

# PRACTICE EXAM 4: MBE SIMULATION

## (200 QUESTIONS)

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**Time allowed: 6 hours (two 3-hour sessions of 100 questions each)**

Read each question carefully. Select the best answer of the four options provided. Answer every question; there is no penalty for incorrect answers. Apply generally accepted fundamental legal principles unless the question specifies otherwise. Apply the Federal Rules of Civil Procedure to Civil Procedure questions and the Federal Rules of Evidence to Evidence questions.

### **MORNING SESSION (Questions 1–100)**

1. A manufacturer of industrial equipment incorporated in State A and headquartered there sells its products through independent distributors. One distributor in State B sold a defective unit that injured the plaintiff in State B. The plaintiff sues the manufacturer in State B federal court. The manufacturer moves to dismiss for lack of personal jurisdiction. The plaintiff's strongest argument for jurisdiction is:

- A. The manufacturer's products are sold nationwide, including in State B markets and other jurisdictions.
- B. The manufacturer purposefully directed its products into the State B market through its distribution arrangement and the injury arose from that conduct.
- C. The defective product caused injury in State B, which alone supports specific personal jurisdiction over the manufacturer.
- D. The manufacturer maintains a website accessible to consumers and businesses located in State B.

2. A plaintiff (citizen of State X) sues two defendants: Defendant A (citizen of State Y) and Defendant B (a corporation incorporated in State X with its principal place of business in State Z). The plaintiff claims \$90,000 in damages. The most likely basis for federal jurisdiction is:

- A. Federal question jurisdiction because the dispute involves citizens from multiple states.

- B. Diversity jurisdiction because the two defendants have different state citizenships from each other.
- C. Diversity jurisdiction because the amount in controversy exceeds the \$75,000 statutory threshold.
- D. No basis exists because Defendant B is a citizen of State X by incorporation, destroying complete diversity.

3. A plaintiff brings a state-law negligence claim in federal court under diversity. The defendant argues a federal statute governs the standard of care. The state has a contrary, more demanding standard. If the federal statute does not directly address the standard of care but speaks to related conduct, the court will most likely:

- A. Apply the federal statute because federal law preempts state law whenever it bears on the issue.
- B. Apply the state standard because diversity cases are governed by state law without exception.
- C. Conduct an Erie analysis to determine whether the federal statute directly controls; if not, apply the state standard while considering the statute's preemptive effect on related conduct.
- D. Stay the case pending congressional clarification of the federal statute's scope and intended reach.

4. A plaintiff cannot locate the defendant after diligent search and seeks to serve by publication in a federal diversity action. The court's strongest reason to permit service by publication would be:

- A. Publication is permissible when the defendant cannot be located despite reasonable diligence, with court authorization and exhaustion of alternative means like mail to last known address.
- B. Service by publication is the preferred method whenever the defendant proves difficult to locate after initial attempts.
- C. Service by publication satisfies due process automatically once it has been attempted by the plaintiff.
- D. Service by publication is not permitted under any circumstances in federal court litigation.

5. A plaintiff filed in a federal district where venue is proper but the parties and witnesses are all located in another district. The defendant moves to transfer under 28 U.S.C. § 1404(a). The court's strongest justification for granting transfer would be:

- A. The plaintiff's choice of forum is entitled to no deference once the dispute could have been brought elsewhere.

B. Transfer serves convenience of parties and witnesses and the interests of justice, considering private and public factors under Gulf Oil.

C. The transferee district has substantially greater expertise in this type of commercial litigation than the current district.

D. The plaintiff's counsel formally objected to remaining in the original district during the pretrial conference.

6. A plaintiff seeks Rule 23(b)(3) damages class certification. The defendant argues common questions do not predominate. The plaintiff's strongest argument for predominance is:

A. All class members are represented by the same lawyer with the same overall litigation strategy.

B. The class members share a common factual background and similar circumstances giving rise to claims.

C. Common legal and factual issues — including liability and the defendant's standard conduct — overwhelm individualized issues like damages amounts.

D. The class is large enough to satisfy numerosity and other Rule 23(a) prerequisites for certification.

7. A plaintiff sues a foreign manufacturer in federal court for injuries occurring in a foreign country. Most witnesses, documents, and physical evidence are abroad. The defendant moves to dismiss on forum non conveniens grounds. The court will most likely:

A. Deny the motion because the plaintiff retains a right to bring suit in the United States courts.

B. Grant dismissal if an adequate alternative forum exists and private and public interest factors strongly favor it.

C. Transfer the case under § 1404(a) to the federal district most closely connected to the underlying events.

D. Stay the case until the foreign court has had an opportunity to consider the dispute first.

8. A federal statute requires producers to label products in a specified manner. A consumer purchases a mislabeled product and sues for statutory damages. The consumer's strongest argument for standing is:

A. The consumer is the type of person Congress intended to protect through this labeling statute.

B. The consumer purchased the mislabeled product, which alone establishes standing in all consumer cases.

- C. The statute itself creates standing for any consumer affected by the producer's labeling practices.
- D. The consumer suffered a concrete injury — paying for a product not as represented — traceable to mislabeling and redressable by statutory damages.

9. A buyer in State A contracted with a seller in State B for goods. The contract specified that disputes would be resolved in State A courts. The seller breached, and the buyer sued in State A federal court. The seller moves to dismiss for lack of personal jurisdiction. The buyer's strongest argument is:

- A. The forum selection clause constitutes consent to State A jurisdiction, supported by purposeful contracting with a State A buyer for performance affecting State A.
- B. The seller's products were sold throughout the country with substantial revenue from multiple jurisdictions including the forum state.
- C. The contract was negotiated by phone calls and email exchanges that crossed state lines on multiple occasions.
- D. The buyer is a State A citizen with a presumptive right to sue at home for breaches affecting State A residents.

10. A defendant refuses to produce certain documents during discovery, claiming work product protection. The plaintiff moves to compel. The court will most likely:

- A. Order production because work product is not a recognized federal protection during civil discovery.
- B. Deny the motion because work product protection is absolute and cannot be overcome in any case.
- C. Order production if the plaintiff shows substantial need and undue hardship; opinion work product remains protected from disclosure.
- D. Refer the discovery dispute to a court-appointed special master for further factual development.

