprive her of her jewels. (A) is wrong. The jury does have the power to ignore Dennis's testimony, but the conviction will be reversed because of the unconstitutional instruction on burden of proof. (B) is wrong. Dennis is not required to rebut the state's evidence; the state must prove each element beyond a reasonable doubt. (C) is not the best answer. While it is true that in some jurisdictions the judge cannot

comment on the evidence in a criminal case, that prohibition would not be violated by an appropriate instruction on burden of proof.

### **Answer to Question 123**

- (A) This question raises the issue of whether an employee's out-of-court statement ("The accident was my fault; I wasn't paying any attention") will be attributed to the employer, and thus considered an admission when the employer is a party. The answer is yes, provided the statement was made *while the person was employed by the employer* (not before or after the period of employment) *and* provided the statement *related to the employment*. [Fed. R. Evid. 801(d)(2)(D)] (A) is correct. Wilber's statement was made while he was employed by Ace Meat Packing Co., and it related to his employment in that it pertained to an accident that occurred when he was driving an Ace truck, presumably in the course of employment. Conversely, (C) is incorrect. That Wilber is no longer employed by Ace does not bear on the admissibility of his statement; what counts is that he was employed by Ace at the time he made the statement. (D) is also incorrect. That Ace may not have authorized Wilber to make the statement does not preclude it from being admissible; what counts is that the statement was made by an employee and related to his employment. Although one basis for attributing an employee's statement to the employer is the employer's authorization for the employee to speak on its behalf [Fed. R. Evid. 801(d)(2)(C)], that is not the only basis for treating the employee's statement in such a manner. (B) is incorrect because there is little reason to conclude that Wilber's statement was an "excited utterance" within the meaning of that hearsay exception. [Fed. R. Evid. 803(2)] The question does not indicate that Wilber spoke in an excited manner. The words in the statement itself do not suggest that the statement was made while Wilber was agitated. That Wilber spoke shortly after the accident would not alone be sufficient to make his statement an "excited utterance."

### **Answer to Question 124**

- (A) Barry had exclusive, continuous possession of the three-foot strip for the requisite statutory period. This possession was open and notorious; *i.e.*, it was possession as an owner would make of the land, and it put the true owner and the community on notice of the fact of possession. This possession was also hostile and under claim of right. Under the majority view, Barry's mistake as to the ownership of the three-foot strip is not determinative. Barry has held under claim of right because his actions appear to the community to be a claim of ownership and he is not holding with permission of the owner. Thus, (D) is incorrect. (C) is incorrect because the open and notorious nature of Barry's possession was sufficient to put the true owner on notice that a possession adverse to the owner's title had been taken. (B) is simply an incorrect statement of the law; there is no such presumption.

### **Answer to Question 125**

- (A) The facts state that Carter swung the hammer at John "intending to frighten" him. Thus, Carter did an act with the intent of causing the apprehension of immediate harmful or offensive contact, *i.e.*, an "assault." Because John was actually hit by the hammer head, the trial court would utilize the *transferred intent doctrine* to supply the necessary intent for battery. It makes no difference that Carter may not have known that the hammer was defective, because he set in motion the force that injured John; hence, (C) is an improper answer. (B) and (D) are not correct answers because they both go to the issue of a defense, and a person is not privileged to use deadly force against another no matter how provoking the other's mere statements may have been. Clearly, being hit with a hammer would be considered deadly force.

## 248. MIXED SUBJECTS

### Answer to Question 126

- (D) *The Daily Bleat's* best defense is that Dr. Wally is dead. Only living persons can be defamed; defamation of a deceased person is not an actionable tort. Thus, because Dr. Wally is dead, *The Daily Bleat* can obtain dismissal of the defamation action without having to establish any defamation defenses. Therefore, (D) is correct. (A) is not as good a defense as (D) because, in order to use the defense of absence of malice, the newspaper would have to establish that Dr. Wally was a public figure, which would be more difficult than showing that the doctor is dead. Moreover, it is not conclusive from the facts that Dr. Wally is a public figure as defined by the *Gertz* case (someone of pervasive fame or who is involved in a particular public controversy), since the facts merely state that he was prominent in the community. (B) is incorrect because a retraction, while it may show lack of actual malice in mitigation of damages, would not necessarily eliminate all of the harm to Dr. Wally's reputation. The fact that the retraction ran the next day on the front page gives the newspaper a better case, but it is not as good a defense as the fact that Wally is dead. (C) is incorrect because the fact that Snoops got his information from a secretary at the Medical School does not preclude liability for defamation. At most, that fact may be asserted to disprove malice if Dr. Wally was a public figure or negligence if the doctor's death was a matter of public concern. However, even assuming that one of these standards applies, Snoops may still be at fault for not having obtained a more authoritative statement from someone at the Medical School.

### Answer to Question 127

- (A) Zelda did not promise to do anything she was not otherwise obligated to do in bargained-for exchange for Christine's promise, so no consideration supported the latter's promise. If the agreement were otherwise enforceable, none of the other facts offered by the answers would prevent it from being carried out. (B) is incorrect because a court will not examine the promisor's subjective intent when making a promise. (C) is incorrect because mistake as to a fact that motivated the contract is not a defense under these circumstances; Christine had assumed the risk of mistake by making the promise without being certain of the cause of the accident. (D) is similarly incorrect. Mistake as to the value of the promise is generally a risk assumed by the parties.

### Answer to Question 128

- (A) Christine offered to pay Dr. Winston if Dr. Winston treated Zelda. Dr. Winston accepted by treating Zelda; this treatment was also her consideration for the contract. Thus, Christine was contractually bound to pay for the medical expenses and (A) is correct. (B) is incorrect because Christine's promise need not have been in writing to be enforceable. The requirement of a writing under the Statute of Frauds for promises to pay the debt of another is not applicable here. Christine's promise was not a suretyship promise that was collateral to a promise of Zelda's; it was an independent promise by Christine to be primarily liable for Zelda's medical expenses, and therefore need not be in writing to be enforceable. (C) is incorrect because Dr. Winston's treatment is the consideration for Christine's promise to pay. There is nothing in the facts to suggest that Dr. Winston had incurred a preexisting duty to treat Zelda until she recovered; even if Dr. Winston had already agreed to begin treating Zelda, Dr. Winston received Christine's letter and then proceeded to treat Zelda until she recovered, sending Christine the bill in reliance on her promise. Hence, a court will find sufficient consideration here to avoid a preexisting duty problem. (D) is incorrect because Dr. Winston's treatment was the benefit that Christine sought to derive from her bargain. Remember that the benefit need not have economic value. Christine's benefit here is her peace of mind.

**Answer to Question 129**

- (A) Since Sandy informed Ben that he could develop the eastern five acres of the land, and since he reasonably relied on her statement to his detriment, she probably will be estopped to deny its effect. (B) is incorrect. Where the language of the grant is clear and a joint tenancy is created, no presumption is needed or applies. The joint tenancy cannot later be changed by subsequent informal action. (C) is wrong because an oral agreement is not effective to terminate a joint tenancy. (D) is an incorrect statement of the law. A joint tenant may not pass an interest to anyone at death, due to the right of survivorship.

**Answer to Question 130**

- (A) The Statute of Frauds prevents the enforcement of an oral agreement concerning an interest in land. (B) is wrong because there is no issue as to the record title to the land. The agreement between Ben and Sandy, if it had been reduced to writing, would have been perfectly valid as between them. (C) is wrong because a joint tenancy can be unilaterally severed. (D) is wrong because this would not support Sandy's ownership of the entire piece of land.

**Answer to Question 131**

- (B) As a general matter, a state may regulate in ways that impact on interstate commerce as long as the regulation does so only indirectly and the benefits outweigh the burdens imposed by compliance with the regulation. [Kassel v. Consolidated Freightways Corp. (1981)] When, as here, only a bare assertion that the regulation would increase safety is involved, a court will generally find that the regulation is invalid. This does not mean that a state could not prevail if it proved that the benefits of the regulation do in fact outweigh the burdens. Indeed, the Court intimated that such would be the case in *Bibb v. Navajo Freight Lines, Inc.* (1959). But Nevada has not made a sufficient showing here, and Western has presented colorable "expert" evidence to the contrary. (A) is incorrect because economic and social regulations are tested at the rational basis level for due process purposes, and even the minimal showing here would suffice for the state. (C) states a correct premise (*i.e.*, that the state is regulating for highway safety), but an incorrect result, and is wrong. (D) is wrong because the state has in fact made no such showing before the court. Thus, while there is a normal presumption of constitutionality, the state here has not met its burden in defending the measure in the face of contrary, expert evidence.

**Answer to Question 132**

- (D) A conspiracy requires an agreement between two or more people to accomplish an unlawful act or objective. The parties must intend to enter into the agreement and intend to achieve the objective of the agreement. Baxter and Dunn agreed to defraud the insurance company and had the requisite intent. They also committed an overt act in furtherance of that intent. Thus, they can be convicted of conspiracy. (A) is wrong because the crime is complete upon agreement with the requisite intent; the objective does not have to be accomplished. (B) is wrong because impossibility is not a defense to conspiracy. (C) is wrong. Taking the neighbor's property could make them guilty of some other crime, but it is not necessary to convict them of conspiracy.