11. A plaintiff sues Defendant A for an injury arising out of a joint venture between A and a non-party T. T cannot be joined because joining T would destroy diversity. The court will most likely:

- A. Proceed with the action without T regardless of the impact on the absent party's interests.
- B. Dismiss the case automatically because of T's absence from the federal litigation entirely.

C. Apply Rule 19(b)'s factors — prejudice, ability to shape relief, adequacy of judgment, and alternative forums — to decide whether to proceed.

D. Allow joinder of T as an indispensable party despite the resulting diversity problem.

12. A plaintiff filed suit and shortly before the statute of limitations expired attempted to add a new claim arising from the same conduct. The court will most likely:

A. Permit the amendment to relate back because the new claim arises from the same conduct, transaction, or occurrence set out in the original pleading.

B. Deny the amendment because limitations periods are strict and absolute once the statutory time has expired.

C. Permit the amendment without considering the relationship between the new claim and the original allegations.

D. Refer the issue to the court's broad discretion without applying any Rule 15(c) relation-back analysis.

13. A complaint alleges that the defendant "engaged in unlawful price-fixing" but does not allege specific conduct. The defendant moves to dismiss under Rule 12(b)(6). The court will most likely:

A. Deny the motion because conclusory allegations of unlawful conduct are sufficient at the pleading stage.

B. Grant dismissal automatically without regard to the specific factual content of the allegations.

C. Permit limited discovery before ruling on the sufficiency of the plaintiff's factual allegations.

D. Grant dismissal because *Twombly* and *Iqbal* require factual allegations that plausibly suggest misconduct, not conclusory recitations of legal elements.

14. A defendant timely removes a case from state to federal court. The plaintiff seeks remand, arguing the federal court lacks subject matter jurisdiction. The defendant's strongest argument against remand is:

A. Removal automatically cures any underlying subject matter jurisdiction defects in the original state-court action.

B. The federal court has original jurisdiction because the action arises under federal law on the face of the well-pleaded complaint.

C. Both parties agreed to litigate in federal court, providing a sufficient basis to retain federal jurisdiction here.

D. Federal courts have broad jurisdiction by default in cases that originally arose under state-law theories.

15. After discovery, a defendant moves for summary judgment, arguing the plaintiff has produced no evidence on an essential element. The plaintiff opposes by pointing to record evidence. The court will most likely:

A. Grant summary judgment because the defendant bears the burden of producing affirmative evidence on the issue.

B. Deny summary judgment because the procedure is disfavored and trials are preferred for fact-bound issues.

C. Grant summary judgment only if no genuine dispute of material fact exists; the non-movant must point to specific record evidence.

D. Refer the case to mediation before deciding whether the evidentiary record is sufficient for trial.

16. A plaintiff prevailed against Defendant in a prior federal action for breach of contract. The plaintiff now sues Defendant in a second action seeking lost profits from the same breach on a different theory. Defendant raises res judicata. The court will most likely:

A. Permit the second action because the new legal theory differs from the one in the prior breach action.

B. Bar the second action because claim preclusion bars relitigation of any claim arising from the same transaction.

C. Permit the second action because damages claims may be pursued separately when distinct theories of recovery exist.

D. Permit the second action because both parties remain willing to litigate the additional damages theory.

17. In a prior negligence action between A and B, the jury found B not negligent. A now sues B's employer for vicarious liability based on B's conduct. The employer raises issue preclusion. The court will most likely:

A. Permit relitigation because the employer was not a formal party to the prior negligence action.

B. Bar relitigation because privity is automatic between every employer and every employee in vicarious cases.

C. Permit relitigation because the parties to the second action differ from those to the first action.

D. Bar relitigation under defensive nonmutual issue preclusion if B's negligence was actually litigated and necessary, with full and fair opportunity.

18. A plaintiff seeks to appeal a district court order denying class certification. The order is not a final judgment. The plaintiff's strongest argument for immediate appeal is:

A. Rule 23(f) permits discretionary interlocutory appeal of orders granting or denying class certification, subject to acceptance by the court of appeals.

B. Class certification orders are automatically appealable as of right under the federal final judgment rule.

C. The denial of class certification effectively ends the case, making it the practical equivalent of a final judgment.

D. Final judgment is required before any appeal, and the plaintiff must wait for resolution of the underlying claims.

19. A defendant moves to dismiss for lack of personal jurisdiction. The defendant's only contact with the forum is purchasing a single shipment of goods from a forum supplier years before the lawsuit. The plaintiff's strongest argument for jurisdiction is:

A. The single purchase establishes minimum contacts only if the claim arises from that purchase and purposeful availment can be shown; isolated unrelated contacts are insufficient.

B. Any in-state purchase establishes general jurisdiction over the defendant for all claims, regardless of relationship.

C. A single transaction with a forum supplier is always sufficient for specific personal jurisdiction in all cases.

D. No contact analysis is required because the plaintiff's choice of forum controls the jurisdictional inquiry here.

20. A diversity action is filed in State A state court against a defendant who is a citizen of State A. The defendant attempts to remove to federal court. The plaintiff seeks remand. The plaintiff's strongest argument is:

- A. Removal requires federal question jurisdiction in addition to satisfying the diversity statute's requirements.
- B. Removal is barred whenever any party formally objects to the removal in a timely written motion.
- C. The forum defendant rule under § 1441(b)(2) bars diversity removal when a properly joined and served defendant is a citizen of the forum state.
- D. Removal is barred when the amount in controversy is uncertain or below the jurisdictional threshold.

21. A plaintiff seeks to amend the complaint to add a new defendant after the statute of limitations expired. The new defendant received timely informal notice. The court will most likely:

- A. Permit relation back under Rule 15(c)(1)(C) if the new defendant had timely notice avoiding prejudice and knew of the identity mistake.
- B. Deny relation back whenever the limitations period has expired before the amendment is filed with the court.
- C. Permit relation back without conditions, since adding new parties is a routine amendment under Rule 15.
- D. Permit relation back only if the original defendant in the action expressly consents to the joinder of the new party.

22. A plaintiff brings a fraud claim in federal court. The defendant moves to dismiss under Rule 9(b). The plaintiff's strongest argument for sustaining the pleading is:

- A. Rule 9(b) requires particularity — the who, what, when, where, and how of fraudulent statements — though intent and knowledge may be alleged generally.
- B. Fraud claims are governed by the Rule 8 notice pleading standard applicable to all federal civil claims generally.
- C. Pleading specificity is irrelevant once the plaintiff has suffered damages traceable to the alleged misconduct.
- D. Rule 9(b) is satisfied by a general allegation that fraud occurred in the course of the underlying transaction.

23. A plaintiff seeks voluntary dismissal under Rule 41(a) before the defendant has filed an answer or summary judgment motion. The defendant objects. The court will most likely:

- A. Refuse dismissal because the defendant has now formally objected to the plaintiff's request for voluntary withdrawal.
- B. Permit voluntary dismissal without prejudice as of right because no answer or summary judgment motion has been filed.
- C. Convert the motion to a Rule 12(b) motion to dismiss based on the substantive arguments raised.
- D. Stay the case pending further briefing on whether voluntary dismissal serves the interests of justice here.

24. In a diversity case, state law provides a six-year statute of limitations. A federal statute applicable to the action provides a five-year period. The court will most likely:

- A. Apply the federal limitations period in all diversity cases as a matter of uniform federal practice in the courts.
- B. Apply whichever period is shorter to favor finality and prompt resolution of the underlying controversy at bar.
- C. Apply whichever period is longer to favor adjudication of meritorious claims and avoid the harshness of strict bars.
- D. Apply state law for the limitations period because statutes of limitations are substantive under Erie for diversity purposes.

25. A plaintiff brings a state-law breach of contract action involving interpretation of a federal regulation as an embedded issue. The defendant removes on federal question grounds. The court will most likely:

- A. Remand because the action is fundamentally a state-law claim that does not invoke federal question jurisdiction.
- B. Retain jurisdiction because any federal regulatory issue embedded in a state-law claim creates federal question jurisdiction.
- C. Retain jurisdiction because the plaintiff invoked federal law by referencing the federal regulation in the complaint.
- D. Apply the Grable substantial federal question doctrine, retaining jurisdiction only if the federal issue is necessarily raised, disputed, substantial, and balanced.

26. During depositions, a witness refuses to answer certain questions, asserting attorney-client privilege. The opposing party moves to compel. The court will most likely:

- A. Order disclosure because privileges are generally disfavored and yield to the search for relevant truth in litigation.
- B. Order the witness to answer only after determining that the communication was made for legal advice in confidence, with no waiver or crime-fraud exception.
- C. Refer the dispute to a court-appointed arbitrator for an initial determination of the privilege claim.
- D. Order disclosure if the witness's lawyer agrees that the privilege does not apply to the specific communications at issue.

27. At a pretrial conference, parties dispute the order of witnesses. The court will most likely:

- A. Defer to the plaintiff's preference because the plaintiff bears the burden of proof and goes first at trial.
- B. Issue a scheduling order under Rule 16 setting the order of witnesses and other case-management matters after consultation.
- C. Order alternating witnesses between the parties regardless of the strategic needs of either side at trial.
- D. Take no formal position because pretrial conferences are advisory and not binding on the parties or the court.

28. A federal court of appeals reviews factual findings made by a district court after a bench trial. The appellant argues the findings are erroneous. The court will most likely:

- A. Conduct de novo review of all factual findings, giving no deference to the trial court's evaluation of the evidence.
- B. Affirm without conducting any meaningful review of the underlying factual record developed in the trial court below.
- C. Apply the clearly erroneous standard under Rule 52(a)(6), reversing only with a definite and firm conviction of mistake.
- D. Refer the appeal to a special master for additional fact-finding before the appellate panel renders its decision.

29. A plaintiff seeks to amend to add a wholly new claim. The defendant objects on futility grounds, arguing the new claim is barred by the statute of limitations. The court will most likely:

A. Permit amendment because Rule 15(a) requires liberal granting of leave to amend whenever justice so requires it.

B. Deny amendment automatically without considering the substantive validity of the new claim under existing law.

C. Permit amendment only if the new claim is not futile — not barred by limitations and otherwise legally viable on the merits.

D. Permit amendment if the plaintiff has acted in good faith throughout the litigation without undue delay or bad motive.

30. A state has enacted a statute imposing criminal penalties for certain conduct. A potential defendant who has engaged in the regulated conduct sues for declaratory relief, arguing the statute is unconstitutional. The plaintiff's strongest argument that the case is ripe is:

A. The statute has been on the books for several years and remains actively enforced against similarly situated parties.

B. The plaintiff faces a credible threat of prosecution, the issues are fit for judicial review, and withholding consideration imposes hardship.

C. The state has not specifically threatened the plaintiff with prosecution in any communications to date.

D. The plaintiff has satisfied standing requirements by alleging an injury fairly traceable to the state's enforcement powers.

31. A federal statute regulates production of an agricultural product, including production for personal consumption that never enters interstate commerce. A farmer challenges application to her personal-use production. The court will most likely:

A. Strike down the statute because Congress lacks authority to regulate purely intrastate conduct that has no commercial nexus.

B. Permit regulation only of commercial production destined for sale across state lines in the broader marketplace.

C. Sustain the statute under *Wickard* and *Raich* because aggregate effects of personal-use production substantially affect interstate commerce.

D. Strike down the application because the farmer's personal-use conduct is not economic activity within Congress's reach.

32. Congress enacts a statute requiring state officials to perform background checks before issuing certain licenses. A state challenges the statute. The state's strongest argument is:

A. Congress lacks any authority whatsoever to enact a statute touching on traditional state regulatory functions like licensing.

B. The Tenth Amendment reserves all regulatory authority to the states without exception in matters affecting their citizens.

C. The statute commandeers state officials in violation of the anti-commandeering doctrine of *Printz v. United States*.

D. The statute violates the state's sovereign immunity from suit under the Eleventh Amendment to the Constitution.

33. A state law restricts the right to bear arms more stringently than federal law. A challenger argues the law violates the Second Amendment. The challenger's strongest argument is:

A. State laws restricting fundamental constitutional rights are subject to direct federal court review without any further analysis.