**Answer to Question 133**

- (D) Common law burglary is the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony or larceny inside the house. However, in addition to the specific intent to commit a felony (for which insurance fraud might qualify), the defendant

## 250. MIXED SUBJECTS

also must have intended to break and enter the dwelling. If Dunn reasonably believed it was Baxter's home, he would not have the intent to break and enter, as he would believe he was invited to enter the house the way he did. (A) is wrong because mistake of law is not a defense. (B) is wrong; opening the window, even though it was ajar, would be considered a breaking under the better view. (C) is wrong; there clearly was an entry.

### Answer to Question 134

(A) Clem's best theory is that Allan negligently failed to control the conduct of his guests. A land-owner has a duty to exercise reasonable care with respect to his own activities on the land and to control the conduct of others on his property so as to avoid unreasonable risk of harm to those outside the property. It was reasonably foreseeable that a large skyrocket might malfunction and cause injury or damage to the person or property of someone outside Allan's land, especially to an adjoining landowner. By failing to prevent his guest from lighting the skyrocket, Allan breached his duty to control the conduct of persons on his property so as to avoid an unreasonable risk of harm to those outside the property. This breach actually and proximately caused the damage to Clem's garage. Therefore, Clem would prevail under the theory set forth in (A). Regarding (B), it is questionable whether the setting off of fireworks constitutes an ultrahazardous activity. However, even if this is deemed to be an ultrahazardous activity, simply failing to control Bob's activities will not render Allan strictly liable for harm that results. Allan would owe an absolute duty to make safe an ultrahazardous activity in which he was actually engaged (*e.g.*, if Allan himself was setting off the fireworks or if he had organized the party with a purpose of having his guests shoot fireworks out of his backyard). However, Allan was not so engaged. At most, Allan failed to prevent someone else from shooting fireworks. For this, Allan can be held liable on a negligence basis, but not in strict liability. (C) is incorrect for two reasons. First, Clem's being invited to Allan's party does not make Clem an "invitee." A social guest is deemed to be a licensee, *i.e.*, one who enters on land with the permission of the owner or possessor for his own purpose rather than for the benefit of the owner or possessor. Second, at the time of the damage to the garage, Clem was not even on the land of Allan. Thus, Clem is neither a licensee nor an invitee; Allan's duty toward him is one of ordinary care because he is an adjoining property owner. (D) is incorrect because Allan did not violate the ordinance. The precise standard of care in a common law negligence case may be established by proving the applicability to the case of a statute providing for a criminal penalty. Where the plaintiff is in the class intended to be protected by the statute and the statute was designed to prevent the type of harm suffered by the plaintiff, violation of the statute is negligence *per se* in most jurisdictions, *i.e.*, plaintiff will have established a conclusive presumption of duty and breach of duty. The ordinance here at issue proscribes the sale of fireworks within the city. Allan did not engage in any transaction involving fireworks. Thus, Allan did not violate the ordinance, and negligence *per se* is inapplicable.

### Answer to Question 135

(B) Bob probably will be able to avoid liability if he can establish that he aimed the skyrocket to avoid crashing into Clem's garage. The element of breach of duty in a negligence case requires a showing that the defendant acted unreasonably, which is a question for the trier of fact. Assuming that Bob owed a duty to avoid harm to Clem's garage, Bob will be able to argue that he did not breach that duty because he aimed the skyrocket to avoid crashing it into Clem's garage. If the facts support this argument, Bob probably will be able to avoid liability to Clem. (A) is incorrect because customary methods of conduct do not conclusively establish the standard for determining whether a defendant's conduct amounted to negligence. Although it may have been an "accepted custom" in the community to set off skyrockets on the Fourth of July, this custom may in fact present an unreasonable risk of injury to persons in the position of Clem. Thus, the argument

in (A) does not enable Bob to avoid liability. (C) is incorrect because all of the direct consequences of a negligent act are viewed as proximately caused by that act. If it was reasonably foreseeable that firing the skyrocket would cause damage to Clem's garage, then Bob's conduct was negligent. If some damage to the garage from the skyrocket was foreseeable, Bob is liable for the total destruction that occurred, despite the fact that the garage would not have burned down if it were not built of highly flammable material (*i.e.*, Bob must "take his plaintiff as he finds him"). (D) is incorrect because there really is no restricted scope of liability for Allan with respect to persons outside his property. A landowner has a duty to exercise reasonable care with respect to his own activities on the land so as to avoid unreasonable risk of harm to others outside the property. Thus, Allan would be liable to Clem if Allan had fired the skyrocket and thereby created an unreasonable risk of harm to Clem's garage, resulting in damage to the garage. Bob's status as a guest on Allan's property does not excuse Bob from the duty to refrain from creating an unreasonable risk of harm to the person or property of a foreseeable plaintiff, such as Clem. Therefore, (D) presents nothing that will enable Bob to avoid liability.

#### **Answer to Question 136**

- (B) Other crimes and wrongs are generally not admissible to prove that a person acted in conformity with his bad character. They are sometimes admissible to establish the identity of the accused. Other crimes are admissible on identity when they are committed in a very unique way that shows what amounts to a "signature" of the perpetrator. Theoretically, even signature crimes can be excluded if the judge determines that the probative value is substantially outweighed by prejudice. However, a crime qualifying as a signature crime is highly probative and would rarely be excluded under that theory. Therefore (B) is the most likely result. (C) and (D) are not wrong but, given the highly unique weapon, they are not as likely as (B). (A) is wrong. One other crime could not establish habit.

#### **Answer to Question 137**

- (C) Shelley would be acquitted if the jury found that she was reasonable in believing that the house was abandoned. Under the terms of the statute, the actor must "willfully shut off the gas . . . to an inhabited dwelling." The requirement of an inhabited dwelling is a material element of the crime. A reasonable mistake about a material element will negate criminal liability for all crimes except strict liability offenses. This is not a strict liability offense since a mental state of willfulness is required. Thus, if Shelley reasonably believed that the house was abandoned, she made a reasonable mistake about whether it was an "inhabited dwelling," and she should be found not guilty. (A) is wrong because, as mentioned, this is not a strict liability offense; willfulness is required. (B) is not as good an answer as (C) because there is no specific amount of time that she must wait before reasonably concluding that the house has been abandoned. (B) assumes that the jury will find her actions unreasonable, but it is also possible that they will find her actions reasonable. (D) is wrong because if all the elements of the statute were present, Shelley would not be excused from criminal liability simply because the couple had been negligent in mailing the rent check.

#### **Answer to Question 138**

- (C) If Sandra prevails, it will be because the court has applied the promissory estoppel exception to the Statute of Frauds. [See Restatement (Second) of Contracts §§129, 139] Because Sandra relied on Mildred's promise by moving in with her and caring for her, and because the monetary value of her services is difficult to determine, specific enforcement of Mildred's promise is necessary to avoid injustice. [See Restatement (Second) of Contracts §129, illus. 10] (D) is wrong because

## 252. MIXED SUBJECTS

Sandra's performance of the oral agreement is not such as could be explained only by the existence of an oral agreement to convey the brownstone. Mildred's daughter has done nothing but assert her legal rights, and a familial relationship does not obviate the Statute of Frauds. Thus, (A) and (B) are incorrect.

### Answer to Question 139

- (B) An inter vivos conveyance by one joint tenant of his interest in the property severs the joint tenancy and changes it to a tenancy in common. (A) is wrong because, as discussed above, severance results in a tenancy in common. West and Brown could not hold as joint tenants because the unity of time is lacking. (C) is incorrect because a tenancy by the entirety can be created only in a husband and wife. Hines and West were not married until after the creation of the tenancy, and their marriage does not change the nature of their title to Blackacre. (D) is wrong because Hines's conveyance to Brown severed the joint tenancy.

### Answer to Question 140

- (C) The facts do not make out a claim for invasion of privacy in any of the four forms that invasion of privacy takes. The photograph was not an appropriation for commercial purposes because it was incidental to a legitimate news story and was not used in an advertisement. The photograph did not involve intrusion because it was taken in a public place. The news feature did not involve false light because the caption correctly identified Betty as Sonny's mother and the facts do not indicate anything else to suggest that the photograph conveyed a false impression. Finally, Betty's appearance at the police station simply was not a private fact, because it is generally agreed that anything visible in a public place may be recorded and given circulation by means of a photograph. (A) and (B) are therefore incorrect. (D) is incorrect because truth is not a defense to most invasion of privacy actions. Even for false light invasion of privacy, the fact that the caption was true does not preclude recovery if the photograph otherwise conveyed a false impression. Thus, (C) is a better choice than (D).

### Answer to Question 141

- (D) At common law, murder was the unlawful killing of a human being with malice aforethought. Malice aforethought could be established with any one of the following states of mind: intent to kill; intent to cause serious bodily harm; the depraved heart killing (a reckless indifference to an unjustifiably high risk to human life); or the commission of a felony. It is unlikely the defendant in (A) would be found guilty of murder. The defendant's action does not indicate the depraved heart mental state. There clearly was no intent to kill, intent to cause bodily harm, or commission of a felony. In (B), the defendant's crime would most likely be classified as voluntary manslaughter in light of the provoking event and subsequent heat of passion. It is unlikely the defendant in (C) would be guilty of murder. While the defendant's action might be classified as negligent or even reckless, it would not represent a depraved heart—reckless indifference to life state of mind. (D) represents the fact pattern where the defendant is most likely guilty of murder. Firing a gun into a house would demonstrate a reckless indifference to a high risk to human life.

### Answer to Question 142

- (A) Since the state statute conflicts with the terms of the federal contract, the federal contract must take precedence, pursuant to the Supremacy Clause and principles of federal immunity from state regulation. (B) is not a good answer because there are no facts indicating that the statute was enacted after the contract was formed; in fact, the problem implies that the reverse is true. (C) is

not the best answer because, although it is possible that a state's regulation of the manufacture of goods might affect interstate commerce so as to invoke the commerce power, the facts of this problem do not indicate any likelihood of such a circumstance, and are insufficient to be conclusive anyway. Thus, (A) is the only correct answer.

#### **Answer to Question 143**

- (A) Child will prevail because a jury easily could find that a reasonable person, knowing that children frequently played in Elm Street and observing a ball roll into the street, would take reasonable care to avoid the foreseeable risk of hitting a child darting into the street. (B) is wrong because reasonable care in the circumstances could require driving at less than the speed limit. (C) raises the possibility of a contributory negligence defense. A child, however, is usually held to the standard of a reasonable child of like age, intelligence, and maturity. The facts tell us nothing about Child's intelligence and maturity, but a jury is likely to find that most children four years of age are unlikely to watch out for traffic. (C) thus is wrong because Child probably would not be considered negligent under a child standard of care. (D) is wrong because the parents' potential negligence, even if it gave rise to a contribution claim by Driver against them, would not cut off Child's claim against Driver because Driver's negligence would remain both an actual and a proximate cause of the accident—even if parental negligence was also a cause. A parent's negligence ordinarily is not imputed to a child, and no other basis appears from the fact pattern for doing so.

#### **Answer to Question 144**

- (D) Pedestrian had fallen and was in "helpless peril" when Driver's car struck him. If Driver had the "last clear chance" to avoid the accident, that would override any contributory negligence on Pedestrian's part. (A) is incorrect because "danger invites rescue," and it is foreseeable that an adult would rush out to aid a child in danger. (B) is incorrect because one may be negligent even if speed limits are observed. (C) is incorrect because relatives are not the only people who may be expected to be rescuers, even though Pedestrian did not have a *duty* to rescue Child.

#### **Answer to Question 145**

- (C) Because Blueacre was held in joint tenancy, all of the interest in Blueacre could only be conveyed by both of the joint tenants. The forgery of Howard's signature on the deed is ineffective to convey his interest in the property. Thus, (B) is incorrect. However, Wendy's signature on the deed will serve to convey her interest in Blueacre. (D) is therefore incorrect. This conveyance of Wendy's interest in the property terminates the joint tenancy, leaving Howard and Tim holding their interests as tenants in common. Thus, (A) is incorrect.

#### **Answer to Question 146**

- (D) Where no suspect or quasi-suspect classification or fundamental rights are involved, the equal protection analysis uses the rational basis test: if the statute is rationally related to a legitimate state interest, it is valid. Since there appears to be a rational basis for the challenged legislation—protecting the environment and the citizenry from the effects of potentially permanent artificial materials—the law is valid. (A) is incorrect because it assumes that the state must use the least restrictive alternative, but that is not required except when strict scrutiny is used. There is no basis for such review under the facts of this question because there is neither a suspect classification nor a fundamental right. (B) is wrong for the same reason: under equal protection analysis, a "compelling purpose" is required only when strict scrutiny is used. Challenges to economic

## 254. MIXED SUBJECTS

regulations are subjected only to a rational basis test. (C) is incorrect because whether Congress has entered the field is irrelevant to an equal protection analysis. The call of the question specifically asks for the determination of the equal protection challenge; federal preemption issues are irrelevant here.

### Answer to Question 147

- (D) The ranch will pass exactly as expressed by Fred in the deed. Since Diane died without children, George does not have a life estate. (A) is wrong because, absent applicability of the doctrine of destructibility of contingent remainders, merger occurs when a life estate and a vested remainder or reversion is held by the same person—not the case here because George has no life estate. Diane's interest is a life estate; thus, she has no interest to pass to George by intestate succession. (B) is therefore wrong. (C) is wrong because the Rule Against Perpetuities is not violated; the spouse's interest will vest, if at all, within a life in being plus 21 years, since Diane's spouse will be identifiable at her death.

### Answer to Question 148

- (C) George has a life estate, Ann has an absolutely vested remainder, and Curtis, by intestate succession, will inherit Bradley's absolutely vested remainder. The remainder to Diane's children was vested subject to open upon the birth of her first child. Since Diane cannot have any more children after her death, all members of the class are ascertained at that time and the remainder becomes indefeasibly vested. Since the grant was to Diane's "children" rather than "issue" or "descendants," there is no unborn spouse problem. (A) is wrong because Bradley's vested remainder is inheritable by Curtis. (B) is wrong because George has only a life estate—not a fee simple absolute—and Ann and Curtis have absolutely vested remainders. (D) is wrong because the class gift in the limitation "to the remainder in fee simple to Diane's children" closes upon Diane's death; no children thereafter can be born to her, which precludes the remainder's being "subject to open."

### Answer to Question 149

- (A) Absent consent or cession, a state retains jurisdiction over federal lands within its territory. However, Congress also retains the power to enact legislation respecting such lands, pursuant to the Property Clause. When Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. Here, the laws of the state of West permit Nimrod to hunt in the state. However, under the Supremacy Clause, the federal statute overrides West's law with respect to matters involving the federal military base which is located in West. The power to raise and maintain an army and navy does not necessarily include the right to regulate certain property. Thus, (B) is wrong. The Commerce Clause could possibly be a proper basis for upholding the statute, but there is nothing in the facts indicating that Congress has exercised the commerce power in this manner. (A) is therefore a better answer. (D) is wrong because the Privileges and Immunities Clause applies to state action.

### Answer to Question 150

- (D) Although evidence of other crimes, wrongs, or bad acts is not admissible to prove character and conformity therewith, it may be admissible if it is relevant to some issue other than the defendant's character or disposition to commit the crime. Here, the testimony is relevant to counter Cheryl's assertion that she lacked knowledge. (A) is therefore incorrect. (B) is incorrect because the testimony tends to make the fact that Cheryl knew about the scheme more probably true than

it would have been without the testimony. (C) is incorrect because Cheryl has neither taken the stand nor introduced evidence of her good character.

#### **Answer to Question 151**

- (A) The prosecution cannot initiate evidence of the defendant's bad character. The prosecution may offer such evidence only after the accused has put her character in issue by either taking the stand (placing credibility in issue) or offering evidence of her good character. Thus, (C) is incorrect. (B) is incorrect because, under the Federal Rules, character may be proven by opinion evidence. (D) is incorrect because this does not constitute a regular response to a specific set of circumstances; it is merely reputation and opinion evidence.

#### **Answer to Question 152**

- (B) Within 90 days after installation is the most reasonable interpretation of the relevant contract language. The agreement is express, not constructive, on this point, and the normal situation would be that the parties expected payment to occur after installation, since a contrary interpretation would require a prediction as to when installation would be completed. Thus, (B) is correct, and (C) and (D) are incorrect. (A) is incorrect because it does not take into account the 90 days.

#### **Answer to Question 153**

- (A) The memorandum does not cover the entire agreement between the parties and was thus not a complete integration. Since the writing contains no mention of the oral agreement to use existing food products, the testimony would not "interpret" it in any way. Thus, (B) is incorrect. (C) and (D) are wrong because there is no evidence that MacDougall Corporation detrimentally relied upon the oral agreement in signing the memorandum, or that TM's promise constituted a misrepresentation at the time it was made.

#### **Answer to Question 154**

- (B) Generally, late performance of a contract is treated as a minor breach that gives the nonbreaching party a right to damages but does not relieve him of his duty to perform. Late performance will be considered to be material only if the nature of the contract requires timely performance (such as in "goods" contracts within the U.C.C.) or if the contract provides that time is of the essence. Nothing in the contract here states that time is of the essence, and the contract does not by its nature require timely performance (it is a "services" contract rather than a "goods" contract under the U.C.C.). (A) is incorrect because absence of a liquidated damage clause does not have a bearing on whether delay in performance is a material breach. (C) is incorrect because the completion date is stated in terms of a promise rather than as an express condition. (D) is an untrue statement; the doctrine applies to commercial contracts for services.

#### **Answer to Question 155**

- (B) The parties may orally waive the contract provision limiting amendment to a writing; thus (B) is correct and (C) is incorrect. (D) is incorrect because the compromise itself is consideration for the oral agreement. (A) is incorrect because the Statute of Frauds may bar subsequent oral modification of contracts to which it is applicable, but it is not applicable to the services contract here.