B. The Second Amendment is a federal-only protection that has never been extended to apply to state and local government action.

C. The Tenth Amendment limits the state's regulatory authority over arms within the boundaries of the state's territory.

D. The Second Amendment is incorporated against the states through the Fourteenth Amendment Due Process Clause under *McDonald v. City of Chicago*.

34. A municipality prohibits all leafleting in public parks. A leafleter sues. The leafleter's strongest argument is:

- A. Public parks are private property where the municipal government may regulate freely under its property rights and police powers.
- B. Time, place, and manner restrictions on speech in public spaces are presumptively valid under modern First Amendment doctrine.
- C. The leafleting ordinance is content-neutral and thus permissible as a routine regulation of speech in public places generally.
- D. Public parks are traditional public forums, and the content-neutral prohibition fails intermediate scrutiny because it is not narrowly tailored and forecloses ample alternatives.

35. A state provides scholarships for state residents to attend state universities, requiring continuous in-state residency for one year before eligibility. A new resident challenges the residency requirement. The court will most likely:

- A. Apply intermediate scrutiny or rational basis and uphold the requirement, because the state has a substantial interest in subsidizing contributors through residency if not unduly long.
- B. Strike down the law as a violation of the right to travel without conducting any further constitutional analysis or balancing.
- C. Strike down the law because all classifications affecting newcomers to a state automatically receive strict scrutiny review.
- D. Sustain the law because residency requirements are categorically constitutional regardless of the duration or specific benefits involved.

36. A state law regulates the price of a particular service to protect consumers. The provider challenges the regulation as a denial of substantive due process. The court will most likely:

- A. Apply strict scrutiny to economic regulations affecting commercial activity within the state's police power and authority.
- B. Apply rational basis review under *Williamson v. Lee Optical*, sustaining if rationally related to a legitimate state interest.
- C. Apply intermediate scrutiny to economic regulations that significantly burden the regulated industry's commercial operations.
- D. Strike down the regulation because price controls on services are categorically unconstitutional under modern substantive due process doctrine.

37. A city's monument program accepts donations of monuments displayed in a public park. The city has rejected some monuments but accepted others. A potential donor sues, arguing the city has created a public forum. The court will most likely:

- A. Apply the government speech doctrine under *Pleasant Grove v. Summum*, holding monuments in city parks are government speech subject to selection.
- B. Apply traditional public forum analysis to the park as a whole, requiring content-neutrality in all decisions about which monuments may stand.
- C. Apply designated public forum analysis because the city opened the park to private monument donations from members of the public.
- D. Strike down the city's selection process as impermissible content-based discrimination against the rejected donor's particular expression.

38. Congress passes a spending statute providing federal funds to states that adopt certain regulatory standards. A state challenges the condition. The state's strongest argument is:

- A. The condition is so coercive that the amount of federal funds leaves the state with no real choice, exceeding the spending power under NFIB.
- B. The Spending Clause does not exist as an independent constitutional grant of authority to Congress in modern federalism doctrine.
- C. The condition is wholly unrelated to the federal interest underlying the program and fails the relatedness prong of *Dole*.
- D. The condition is unambiguous and clearly stated, which standing alone establishes an automatic violation of the Spending Clause.

39. A public school sponsors a moment of silence at the start of each school day with no specific religious content. A parent challenges the policy. The court will most likely:

- A. Strike down the policy under the traditional three-part *Lemon* test for Establishment Clause analysis as currently formulated.
- B. Uphold the policy because public schools have broad discretion over scheduling and ceremonial activities within the school day.

C. Strike down the policy because it improperly accommodates religious exercise in a state-sponsored public school setting.

D. Uphold the policy if it has secular purpose, neither advances nor inhibits religion, and applies the modern post-Kennedy historical analysis.

40. A university adopts a race-conscious admissions policy seeking to achieve a diverse student body. The court will most likely:

A. Apply strict scrutiny under Students for Fair Admissions, invalidating race-based admissions absent narrow tailoring with measurable, time-bound endpoints.

B. Apply rational basis review because educational diversity is a legitimate state interest pursued by a state-supported institution of higher learning.

C. Apply intermediate scrutiny because race-conscious admissions policies involve a quasi-suspect classification affecting educational opportunity broadly.

D. Sustain the policy if it serves any legitimate educational interest, including a generalized interest in diversity within the student body.

41. A city ordinance prohibits posting any sign on public property without a permit, applying to all signs regardless of content. A signholder challenges the ordinance. The court will most likely:

A. Apply intermediate scrutiny because the ordinance is content-neutral, sustaining if narrowly tailored to a significant interest with ample alternatives.

B. Apply strict scrutiny because all sign regulations restrict expressive activity and burden the speaker's First Amendment interests significantly.

C. Apply rational basis review because the ordinance is a routine exercise of municipal authority over public property and public order.

D. Strike down the ordinance categorically because permit requirements on speech are presumptively invalid prior restraints on all expression.

42. A state law allows mothers but not fathers to claim certain custody preferences in divorce. The father challenges the law. The court will most likely:

- A. Apply rational basis review because custody is a traditional state interest within the police power and family-law authority.
- B. Apply strict scrutiny because gender classifications are inherently suspect under modern Equal Protection doctrine and constitutional analysis.
- C. Apply intermediate scrutiny and likely sustain because custody preferences serve an important state interest in protecting children and families.
- D. Apply intermediate scrutiny under *Craig v. Boren* and likely strike down because gender stereotypes about parenting roles fail VMI's exceedingly persuasive justification standard.

43. A federal taxpayer challenges federal expenditures supporting religious organizations. The taxpayer's strongest argument for standing is:

- A. Federal taxpayers have general standing to challenge any federal expenditure that the taxpayer alleges violates the Constitution.
- B. Taxpayer standing under *Flast v. Cohen* permits Establishment Clause challenges to congressional spending, narrowed by *Hein* and *Winn*.
- C. Standing is automatic for any federal taxpayer regardless of the constitutional provision invoked or the nature of the spending challenged.
- D. Standing exists whenever a federal taxpayer disagrees with how federal funds are being spent on a particular government program.