## 256. MIXED SUBJECTS

### Answer to Question 156

- (C) The circumstances show that the requirement that MacDougall Corporation realize a savings of 2,000 work-hours per restaurant was an express condition of the contract, and TM explicitly assumed the risk of meeting this condition. Therefore, substantial performance of the contract is not sufficient, nor is the actual savings achieved, which was less than promised. Thus, (A) and (B) are wrong. (D) is wrong because certification by MacDougall's CEO was never made a condition of the contract.

### Answer to Question 157

- (D) TM will likely succeed because MacDougall will otherwise be unjustly enriched by getting the system without having to pay the second installment. Where quasi-contractual relief is used to remedy a failed or unenforceable contract, all that is necessary is that the failed contract result in unjust enrichment of one of the parties. Even a party who has breached a contract (and therefore cannot enforce it) can recover in quasi-contract under the modern view as long as the breach did not involve seriously wrongful or unconscionable conduct. Hence, neither the failure of the express condition (A) nor the breach of contract claim (B) would preclude TM from recovering in quasi-contract for the reasonable value of its services. (C) is not as good a choice as (D) because all that is necessary to recover in a failed contract situation is that the other party would otherwise be unjustly enriched. Where there is no contractual relationship between the parties, the party seeking quasi-contractual relief must specifically show that his expectation of being compensated is reasonable and that the benefits were conferred at the express or implied request of the defendant, but those elements are assumed when the unjust enrichment occurs in a failed contract situation. Hence, (D) states the rule in this situation more accurately than (C).

### Answer to Question 158

- (C) The court will likely deny the motion because Congress generally has the power to condition federal spending if Congress reasonably finds that the spending program is for the general welfare. (A) is incorrect because the federal government determines how the funds are to be expended, not the recipient. Thus, while it may be arguable that the city's plan is a better way to use the money, the fact remains that the money was given for one purpose only and it must be expended for that purpose. Hence, (B) is wrong because the federal government in this situation does have the authority to control the spending of its funds and it is not an interference with the state's sovereign powers. (D) is wrong because the doctrine of sovereignty does not just extend to the state's executive or legislative branch, but to all governmental activities and entities within the state.

### Answer to Question 159

- (D) Since Thomas did not retain a right to revoke the escrow, his delivery of the deed to Kenneth completes the conveyance. Title passes to Ben automatically on Thomas's death and "relates back" to the date of delivery to Kenneth. Thus, Thomas's home was not his property at his death, and it cannot pass to Sally. Thus, (A) is incorrect. (B) is incorrect because recording is a form of protection; it is not required to convey property. (C) is incorrect because execution of the deed alone is not enough to convey title; delivery is also required for a valid conveyance.

### Answer to Question 160

- (D) Burglary requires a specific intent to commit a crime and intoxication might negate the existence of that intent. In the circumstances of the problem, Jesse could argue with some force that he did

not intend to kill the MP or act with premeditation, but must account for the fact that the killing occurred in what could be characterized as a burglary, which would be murder under the statutes of the jurisdiction. Thus, if Jesse did not have the requisite intent, he did not commit burglary and so the killing does not fall under the felony murder part of the statute. Jesse can therefore be convicted only if he acted intentionally or with premeditation. (A) is incorrect because voluntary intoxication is not a defense unless it negates *intent*; (A) concerns the issue of causation. (B) is wrong because it states the wrong standard of proof—the prosecution must prove all elements of the crime beyond a reasonable doubt. (C) is wrong because voluntary intoxication may be a defense to the felony murder definition of murder.

#### **Answer to Question 161**

- (B) Voluntary intoxication has historically been treated as the equivalent of recklessness for the reasons outlined in (B). (A) is wrong because intoxication *is* the crucial issue; drinking was a major part of Jesse's conscious risk taking. (C) is wrong because voluntary intoxication is a defense to some crimes. (D) is wrong; it is irrelevant what the common law definition of manslaughter is because here there is a statute defining the crime.

#### **Answer to Question 162**

- (B) The general rule is that a minor's conduct is judged by the standard applicable to an ordinarily prudent minor of the same age, experience, and intelligence in similar circumstances. Thus, (A) is wrong. The fact that Jack is almost an adult does not make this rule inapplicable, but would affect the level of care to which he would be held. Therefore, (C) is wrong. (D) is a misstatement of law; strict liability does not apply.

#### **Answer to Question 163**

- (C) Whether Jack possessed the requisite intent for battery is determined by the substantial certainty that a harmful or offensive contact would result from his intentional action. Even if Jack did not mean to hurt anyone, he knew that at least an offensive contact would result from putting the bucket on the door. Under the circumstances, such contact was practically inevitable, even though Jack's plans were not carried out exactly as he intended, since the "wrong" victim was struck. Under the transferred intent doctrine, Jack's intent is transferred from his father to Walt. If liable for an intentional tort, Jack would also be liable for the "lesser" torts of negligence and reckless conduct.

#### **Answer to Question 164**

- (C) Since Opal had a scheme for an exclusively residential subdivision that included these lots when the sales began, a court will imply a reciprocal negative servitude limiting the remaining lots to the same use. (A) is incorrect because Opal also covenanted to restrict the lots to single-family use. (B) is incorrect, because if there is a reciprocal negative covenant, it would apply whether or not the deeds specifically contained the provision. Fun Spa's actual knowledge is not the issue; Fun Spa must have had actual notice, record notice, or, as is likely here, inquiry notice (*e.g.*, neighborhood appears to conform to common restriction). Thus, (D) is not the best answer.

#### **Answer to Question 165**

- (B) The government can place reasonable restrictions on time, place, and manner of speech in public forums. It would be difficult to envision more reasonable ordinances than the ones involved here.

## 258. MIXED SUBJECTS

Therefore (B) is correct, since it states the appropriate rule. (D) is wrong, since a facial challenge requires that there be no conceivable circumstances under which the ordinance could be constitutionally applied, and that is clearly not the case here. (A) is wrong; the unconstitutionality of the ordinance could be raised for the first time as a defense in the criminal case. Under accepted principles of comity, Jim does not have to go to federal court to litigate federal constitutional claims. (C) is wrong because even if the law represents the “will of the people,” it could still be unconstitutional. The Supreme Court has emphasized repeatedly that constitutional rights are neither subject to, nor can be compromised by, a “vote of the people.”

### Answer to Question 166

- (A) A birthdate (other than that of a famous person such as George Washington) is not the type of fact that a court will recognize as true without formal presentation of evidence (*e.g.*, presentation of a certified copy of a birth certificate). Under the Federal Rules, courts may judicially notice a fact that is (i) generally known within the territorial jurisdiction of the court or (ii) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Records of any state or federal court may be judicially noticed; they are easily verifiable. Thus, (B) is incorrect. (C) can be determined by consulting an almanac. It is therefore a manifest fact and can properly be noticed. The grounds for judicial notice of (D) are several: it is common knowledge, it is easily verifiable by reference to a calendar, and the state holiday is subject to judicial notice as a state law.

### Answer to Question 167

- (C) The only basis of liability that Prentiss could use in his suit is negligence—*i.e.*, that Doreen negligently selected and stored the fertilizer. If Doreen acted reasonably in selecting and storing the fertilizer, she will prevail. (A) is wrong because Doreen would not be liable simply because other fertilizers were available. (B) is wrong because property owners are not strictly liable for all emissions from their property. There is no suggestion that the storage of the fertilizer was an ultrahazardous activity that would allow Prentiss to bring a strict liability action. (D) is wrong despite the fact that Prentiss’s lack of property rights in the land would preclude him from maintaining a nuisance action; he could still maintain a negligence action as a foreseeable victim of negligent conduct. (C) is the best answer because it precludes this result.

### Answer to Question 168

- (A) A witness other than the accused may be impeached by (i) any felony conviction (unless the judge determines that its probative value is substantially outweighed by Rule 403 considerations) and (ii) conviction of any other crime requiring proof or admission of an act of dishonesty or false statement. [Fed. R. Evid. 609(a)] Embezzlement is both. The fact that an appeal is pending does not affect the admissibility of the conviction; thus, (B) is incorrect. The official record of judgment is always admissible proof that the judgment was entered; (C) is therefore incorrect. While the proposition in (D) is correct, it does not apply to proof of prior convictions. A prior conviction may be shown either by cross-examination of the witness or introducing a record of judgment.

### Answer to Question 169

- (A) A treaty is the supreme law of the land, and state statutes that conflict with ratified treaties are invalid. (B) and (C) state incorrect rules of law. The federal government may exercise its property powers to acquire control of free roaming animals on public land. The federal government does not, however, have inherent authority over or ownership of all “free roaming wildlife.” A state

may, in turn, assert some rights over animals within its borders. That power must, nevertheless, give way in the face of a valid exercise of federal power. (D) is wrong because a treaty, being the supreme law of the land, takes precedence over the rights reserved to the state under the Tenth Amendment.