44. A state law denies a particular benefit to recent state residents while granting it to longer-term residents. A new resident challenges the law. The strongest argument is:

- A. The Privileges or Immunities Clause has no application to a state law denying benefits based on the duration of state residency.
- B. The state law violates the Privileges and Immunities Clause of Article IV, which protects citizens of other states traveling for work.
- C. The state law violates the Equal Protection Clause but not the Privileges or Immunities Clause of the Fourteenth Amendment.
- D. The state law violates the Privileges or Immunities Clause of the Fourteenth Amendment under *Saenz v. Roe*, protecting the right to travel.

45. A state law requires that all milk sold in the state be processed in-state. A processor challenges the law. The court will most likely:

- A. Strike down the law under the Dormant Commerce Clause as facially discriminatory, applying virtually per se invalidity absent narrow necessity.
- B. Sustain the law under Pike balancing because it imposes only an incidental burden on interstate commerce in milk markets.
- C. Apply rational basis review because the law is a traditional exercise of state police power over food safety regulation.
- D. Sustain the law as a valid exercise of state police power over the local milk industry and its public health interests.

46. A federal court is asked to review a presidential decision committed by the Constitution to the President. The court will most likely:

- A. Apply the political question doctrine under *Baker v. Carr*, declining review where the issue is textually committed or lacks judicially manageable standards.
- B. Decide the merits because federal courts have a duty to exercise jurisdiction over all properly presented constitutional questions before them.
- C. Defer to the executive on the underlying decision while reviewing the procedural framework under which the decision was reached and announced.
- D. Refer the issue to Congress for legislative determination before any judicial review may proceed in the ordinary course of cases.

47. A statute prohibits burning the American flag for political protest. A protester is convicted under the statute. The protester's strongest argument is:

- A. Flag burning is conduct rather than speech and therefore falls outside the protections afforded by the First Amendment to expressive conduct.
- B. The statute serves an important government interest in national unity and protecting a unique symbol of national identity from desecration.
- C. The statute operates as a permissible time, place, and manner restriction on expressive conduct that does not depend on its message.

D. Flag burning is symbolic speech protected by the First Amendment, and the content-based statute fails strict scrutiny under *Texas v. Johnson*.

48. A statute criminalizes "annoying" conduct. A defendant challenges the statute on due process grounds. The defendant's strongest argument is:

A. The statute fails to provide a meaningful criminal penalty proportionate to the alleged annoying conduct that triggers prosecution under it.

B. The statute is unconstitutionally overbroad as applied to the specific conduct that gave rise to the defendant's pending criminal prosecution.

C. The statute is preempted by federal law and may not be enforced against the defendant by the state criminal justice system.

D. The statute is void for vagueness because it fails to give ordinary people fair notice and lacks meaningful enforcement guidelines under *Connally*.

49. A state law restricts a procedural right that the federal Bill of Rights protects in federal court. A defendant challenges the state law. The court will most likely:

A. Apply the incorporated right if selectively incorporated against the states; most procedural rights of the Fifth and Sixth Amendments have been incorporated.

B. Apply the state law because the federal Bill of Rights does not bind state governments in the absence of express congressional authorization.

C. Apply the state law because state courts have independent authority to determine the scope of procedural rights in state proceedings.

D. Strike down the state law as a per se violation of the Tenth Amendment's reservation of unenumerated powers to the states or the people.

50. A state law requires public schools to post the Ten Commandments. A student challenges the law. The court will most likely:

A. Sustain the law as a permissible cultural display reflecting the historical influence of religious traditions on Western legal systems.

B. Strike down the law under *Stone v. Graham* because the predominant purpose is religious and the law endorses religious doctrine in public schools.

C. Apply rational basis review and uphold the law because educational displays of historical documents serve a legitimate state interest in instruction.

D. Sustain the law as a permissible accommodation of religion that does not coerce students into religious belief or practice in any meaningful way.

51. A school district denies funding for a student club because the club promotes a religious viewpoint, while funding similar secular clubs. The club challenges the denial. The court will most likely:

A. Strike down the denial as impermissible viewpoint discrimination under *Rosenberger*, holding that religious viewpoints cannot be excluded from limited public forums.

B. Sustain the denial under the Establishment Clause because public funding for religious expression violates the prohibition on government establishment of religion.

C. Sustain the denial because schools have broad discretion to determine which student activities will receive financial support within their educational programs.

D. Apply rational basis review and sustain the denial because school officials have discretion to set priorities for student programming and resource allocation.

52. A state law restricts a personal liberty interest. The plaintiff challenges the law as violating substantive due process. The court will most likely:

A. Apply rational basis review to all liberty interests because economic and personal liberty interests are not distinguished in modern doctrine for analytical purposes.

B. Apply strict scrutiny to all liberty interests on the theory that any restriction on personal liberty by the state requires a compelling governmental justification to survive.

C. Apply intermediate scrutiny to all liberty interests as a middle-ground standard that balances state interests against individual liberty concerns under modern doctrine.

D. Apply strict scrutiny if the liberty interest is fundamental under *Glucksberg* (deeply rooted in history and tradition), and rational basis review if it is not so rooted.

53. A state law restricts voting rights for a particular subset of citizens. The court will most likely:

- A. Apply rational basis review because voting is administered by the state as part of its traditional sovereign function over elections within its borders.
- B. Apply intermediate scrutiny because voting restrictions affect quasi-suspect interests that fall between the categories of fundamental and ordinary rights.
- C. Apply rational basis review unless the restriction is shown to involve racial discrimination, which would trigger strict scrutiny under Equal Protection doctrine.
- D. Apply strict scrutiny because voting is a fundamental right, requiring narrow tailoring to a compelling government interest under Equal Protection doctrine.

54. A federal court is asked to decide a case in which the parties have settled and the only remaining issue is academic. The court will most likely:

- A. Dismiss as moot under Article III, recognizing exceptions for capable of repetition yet evading review, voluntary cessation, and certain class actions.
- B. Decide the merits because federal courts have an obligation to resolve fully briefed and presented legal questions of public interest and importance.
- C. Refer the dispute to mediation in the hope that the parties may reach an additional settlement on the remaining academic legal questions.
- D. Defer to the parties' settlement agreement and dismiss the case with prejudice based on the parties' joint stipulation of resolution at the trial level.