#### **Answer to Question 170**

- (A) A grantor may deliver a deed to an escrowee with instructions that it be delivered to the grantee when certain conditions (*e.g.*, death of the grantor) are met. When the conditions occur, title passes automatically to the grantee and relates back to the date of delivery to the escrowee. Thus, (D) is incorrect. (B) is not as good an answer because the facts given are insufficient to conclude that the note is a valid conveyance. To work a conveyance, the note would have to include the names of the grantor and grantee, operative words of conveyance (questionable here), a description of the land, and the grantor's signature. (C) and (D) are wrong because deeds may be effective to convey property although recorded after the grantor's death or although the grantor remains in possession after executing the deed.

#### **Answer to Question 171**

- (D) To convict for attempt, the prosecutor must establish that the defendant (i) had the specific intent to commit the crime; and (ii) engaged in behavior that constituted a substantial step toward commission of the crime and was strongly corroborative of the defendant's criminal purpose. In (A), Walter could be found guilty of attempted murder. He had the specific intent to kill, and the jury could find he took a substantial step toward commission of the crime. In (B), Yvette could be found guilty of attempting to obtain property by false pretenses. She had the specific intent to commit the crime, and the jury could find she took a substantial step toward commission of it. In (C), Hazel could be found guilty of attempted robbery; she had the specific intent, and the jury could find the necessary act. In (D), Farley could not be guilty of attempt. Since the activity he was engaging in, and intending to engage in, is not illegal, he cannot be found guilty of attempt even if he thought he was engaging in criminal conduct. This is the doctrine of legal impossibility.

#### **Answer to Question 172**

- (D) This ordinance is too broad. The Supreme Court has defined obscenity as a description or depiction of sexual conduct that taken as a whole, by the average person, applying contemporary community standards, appeals to the prurient interest in sex, portrays sex in a patently offensive way, and using a reasonable person standard, does not have serious literary, artistic, political, or scientific value. Thus, under this definition, not all nudity is obscene. (A) is incorrect because although the town may try to protect its minors, that purpose does not allow it to prohibit all such advertisements. The ordinance is too broad to be valid and its purpose will not save it. (B) is incorrect because if the posters fall within the Court's definition of obscenity, they could be prohibited because obscenity is not protected by the First Amendment. (C) is incorrect because the "average person" in the above definition does not include children.

#### **Answer to Question 173**

- (B) Albert's statement is a vicarious admission by a party-opponent. The statement acknowledges significant consumption of alcohol, which could have contributed to the accident. Under the Federal Rules, statements by an agent concerning a matter within the scope of his agency, made during the existence of the relationship, is nonhearsay. Thus, Albert's admission of drinking is admissible against his employer, and (D) is therefore incorrect. (A) is incorrect because the

## 260. MIXED SUBJECTS

statement against interest exception requires that the declarant be unavailable as a witness. The facts do not indicate that Albert is unavailable. (C) is incorrect because the excited utterance exception requires that the statement concern the immediate facts of the startling occurrence. Albert's admission of drinking does not concern the immediate facts of the accident. Moreover, (A) and (C) are hearsay exceptions, and the Federal Rules do not recognize Albert's statement as hearsay.

### Answer to Question 174

- (A) Where plaintiff is well-known, so that her name and likeness have commercial value, using plaintiff's name or likeness for commercial purposes without permission is an invasion of privacy. (B) is wrong. There is generally no violation of one's right of privacy when her picture is taken in a public place. (C) is wrong. In the absence of actual consent or some other recognized privilege, the appropriation is actionable. Department Store's good faith belief that consent was obtained is no defense. (D) is wrong because Actress's status as a public figure bolsters this type of invasion of privacy charge (commercial appropriation) rather than diminishes it.

### Answer to Question 175

- (A) Since Betty installed the equipment without any intention to benefit her landlord, the chattels have not become fixtures, and she is entitled to remove them at the end of the lease term if she repairs any damage done by the removal. (B) is wrong because the Statute of Frauds does not preclude the bank from claiming an interest in chattels that have become fixtures and thus part of the real estate, and are nonremovable. (C) is wrong since Betty's notice of the mortgage is immaterial. The mortgagee's rights are no greater than those of the landlord herself, so the same issue could arise even without any mortgage being involved in the question. (D) is wrong because personal property that a tenant attaches to the real property may become a fixture (and thus part of the real property) if the tenant intended to improve the realty.

### Answer to Question 176

- (B) If Alice had installed the chattels herself, clearly Betty would have no right to remove them upon termination of a lease. The bank acting under its mortgage would be entitled to treat the items as part of the real estate since it is reasonable to assume that chattels attached to realty by the owner of the real property were intended to be a permanent part of the property as fixtures. Thus, (A) and (C) are incorrect. (D) is wrong because the mortgage need not expressly mention personal property in the event that the personal property in question had been so attached to the real estate as to become fixtures.

### Answer to Question 177

- (A) The fact that no police officer has been terminated during probation except for cause may be enough for Ruby to show that she has a right to a hearing. Continued public employment may be a protected property interest if there is a clear practice or mutual understanding that an employee can be terminated only for "cause." If Ruby can establish this, she will be able to force the city to give her a reason for her termination and a hearing. (C) is incorrect because a general increase in police officer positions does not establish a specific right to employment for Ruby. (B) is wrong because there is nothing in the Constitution that requires that a city follow any particular method of employment practice, as long as the method chosen by a city does not violate some constitutional prohibition. The fact that the city's civil service law was not changed to reflect the additional period of time a police officer spends in the police academy does not create a right protected by the Fourteenth Amendment. (D) also states facts that could give rise to an equal protection, rather than due process, claim.

**Answer to Question 178**

- (C) While on probation, Ruby was subject to being fired at any time. Thus, she had no right in the nature of a property right and, constitutionally, would not be entitled to a hearing. (A), (B), and (D) are all arguable reasons for terminating Ruby's employment. However, just because the city might have had a valid reason for firing her, it does not follow that, if she were otherwise entitled to a hearing, the city could forgo it. (A), in addition, is not a good argument if the standard by which Ruby was tested was an artificial standard based solely on the physical differences between men and women, having no rational relationship to the needs of the job of a police officer.

**Answer to Question 179**

- (B) There is no evidence that Driver was negligent. Thus, he can recover the full amount of his damages regardless of the jurisdiction's adoption of comparative negligence. (A) and (D) are wrong since one spouse's negligence is ordinarily not imputed to the other. (C) is wrong because this is not the proper use of the last clear chance doctrine, which is used by plaintiffs to rebut a contributory negligence defense, not by defendants to defend a negligence claim, and is not applicable in comparative negligence jurisdictions.

**Answer to Question 180**

- (B) Rider's negligence will proportionately reduce her recovery (even if greater than that of Reckless). (A) is incorrect because Rider's damages will be reduced by the amount of her own fault, regardless of whether Driver was negligent. (C) is incorrect because the last clear chance doctrine is used by plaintiffs to counter a contributory negligence defense, not by defendants to defend a negligence claim, and is not applicable in comparative negligence jurisdictions. (D) is incorrect because pure comparative fault allocates liability based on the percentage of a tortfeasor's fault, not on the basis of who is "primarily" at fault.

**Answer to Question 181**

- (B) Jenny is liable as an accessory after the fact because she helped Joey to escape arrest. An accessory after the fact is one who receives, relieves, comforts, or assists another knowing that he has committed a felony, in order to help the felon escape arrest, trial, or conviction. The felony must be completed at the time the aid is rendered. Joey committed the felony of car theft. Although Jenny was emotionally disturbed and of borderline mental retardation, she understood what Joey had done and that the police were after him. Knowing these things, Jenny decided to help Joey escape the police, and she actively assisted him by doing much of the driving to the mountains to avoid the police. Thus, Jenny knowingly assisted a felon in an effort to help him escape apprehension. This conduct renders Jenny liable as an accessory after the fact. Because Jenny is liable for the common law crime of being an accessory after the fact, (D) is incorrect. (A) is incorrect because Jenny and Joey did not enter into an agreement to commit car theft. A conspiracy is a combination or agreement between two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Conspiracy requires: (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. Each conspirator is liable for the crimes of all other conspirators if: (i) the crimes were committed in furtherance of the objectives of the conspiracy; and (ii) the crimes were a natural and probable consequence of the conspiracy. Here, there was no agreement between Jenny and Joey to accomplish the theft of the car by mutual action. Jenny did not even meet Joey until after he had stolen the car, at which time she agreed to help him escape capture. Helping Joey escape capture after the completion of the car theft does not make Jenny a co-conspirator with regard to the theft itself. (C) is incorrect because compounding a felony

## 262. MIXED SUBJECTS

consists of entering into an agreement for valuable consideration not to prosecute another for a felony or to conceal the commission of a felony or the whereabouts of a felon. Although Jenny helped to conceal the whereabouts of Joey, she did so simply because of her dislike for the police. Jenny did not agree to conceal Joey's whereabouts in exchange for valuable consideration. Therefore, Jenny is not guilty of compounding a felony.

### Answer to Question 182

- (D) If a reasonable person would have regarded the theft as essential to avoid starvation, Jenny will be deemed to have acted under the defense of necessity. Conduct otherwise criminal is justifiable if, as a result of pressure from natural forces, the defendant reasonably believes that the conduct is necessary to avoid harm to society exceeding the harm caused by the conduct. The defense of necessity is to be contrasted with the excuse of duress, under which a person is not guilty of an offense, other than homicide, if she performs an otherwise criminal act under the threat of imminent infliction of death or great bodily harm, provided that she reasonably believes death or great bodily harm will be inflicted on herself or on a member of her immediate family if she does not perform such conduct. Here, Joey threatened to drive off and leave Jenny to starve in the mountains. Although this threat came directly from a human source, rather than from natural forces, the actual harm with which Jenny was faced emanated from the physical need for food. Because the defense of necessity requires an objective test, it is necessary that Jenny have had a reasonable belief that she had to steal the food to avoid starvation, which would have been a greater societal harm than the theft. If Jenny had such a belief, and it was reasonable, she has a valid defense of necessity and is not guilty. (B) is incorrect because an otherwise criminal act can be justified if there is a reasonable belief that such an act is necessary to avoid an even greater harm to society. Certainly, a threat of starvation would present a greater harm than that posed by the theft of Fisher's food. Consequently, a threat of starvation can justify an act that is otherwise criminal. (A) is incorrect because it implies that Jenny's conduct is excused by duress. As noted previously, Joey did not threaten Jenny with imminent death if she failed to steal the food. The threat with which Jenny was faced was one of eventual starvation if Joey left her in the mountains. Thus, it cannot be said that Joey's "direction" actually exerted any coercion or duress over Jenny. (C) is incorrect because larceny (of which petit theft is a variety) requires for asportation that the property be moved (even if only slightly) and that such movement be part of a carrying away process. Jenny moved the sandwich from Fisher's ice chest to her mouth and took a bite out of it. Although this movement may have been slight, it was certainly part of a carrying away process.

### Answer to Question 183

- (C) Joey's failure to determine whether Fisher was dead or alive when Joey and Jenny threw Fisher into the stream constitutes criminal negligence, and when a death is caused by criminal negligence, it is involuntary manslaughter. Criminal negligence requires a greater deviation from the reasonable person standard than is required for civil liability. The defendant must have taken a very unreasonable risk in light of the utility of his conduct, knowledge of the facts, and the nature and extent of the harm that may be caused. Joey's conduct in throwing Fisher into the stream was designed merely to disguise the fact that Fisher had been hit on the head and apparently killed by Jenny. Such conduct has no social utility. In addition, Joey was certainly aware that, if Fisher was not actually dead, throwing him into the stream would most likely result in his death by drowning. Thus, Joey acted with a sufficiently high degree of deviation from the reasonable person standard of care as to constitute criminal negligence. This negligence caused the death of Fisher. Therefore, the killing is involuntary manslaughter. (A) is incorrect because an excusable homicide is one for which there is a defense to criminal liability. Joey's guilt of involuntary manslaughter

means that the death of Fisher is the result of criminal homicide rather than excusable homicide. (B) is incorrect because the killing of Fisher was not intentional. An intentional killing is reduced from murder to voluntary manslaughter if the defendant committed the killing under a provocation that would arouse sudden and intense passion in an ordinary person such as to cause him to lose self-control, and there was insufficient time between the provocation and the killing for the passions of a reasonable person to cool. As noted above, Joey's act resulting in the death of Fisher was not intentional, but was rather committed as a consequence of criminal negligence. In addition, Joey was not acting under any provocation that would have reduced an intentional killing to voluntary manslaughter. For these reasons, the killing is not voluntary manslaughter. (D) is incorrect because Joey did not act with malice aforethought. Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought exists if the defendant: (i) intends to kill; (ii) intends to inflict great bodily injury; (iii) is aware of an unjustifiably high risk to human life; or (iv) intends to commit a felony. It is theoretically possible that Joey could be convicted of murder based on awareness of an unjustifiably high risk to human life (depraved heart). However, a finding that Joey acted unreasonably would not establish this state of mind. When Joey threw Fisher into the stream, he was most likely acting with criminal negligence rather than with any of the states of mind that would constitute malice aforethought. Therefore, Joey is not guilty of murder.

#### **Answer to Question 184**

- (C) Larceny is a specific intent crime that requires that the defendant intend to permanently deprive the owner of his property. If Defendant can show that he really believed the car to be his own, there is no intent to deprive the owner of his property, and, therefore, Defendant is not guilty of larceny. (A) is wrong because battery is a general intent crime that can arise out of a showing of gross negligence. Shooting at a residence is gross negligence and can support a finding of battery even if the defendant does not know that anyone is home. (B) is obviously wrong because the defendant's criminal act does not lie in the fact that he did not see the child in time, but in the fact that he was driving while intoxicated, and it was his intoxication (grossly negligent conduct) that caused him to be unable to see the child in time. (D) is an interesting problem. The defendant in this case was drunk at the corner bar when the child was killed, so it cannot be determined whether this defendant was the cause of the fire. However, a parent has an obligation at common law to supervise and protect her children. Since the defendant left this child alone and unsupervised, it is possible that the defendant could be charged with involuntary manslaughter when the child was accidentally killed. The fact that she was intoxicated at the time would not be a defense to a charge of involuntary manslaughter arising out of the fact that this child was left alone.

#### **Answer to Question 185**

- (C) If offers stating precisely the same terms cross in the mail, they do not give rise to a contract. An offer cannot be accepted if there is no knowledge of it. The letters sent by Mom and Huck constitute crossing offers, of which there was no acceptance. Thus, there is no contract. (B) is incorrect; it is a misstatement of the law. (A) is incorrect because, under the U.C.C., a reasonable price will be supplied by the court unless the parties have shown that they do not want a contract until they have agreed on price. Here, the May 15 writing indicates that Mom and Huck did not intend to be contractually bound until they agreed on a price. As explained above, the crossing letters do not indicate an agreement on price. (D) is an incorrect statement of the law.

#### **Answer to Question 186**

- (C) The validity of a law that regulates elections is determined by a balancing test. If the law regulates "core political speech," rather than the process surrounding elections, strict scrutiny is

## 264. MIXED SUBJECTS

applied (*i.e.*, the law must be narrowly tailored to achieve a compelling interest). The Supreme Court has held that a state law prohibiting campaigning on election day is invalid as applied to a newspaper editorial urging voters to vote a certain way, because the right to comment on political issues is an essential element of free speech. The State Yellow statute here at issue is similar to the law that was held invalid by the Court; thus, its enforcement should be enjoined on free speech grounds. (A) does not offer a very good argument for the paper. It is true that the regulation affects interstate commerce because the newspaper is circulated in other states. However, because the regulation does not directly burden interstate commerce (*i.e.*, it does not discriminate against interstate commerce by favoring local economic interests), the newspaper must argue that the burden on interstate commerce outweighs the promotion of legitimate local interests. Here, the local interest of promoting fair elections is quite strong, and the burden on interstate commerce is very weak. Therefore, the Commerce Clause argument is not very strong. (B) is incorrect because the statute in fact does not affect the newspaper's right to distribute the paper; it merely prohibits the paper from containing certain material on certain days. (D) would not be a good argument because the Equal Protection Clause only prohibits setting up classes to treat similar persons or groups in a dissimilar manner. Here, all similar entities (newspapers) are treated alike—none is allowed to publish political editorials the day before and the day of an election. The fact that the same material can be printed on other days does not create an equal protection problem.

### Answer to Question 187

- (D) Moms's proposed testimony about Victor's statement ("I'm going to die. The car that hit me had license number DD666!") is hearsay evidence. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted in the statement. [Fed. R. Evid. 801(c)] Since it appears that Victor's statement is being offered to establish that the car that hit him had license number DD666, it is hearsay. Nevertheless, it is admissible under the "excited utterance" exception to the hearsay rule. Hence, (D) is correct. At first glance it might seem that the "dying declaration" exception to the hearsay rule applies as well. [See Fed. R. Evid. 804(b)(2)] There is no indication, however, that the declarant (Victor) is *unavailable* to testify, a prerequisite for admitting evidence under the dying declaration exception. [Fed. R. Evid. 804(a)] Victor is a party and thus would seem to be available to testify. If Victor were to testify that he had no memory as to the license number, he would be considered unavailable [Fed. R. Evid. 804(a)(3)], but there is no indication that Victor has so testified. Therefore, the dying declaration exception does not apply, and (C) is incorrect. (B) is incorrect because Moms's proposed testimony is admissible under the hearsay exception for "excited utterances." [Fed. R. Evid. 803(2)] This hearsay exception, like most, does *not* require the declarant to be unavailable as a condition for the admission of hearsay evidence. It merely requires that the hearsay statement relate to a *startling event or condition*, made while the declarant was under the *stress of excitement* caused by the event or condition. Victor's statement relates to a startling event (the car crash) that prompted the statement. Because the statement was made so soon after the crash, while Victor was badly injured, it probably constitutes an excited utterance. Moms's testimony is highly probative in establishing that Dick Devilish was driving the car that struck Victor. (A) is incorrect in asserting that Moms's testimony is inadmissible because it is more prejudicial than probative. Moms's testimony is in no sense *unfairly* prejudicial to Devilish.