55. A state law prohibits all advertising of a lawful product. A producer challenges the law. The court will most likely:

- A. Apply rational basis review because advertising regulation falls within the state's traditional authority over commercial activity within its territory.
- B. Apply Central Hudson intermediate scrutiny to commercial speech and likely strike down because the broad prohibition is more extensive than necessary.
- C. Apply strict scrutiny because the law operates as a complete prohibition on a category of speech otherwise protected by the First Amendment broadly.
- D. Apply the Lemon test because the regulation of advertising touches on the relationship between commercial expression and the state's regulatory interests.

56. The President orders a federal agency to take action contrary to congressional direction. The agency challenges the order. The court will most likely:

- A. Defer to the President under Article II because the President holds the executive power and supervises the executive branch including independent federal agencies.
- B. Apply *Youngstown v. Sawyer*, holding presidential power is at its lowest ebb against the will of Congress and likely invalidating the order absent specific constitutional authority.
- C. Apply Chevron deference to the executive's interpretation of the relevant statutory authority underlying the agency's organic statute and regulatory framework.
- D. Defer to the agency's interpretation of its own statute under the principles of administrative deference that have governed agency action since the 1980s.

57. A state law classifies persons based on age, providing benefits to a particular age group. A challenger argues the law violates Equal Protection. The court will most likely:

- A. Apply strict scrutiny because age-based classifications affect fundamental rights to equal treatment under the laws and equal protection of the laws generally.
- B. Apply intermediate scrutiny because age is a quasi-suspect classification that requires substantial justification under the modern Equal Protection framework for analysis.
- C. Apply rational basis review because age is a non-suspect classification, sustaining the law if rationally related to a legitimate state interest under *Murgia*.
- D. Strike down the law because age-based classifications are categorically unconstitutional discrimination that cannot survive any level of judicial scrutiny under Equal Protection.

58. Congress enacts a statute regulating an activity that traditionally has been regulated by states. A state challenges the statute. The state's strongest argument is:

- A. The statute violates the Tenth Amendment per se because Congress lacks any enumerated power to regulate this category of activity in the modern administrative state.
- B. The statute exceeds Congress's enumerated powers; if Congress has enumerated authority, the Tenth Amendment does not provide independent grounds for invalidation under *New York*.

C. The statute violates federal supremacy by improperly regulating matters that fall within the state's reserved sovereign authority under the federal structure.

D. The statute violates the Necessary and Proper Clause because the regulation is not necessary to carry out any other enumerated power that Congress holds under the Constitution.

59. A and B are negotiating. A sends B a letter stating, "I offer to sell you my car for \$5,000." B responds, "I'll think about it." Two days later B sends a letter accepting. Before the letter arrives, A sells the car to C. The court will most likely hold:

C. The court will most likely hold:

A. A contract was formed at A's initial written offer to B for the sale of the car at the stated price.

B. A contract was formed when B's acceptance letter was placed in the mail under the mailbox rule.

C. A contract was formed because B's response that she would "think about it" preserved the offer pending consideration.

D. No contract was formed if A's sale to C effectively revoked the offer through reliable information reaching B, or if B's response was a counteroffer.

60. A offers to sell goods to B, specifying that acceptance must be made by return mail. B accepts by telephone. The court will most likely:

A. Hold a contract was formed because telephone acceptance is a faster mode and serves the purposes of the contract better than mail.

B. Hold no contract was formed because the offeror's stipulated mode of acceptance must always be followed exactly in every case without exception.

C. Hold a contract was formed because acceptance is liberally construed under modern doctrine even when the offeror specifies a particular method.

D. Apply UCC § 2-206 or the Restatement view, treating the stipulation as permissive or exclusive depending on construction, with acceptance effective only if consistent.

61. A promises to give B \$1,000 as a gift. B relies on the promise by quitting her job. A reneges. B sues. The strongest argument for B's recovery is:

A. Promissory estoppel under Restatement § 90 — a promise inducing reasonable reliance is binding if injustice can be avoided only by enforcement.

B. Past consideration based on B's reliance establishes a sufficient bargained-for exchange to support the otherwise unenforceable gift promise.

C. Quasi-contract recovery for the loss of B's job, which represents the value of detrimental reliance on the promise by A.

D. Common-law contract requiring no consideration because gratuitous promises are enforceable when intended to induce reliance by the promisee.

62. A advertises a car for sale at a specific price. B sees the ad and immediately calls A to accept. The court will most likely:

A. Hold a contract was formed at the time of the advertisement because B accepted the offer by communicating intent to purchase the vehicle.

B. Hold a contract was formed at the time of B's call because B communicated acceptance of the price stated in the published advertisement.

C. Apply the rule that advertisements are invitations to deal, not offers, unless unmistakably definite offers with specific terms as in *Lefkowitz*.

D. Hold a contract was formed when A acknowledged B's call because mutual assent occurred at that moment under the modern Restatement view.

63. A and B orally agree on the sale of land for \$50,000, with closing in 90 days. B refuses to perform. A sues. The court will most likely:

A. Enforce the oral contract because the property is valuable and the parties demonstrated mutual assent through their conversations and conduct.

B. Bar enforcement because the contract is for the sale of land and unenforceable under the Statute of Frauds without a signed writing.

C. Permit enforcement if B has formally admitted the existence of the oral contract in any pleadings filed in connection with the action.

D. Enforce the oral contract because it was fully described in the parties' written negotiations and electronic communications leading up to the deal.

64. A merchant sends a purchase order to a seller. The seller responds with an acknowledgment that includes additional terms. The merchant does not object. The court will most likely:

A. Apply UCC § 2-207(2): between merchants, additional terms enter the contract unless the offer limits acceptance, the terms materially alter, or timely objection is given.

B. Hold no contract was formed because the additional terms operate as a counteroffer under the strict common-law mirror image rule on offers.

C. Hold the additional terms create a counteroffer that the merchant has not accepted, even though the merchant did not object to them.

D. Hold the additional terms are automatically excluded because contracts between merchants follow the strict mirror image rule of classical common-law offer and acceptance.

65. A and B have a contract for services. They later orally agree to modify the price. A refuses to perform under the modified price, claiming no consideration. The court will most likely:

A. Refuse to enforce the modification under the common-law pre-existing duty rule because A undertook no new obligation in exchange for the higher price.

B. Enforce the modification under UCC § 2-209 (no consideration required), the common-law unanticipated-circumstances exception, or Restatement § 89 fair-and-equitable modification.

C. Enforce the modification only if it is reduced to a writing signed by both parties and acknowledged with formal recitations of consideration on the document.

D. Enforce the modification only if both parties had separate legal counsel reviewing the modified terms during the negotiations preceding the modified agreement.

66. A and B sign a written contract for the sale of goods. The contract contains an integration clause. A claims B orally promised certain features not in the writing. A sues for breach. The court will most likely:

A. Permit A to prove the oral promise because the promise concerned the same transaction as the written contract and is closely connected to it.

B. Permit A to prove the oral promise because integration clauses do not preclude evidence of additional terms negotiated separately by the parties.

C. Bar evidence of the oral promise under the parol evidence rule because the writing is fully integrated and the oral promise contradicts it.

D. Permit A to prove the oral promise to show the parties' true intent regarding the bargain reached at the time of signing the agreement.

67. A contracted to deliver goods to B in 60 days. After 30 days, A informs B that A cannot deliver. B's strongest legal position is:

A. B may treat A's statement as an anticipatory repudiation under UCC § 2-610 and immediately pursue cover, damages, or specific performance.

B. B must wait until the original delivery date before bringing suit because A has not yet failed to perform under the parties' written contract.

C. B is limited to seeking adequate assurance under UCC § 2-609 and may not yet pursue other remedies because A has not actually failed to perform.

D. B must mitigate by accepting partial performance from A in whatever form A is now willing to provide before pursuing any other remedies.

68. A seller's standard form contains a clause disclaiming all implied warranties. The buyer purchases goods that turn out to be defective. The buyer sues. The seller's strongest defense is:

A. All warranty disclaimers in commercial contracts are categorically valid regardless of their language or visibility within the contract document.

B. UCC § 2-316 permits disclaimer of implied warranties when conspicuous and using specific language; merchantability disclaimers must specifically mention "merchantability."

C. The buyer assumed the risk of defects by purchasing the goods after having the opportunity to review the seller's standard form contract terms.

D. Warranty disclaimers are valid only between commercial parties dealing at arm's length in transactions involving substantial sums of money.

69. A breaches a contract with B. B suffers loss in value, foreseeable consequential damages, and incidental damages. B's strongest claim for expectation damages is:

A. Restitution for benefits conferred on A through the partial performance of the contract before the breach occurred and the contract terminated.

B. Reliance damages for the expenditures B reasonably made in connection with the contract that were wasted because of A's failure to perform.

C. Expectation damages including loss in value, foreseeable consequential damages provable with reasonable certainty, and incidental damages under *Hadley v. Baxendale*.

D. Punitive damages for A's intentional breach because A's deliberate refusal to perform causes greater harm than ordinary negligent breaches of contract.

70. A contracts with B for B to confer a benefit on C. A and B later modify the contract to eliminate C's benefit before C learns of the original arrangement. C sues. The court will most likely:

A. Permit modification freely because contracting parties retain full control over their bargain until performance has begun or third parties have intervened.

B. Bar modification because third-party beneficiary rights are absolute and cannot be modified without the third party's express consent at any time after formation.

C. Permit modification only if C's rights had not yet vested; rights vest through material reliance, suit, or assent — otherwise the parties may modify freely.

D. Bar modification only if C consented in writing to the original arrangement and has accepted the benefit through some affirmative conduct relative to the contract.

71. A sells goods to B with delivery on a specific date. A delivers goods that are slightly nonconforming on the date specified. B's strongest legal position is:

A. B must accept the goods because substantial performance is sufficient under modern UCC doctrine for sales of goods between merchants in commercial transactions.

B. B may reject the entire delivery under UCC § 2-601 perfect tender rule, which permits rejection of goods that fail to conform in any respect.

C. B must accept the delivery and seek damages for the nonconformity, because outright rejection is not permitted when the deviation is relatively minor.

D. B must mitigate by reselling the nonconforming goods on the open market and seeking the difference between the resale price and the contract price.

72. A assigns rights under a contract to B without notifying the obligor C. C pays A. B then demands payment from C. The court will most likely:

- A. Hold C's payment to A discharges the obligation because C had no notice of the assignment; once notified, C must pay the assignee or risk paying twice.
- B. Hold B is entitled to payment regardless of C's lack of notice because assignments are effective upon execution between the assignor and the assignee.
- C. Hold the assignment is invalid without notice to C because notice is a formation requirement for effective assignment under modern contract law.
- D. Hold C must pay both A and B because the assignment did not relieve A of any of A's rights against the obligor C under the underlying contract.

73. A and B contract for the sale of a specific painting both believe is by a master. After the sale, the painting is discovered to be a forgery. The court will most likely:

- A. Enforce the contract because mistake about authenticity is not a defense to a completed sale between informed parties dealing at arm's length.
- B. Permit avoidance by either party at any time because both parties were operating under the same mistaken belief about the painting's authorship.
- C. Apply mutual mistake under Restatement § 152, permitting avoidance if the mistake was about a basic assumption with material effect and the adversely affected party did not bear the risk.
- D. Apply unilateral mistake doctrine and refuse avoidance because both parties shared the same factual error about the painting at the time of the sale.

74. A contracts to perform construction on B's property. After signing, an unforeseen catastrophic event makes performance impracticable. A seeks excuse. The court will most likely:

- A. Refuse excuse because performance is theoretically possible even after the event, even though it may now be significantly more difficult and costly to complete.
- B. Refuse excuse because A could have foreseen the event with adequate diligence and built protection against such risks into the parties' written agreement.
- C. Excuse performance only if the event was specifically mentioned in the contract as a basis for excuse under the parties' allocation of risks.
- D. Excuse performance under impracticability if the event was unforeseeable, made performance impracticable, defeated a basic assumption, and A did not assume the risk.