### Answer to Question 188

- (C) There are six exceptions to the warrant requirement. The only exception applicable to this case is a search incident to a lawful arrest. However, if an arrest is unlawful, then any search incident to that arrest is also unlawful. At common law a police officer could not make a warrantless arrest

for a misdemeanor unless it was committed in his presence. While it is unclear whether a warrantless arrest for a misdemeanor not committed in the officer's presence would violate the Fourth Amendment, practically all states follow the common law rule. Because Mary did not commit the misdemeanor of disorderly conduct in the presence of the officer, his arrest and accompanying search were invalid. It follows that (A) is incorrect. (B) is incorrect because it simply states the geographic scope of a search incident to a lawful arrest. (D) is incorrect because *Miranda* warnings, which protect a person's Fifth Amendment right against self-incrimination, do not generally affect seizure of evidence, and would not affect the seizure in this case.

#### **Answer to Question 189**

- (C) The jeweler is entitled to recover \$400 because, upon attaining the age of majority, Shelley affirmed the contract as to her ring at that price. Infants generally lack legal capacity to incur binding contractual obligations. Contracts entered into by infants are voidable at this election unless the contract is for a "necessity." On reaching majority, an infant may affirm; *i.e.*, choose to be bound by her contract. Here, at the time of entering into the contract for the two rings, Shelley was not yet 18 years old (the applicable age of majority). Because a wedding ring is not a necessity, Shelley's contract was voidable at her option. However, when Shelley went back to see the jeweler, she had reached the age of 18. At that time, she chose to be bound by the contract, although her affirmation was limited to her ring (instead of both rings), and to a lower price for her ring than that which was originally agreed upon. When a voidable promise is reaffirmed, the promise will be enforced according to the terms of the reaffirmation rather than the original obligation. Thus, Shelley is now bound by her contract, but only for the purchase of *her* ring at a price of \$400. (D) is incorrect because it ignores the fact that, having affirmed the contract (albeit at different terms), Shelley, who is no longer an infant, is bound to the terms of the reaffirmed contract. (A) is incorrect because \$1,150 reflects the purchase price of both rings as contained in the original contract. Upon reaching majority, Shelley chose not to be bound by the original contract. Similarly, (B) is incorrect because \$500 reflects the purchase price of Shelley's ring as contained in the original agreement (as well as the market value of the ring). Upon reaching majority, Shelley could have refused to pay anything. She is now bound only to the contract as affirmed by her, which is for \$400.

#### **Answer to Question 190**

- (C) The doctrine of equitable conversion places the risk of loss on the purchaser as soon as the enforceable contract is entered into. (B) is wrong because "marketable" title does not refer to whether Lynn would be able to sell a destroyed home or not. It refers to a deed free of any possible dispute as to who is the owner of the property. (A) is wrong because the doctrine of equitable conversion applies to the risk of loss and, thus, there is no such implied term in the conveyance or contract. (D) is wrong because equitable conversion puts the risk of loss on Werner and Lynn is entitled to receive the contract price in the specific performance action.

#### **Answer to Question 191**

- (B) Other crimes and wrongdoings of a defendant are sometimes admissible to prove motive, opportunity, intent, preparation, plans, knowledge, identity, or absence of mistake [Fed. R. Evid. 404(b)], provided, however, that the probative value of the evidence is not substantially outweighed by prejudice or other Rule 403 considerations. On these facts, the probative value of possession of cocaine seems very slight and is highly prejudicial. Therefore, the evidence will probably be inadmissible. (A) is wrong. Other crime evidence is sometimes admissible to show motive, opportunity, etc., even if the defendant does not place his character in issue. Also, if the defendant offers evidence of good character, the prosecutor cannot for that reason alone offer

## 266. MIXED SUBJECTS

extrinsic evidence of specific crimes. (C) is wrong. The issue is whether Donald murdered Vincent during a burglary, not what he did with the money. It is true that the evidence tends to show that Donald had money, but the probative value that he committed the crime charged would be very slight and clearly outweighed by prejudice. (D) is wrong. If the evidence were offered to prove that Donald is capable of committing serious crimes, it would be inadmissible character evidence.

### Answer to Question 192

- (B) The nod constitutes nonverbal conduct intended as an assertion and would thus be considered a “statement” for purposes of the hearsay rule. However, this statement constitutes an admission and hence is not hearsay under Federal Rule 801. (C) is therefore incorrect. Likewise, (A) is incorrect, because (i) an excited utterance is an exception to the hearsay rule and this is not hearsay, and (ii) even if it were hearsay, this does not constitute an excited utterance since the statement was not made during or soon after the startling event and under the stress of that event. (D) is incorrect. Donald responded to the question with a nod. If Donald had failed to respond and the prosecutor wished to introduce his silence as an adoptive admission, then it would be necessary to determine whether there was a reason to respond.

### Answer to Question 193

- (B) This is one of the very rare situations in which a distinction on race is likely to be upheld. The government, based on the facts, has a compelling interest in infiltrating the racist group. Due to the nature of the group, a white police officer is obviously necessary for this task. This means the action meets both elements of the strict scrutiny test: the interest is compelling and the means selected are narrowly tailored since no other nondiscriminatory action would work. The increased salary likely reflects the danger of the undercover task, and so is justifiable. (A) is incorrect because the rational basis test is never used for racial discrimination. Strict scrutiny always is employed. (C) is incorrect because even discriminatory conduct is permissible if it is necessary to achieve a compelling government interest and the means selected are narrowly tailored. (D) is incorrect because, based on the facts of the question, the group prohibits association with black persons. Thus, it is highly improbable that a black person could win the confidence of the group.

### Answer to Question 194

- (A) Stevens’s fax will be considered an offer and Baker’s second fax will be considered an acceptance of the offer. Although Baker merely asked for a price quote, Stevens’s fax in response will be construed as an offer because the language and surrounding circumstances make it reasonable for Baker to expect that Stevens was willing to enter into a contract. “I can deliver 20 computers . . . [for] \$2,000 per computer” coupled with the fact that Stevens knew that Baker wanted to buy 20 computers makes it reasonable for Baker to assume that Stevens was manifesting a promise, undertaking, or commitment to enter into a contract, especially since the terms were so specific here as to quantity, price, and delivery date. Baker’s response was an acceptance of Stevens’s offer to sell the computers. (B) is wrong because Stevens’s fax was the offer, not the acceptance. Baker’s initial fax could not be construed as an offer because it did not manifest present contractual intent and was not definite as to the terms. Therefore, (C) is also wrong. (D) is wrong because Stevens’s fax was definite enough to be an offer. The U.C.C. does not require the same degree of formality as the common law, and so a contract was clearly formed when Baker responded with the fax.

### Answer to Question 195

- (A) The fact that Baker was to pay the \$10,000 when he received his last payment from City would be interpreted as a provision setting the time for payment rather than the source from which the

payment was to come, because the price was clearly set at \$40,000 and was not expressly made conditional on City's paying Baker. Therefore, Baker could not claim that since he had not received payment from City he did not have to pay Stevens. Thus, (C) and (D) are incorrect. (B) is incorrect because it misstates the law.

#### **Answer to Question 196**

- (C) I. is incorrect. The taking of land through eminent domain results in the taking of all interests in the land. II. is incorrect. It is true that Red may not continue to occupy the land and that he is free of his rent obligation, but he will share in the condemnation award. III. is correct. Since the leasehold interest is a property interest, Red has a constitutional right to compensation for the property interest taken through eminent domain. Compensation will be determined by the value of the estate, less the rent Red no longer is required to pay. Thus, (C) is correct, and (A), (B), and (D) are wrong.

#### **Answer to Question 197**

- (C) Sal should not be given benefits. The Supreme Court in *Weinberger v. Salfi* (1975) held that the government does not have to show a compelling reason for denying noncontractual benefits. Sal's rights were noncontractual, and the only obligation of the government was to show that the classification of nine months served some proper governmental purpose. The Court stated that the purpose behind the requirement is to prevent sham marriages (*i.e.*, those solely to qualify for benefits). Thus, (A) and (B) are wrong. (D) is wrong. It implies that distinctions predicated on gender are appropriate in the face of a claim that more women than men would qualify for the benefits, a proposition the Court has rejected on numerous occasions.

#### **Answer to Question 198**

- (C) Pops's proposed testimony about Velma's statement ("I'm going to die. Danny Deft shot me.") is hearsay evidence. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted in the statement. [Fed. R. Evid. 801(c)] Since it appears that Velma's statement is being offered to establish that Danny did the shooting, it is hearsay. Nevertheless, it is admissible under the "dying declaration" exception to the hearsay rule. For a dying declaration to be admissible, two prerequisites must be met: (i) The declarant must be **unavailable** to testify. [Fed. R. Evid. 804(a)] Velma, being dead, obviously is unavailable to testify. (ii) A dying declaration can only be admitted **in certain kinds of cases**—homicide prosecutions and civil cases. [Fed. R. Evid. 804(b)(2)] This is an appropriate case, a murder prosecution. This hearsay exception further requires that the declarant's statement be made while believing her death to be **imminent**, and that the statement concern the **cause or circumstances** of what the declarant believed to be impending death. [Fed. R. Evid. 804(b)(2)] Velma believed her death was imminent. She was bleeding profusely from being shot and gasped, "I'm going to die." In addition, her statement ("Danny Deft shot me") pertained to the cause or circumstances of her death. Pops's proposed testimony might also be admissible under the hearsay exception for "excited utterances." Rule 803(2) makes admissible a hearsay statement relating to a **startling event or condition**, made while the declarant was under the stress of excitement caused by the event or condition. Certainly one could argue that Velma's statement was an excited utterance. But the question does not make clear that her statement was made while under the stress of excitement. Thus, while (D) is a plausible answer, (C) is better because Velma's statement fits so precisely within the dying declaration exception to the hearsay rule. (B) is clearly wrong because it asserts that the statement does not fit within any recognized exception to the hearsay rule. (A) is wrong. Pops's

## 268. MIXED SUBJECTS

testimony obviously would be highly probative in establishing that Danny murdered Velma. (A) nonetheless asserts that the testimony should be inadmissible because it is more prejudicial than probative. This answer is incorrect because it fundamentally misconceives the concept of prejudice in the context of the Rule 403 probative value/prejudicial impact balancing test. The only kind of prejudice that can properly be balanced under this test is *unfair* prejudice. The “prejudice” surrounding the admission of Pops’s testimony is not in any sense unfair; it is merely the natural result of any evidence having such *persuasive* force. In other words, it is prejudicial only in the sense that it will harm Danny’s defense because it is highly probative of the fact that Danny killed Velma.

### Answer to Question 199

- (C) If the telephone company is found to be negligent, it will be liable despite the posting of warning notices. A finding of negligence establishes the *prima facie* elements of duty and breach in a negligence action. The other elements of actual cause, proximate cause, and damages are indicated by the facts. As discussed below, the telephone company’s defenses to negligence will not be successful; hence, Marcus’s mother will win. (A) is incorrect because Marcus appears to have been attracted to the trench by the warning sign, which was not readable from the street, and he was injured only while attempting to leave the site of the excavation. Therefore, his conduct in walking up to the sign was not contributorily negligent, nor did he knowingly and voluntarily assume any risk by reading the sign. (B) is wrong because assumption of risk requires that plaintiff know of the risk as well as voluntarily assume it. Marcus cannot be said to have known of a risk that the edge of the excavation would give way. Although knowledge may be implied where the risk is one that the average person would clearly appreciate, the court will take into account the plaintiff’s age and any other relevant circumstances. It is unlikely that a court would find that an average seventh-grader would appreciate the unstable nature of the edge of the trench in the dusk. (D) is incorrect because strict liability would only be imposed if excavations were considered ultrahazardous or abnormally dangerous activities. For an activity to be ultrahazardous, it (i) must involve a risk of serious harm to persons or property, (ii) must not be capable of being performed with complete safety no matter how much care is taken, and (iii) must not be a commonly engaged-in activity in the community. Although involving a risk of serious harm, an excavation generally is not classified as an ultrahazardous activity because it can be done safely and is a fairly common activity. (Note that even if you were not sure whether courts treated excavations as ultrahazardous activities, (C) would be the better choice because the only difficult issue in a negligence action under these facts is breach of duty, and that is resolved by the additional facts in the choice.)

### Answer to Question 200

- (D) A statement is only considered to be voluntary if it is the product of a free and rational choice. If from the surrounding circumstances it appears that the statement was produced by either physical or mental coercion, it will not be considered to be voluntary. While it is a judgment for the court as to whether the confession would be voluntary or involuntary, the lengthy interrogation would probably result in a finding that the confession was involuntary. If the confession is determined to be involuntary, the evidence obtained as a direct result of the confession will probably be suppressed as the fruit of the poisonous tree. (A) is incorrect because evidence obtained pursuant to a warrant is inadmissible if the warrant was improperly issued. (B) is incorrect because Breeze is not basing his motion to suppress on the search of the garage but on the illegally obtained statement. (C) is incorrect because a warrant may be issued on the basis of such uncorroborated statements.



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*Multistate Practice Exam  
and Analytical Answers*



## Multistate Practice Exam

A.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 (A.M. EXAM)**

- |             |             |             |              |
|-------------|-------------|-------------|--------------|
| 1. A B C D  | 26. A B C D | 51. A B C D | 76. A B C D  |
| 2. A B C D  | 27. A B C D | 52. A B C D | 77. A B C D  |
| 3. A B C D  | 28. A B C D | 53. A B C D | 78. A B C D  |
| 4. A B C D  | 29. A B C D | 54. A B C D | 79. A B C D  |
| 5. A B C D  | 30. A B C D | 55. A B C D | 80. A B C D  |
|             |             |             |              |
| 6. A B C D  | 31. A B C D | 56. A B C D | 81. A B C D  |
| 7. A B C D  | 32. A B C D | 57. A B C D | 82. A B C D  |
| 8. A B C D  | 33. A B C D | 58. A B C D | 83. A B C D  |
| 9. A B C D  | 34. A B C D | 59. A B C D | 84. A B C D  |
| 10. A B C D | 35. A B C D | 60. A B C D | 85. A B C D  |
|             |             |             |              |
| 11. A B C D | 36. A B C D | 61. A B C D | 86. A B C D  |
| 12. A B C D | 37. A B C D | 62. A B C D | 87. A B C D  |
| 13. A B C D | 38. A B C D | 63. A B C D | 88. A B C D  |
| 14. A B C D | 39. A B C D | 64. A B C D | 89. A B C D  |
| 15. A B C D | 40. A B C D | 65. A B C D | 90. A B C D  |
|             |             |             |              |
| 16. A B C D | 41. A B C D | 66. A B C D | 91. A B C D  |
| 17. A B C D | 42. A B C D | 67. A B C D | 92. A B C D  |
| 18. A B C D | 43. A B C D | 68. A B C D | 93. A B C D  |
| 19. A B C D | 44. A B C D | 69. A B C D | 94. A B C D  |
| 20. A B C D | 45. A B C D | 70. A B C D | 95. A B C D  |
|             |             |             |              |
| 21. A B C D | 46. A B C D | 71. A B C D | 96. A B C D  |
| 22. A B C D | 47. A B C D | 72. A B C D | 97. A B C D  |
| 23. A B C D | 48. A B C D | 73. A B C D | 98. A B C D  |
| 24. A B C D | 49. A B C D | 74. A B C D | 99. A B C D  |
| 25. A B C D | 50. A B C D | 75. A B C D | 100. A B C D |



**Question 1**

Dennis robbed a bank and fled in a getaway car driven by an accomplice, not realizing that one of the bundles of money he took had the serial numbers recorded and had a tiny tracking device attached to the wrapper. The bank contacted its security consultant, who obtained portable tracking equipment and was able to trace the bundle of money to Dennis's house. The police were notified and they arrived at Dennis's house a few hours after the robbery. They knocked on the door and announced their presence, and saw someone matching the description of the robber in the hallway. They entered and arrested the suspect, Dennis, and then conducted a protective sweep of the house for the accomplice, who they believed had a gun. They did not find him, but while checking a closet they discovered several of the bundles of money from the bank and a gun Dennis had used in the robbery. The police also discovered two clear plastic bags of what appeared to be marijuana sitting on top of a dresser. They seized the money, the gun, and the two bags; later testing confirmed that the substance in the bags was marijuana.

Dennis was charged with the bank robbery and with possession of the marijuana. At a preliminary hearing, he moves to suppress introduction of the money, gun, and marijuana.

The court should:

- (A) Grant the motion as to the marijuana but not as to the money or the gun because the money and gun were found as a result of the protective sweep for Dennis's accomplice.
- (B) Grant the motion as to the money and the gun but not as to the marijuana because the bags containing the marijuana were clearly visible on the dresser during the search.
- (C) Grant the motion as to all of the evidence seized.
- (D) Deny the motion as to all of the evidence seized.

**Questions 2-3** are based on the following fact situation:

In a writing signed by both parties, Paul Plannah, a renowned architect, agreed for a fee of \$25,000 to design and supervise construction of a new house for Phoebe Threedee, a famous sculptor, the fee to be paid upon completion of the house. Plannah and Threedee got along poorly and, when the design plans were about two-thirds complete, they had a heated argument over the proper location of a marble staircase. Hoping to avoid such encounters, Plannah, without Threedee's knowledge, assigned to Donna Drafty, a newly licensed architect practicing solo, "all of my rights and duties under my design and construction-supervision contract with Threedee." Drafty expressly promised Plannah to carry out the work to the best of Drafty's ability.

2. For this question only, assume that Threedee, on learning of the assignment, refused to allow Drafty to proceed as architect and brought an action against Plannah to compel him to resume and complete performance of the contract.

Is Threedee entitled to such relief?

- (A) Yes, because Plannah's services under the contract are unique.
- (B) Yes, because Plannah has personally completed two-thirds of the design work.
- (C) No, because the Plannah-Threedee contract is one for personal services by Plannah.
- (D) No, because Plannah effectively delegated his remaining duties under the Plannah-Threedee contract to Drafty.