75. A merchant sends a written, signed firm offer to a buyer, stating it will remain open for 60 days. The merchant attempts to revoke after 30 days. The buyer accepts after the revocation but within the 60-day period. The court will most likely:

A. Permit revocation because offers are generally revocable at the offeror's discretion at any time before acceptance under classical common-law principles.

B. Hold the firm offer expired upon revocation because the merchant retained the power to terminate the offer despite the writing's stated open period.

C. Permit revocation because the merchant's firm offer required consideration to bind the offeror to keep the offer open for the stated period of time.

D. Enforce the firm offer under UCC § 2-205 — a merchant's signed written firm offer is binding for the stated period (not exceeding 90 days) without consideration.

76. A and B have a contract for goods. B becomes uncertain about A's ability to perform after observing A's financial difficulties. B's strongest legal position is:

A. B must accept A's performance regardless of A's apparent inability because B has no right to anticipate breach based on A's general financial condition.

B. B may demand adequate assurance of performance under UCC § 2-609, suspending performance pending assurance; failure to assure within reasonable time is repudiation.

C. B must terminate the contract immediately upon learning of A's financial difficulties, because waiting would be considered waiver under the relevant doctrine.

D. B must continue performance unless A actually fails to perform on the scheduled date, since B has no right to demand assurances before actual performance is due.

77. A induces B to enter a contract through misrepresentation about expected results. B relies and incurs expenses. The contract fails. B's strongest claim is:

A. Specific performance of the underlying contract notwithstanding the misrepresentation, because B is entitled to receive the bargained-for benefit despite formation defects.

B. Restitution for the benefits B conferred on A during performance, measured by the value of the benefits transferred from B to A under the contract.

C. Reliance damages — the amount B reasonably and foreseeably spent in reliance on A's promise, less any expenses B saved by not performing, under Restatement § 349.

D. Punitive damages because A's misrepresentation amounted to fraud, justifying punishment in addition to the recovery of B's actual losses caused by the misrepresentation.

78. A and B sign a written contract. A seeks to introduce evidence of B's fraudulent inducement to enter the contract. The court will most likely:

A. Permit the evidence to prove fraud because the parol evidence rule does not bar evidence of formation defects even in fully integrated written contracts.

B. Bar the evidence under the parol evidence rule because integrated contracts represent the parties' final agreement that may not be varied by extrinsic evidence.

C. Permit the evidence only if A explicitly reserved the right to challenge formation in writing during the negotiations and signing of the parties' written agreement.

D. Bar the evidence because once the parties have committed their agreement to writing, the writing controls all aspects of their bargain absent express provision otherwise.

79. A sends a purchase order to B (a consumer, not a merchant). B responds with an acknowledgment containing additional terms. A does not object. The court will most likely:

A. Apply UCC § 2-207(2) to incorporate the additional terms automatically because the offeror did not object within a reasonable time after receiving them.

B. Hold no contract was formed because the acknowledgment with additional terms operates as a counteroffer that A has not accepted by any express conduct.

C. Hold the additional terms become part of the contract automatically because the UCC favors finding contracts whenever the parties have manifested an intent to deal.

D. Apply UCC § 2-207(2) but exclude the additional terms because B is not a merchant; additional terms between non-merchants require express assent from the offeror.

80. A and B contract for B to perform services. A third party C, who would benefit but is not named, sues B for breach. The court will most likely:

- A. Permit C's enforcement of the contract because C is benefited by performance and has a stake in the underlying agreement between A and B as written.
- B. Bar C's enforcement because contracts are private agreements between contracting parties only and do not create rights in non-parties to the underlying agreement.
- C. Permit C's enforcement under modern liberal standing rules that allow non-parties to enforce contracts when they have a sufficient interest in the performance promised.
- D. Bar C's enforcement because C is an incidental beneficiary, not an intended beneficiary; only intended beneficiaries have enforceable rights under Restatement § 302.

81. A sells goods to B. The goods turn out to have a defect in title. B sues for breach of warranty of title. A's strongest defense is:

- A. UCC § 2-312 implies a warranty of title in every sale unless specifically excluded by language or circumstances giving the buyer reason to know the seller does not claim full title.
- B. The warranty of title is automatic in every sale of goods and cannot be disclaimed by the seller through any contractual language or circumstantial indications to the buyer.
- C. The warranty of title is an express warranty only that must be specifically stated in the contract for the buyer to invoke its protection at the time of the dispute.
- D. The warranty of title applies only to merchants and does not bind sellers who are not engaged in regularly conducted business of selling goods of the kind sold.

82. A breaches a contract. B fails to take any steps to mitigate damages. A's strongest legal position is:

- A. B has no duty to mitigate damages because the breaching party should bear the full consequences of its decision to breach the underlying contractual obligation.
- B. B must mitigate by any means available, including taking unreasonable or extraordinary measures to reduce the losses caused by the defendant's breach of contract.
- C. B's complete failure to mitigate damages bars all recovery for losses resulting from the breach, even those that could not have been avoided through any reasonable effort.
- D. B's failure to mitigate reduces damages by the amount that could have been avoided through reasonable efforts under the avoidable-consequences doctrine.

83. A offers to sell goods to B by mail. B begins performance (preparing to receive the goods) but does not notify A. A revokes before notification. The court will most likely:

A. Hold no contract was formed because B did not communicate acceptance through any clear external signal recognized as effective under the parties' usage and the trade's customs.

B. Hold a contract was formed at B's first act of preparation because beginning performance constitutes acceptance under modern doctrine without separate notification.

C. Apply UCC § 2-206(2): beginning performance is a reasonable mode of acceptance but B must notify A within a reasonable time or the offer may be treated as lapsed.

D. Hold the offer was revocable until B completed performance because partial performance does not bind the offeror unless the offeror has received notice of acceptance.

84. A sells goods to B that turn out to have minor manufacturing defects. B sues for breach of implied warranty of merchantability. A's strongest defense is:

A. The defects are minor and excused because UCC warranties protect only against substantial defects that significantly impair the basic functionality of the goods sold to consumers.

B. B accepted the goods at delivery and may not now claim that the goods failed to meet the implied warranty of merchantability under UCC Article 2's framework for sales.

C. The warranty was waived by B's failure to inspect the goods promptly at the time of delivery and to give A reasonable notice of any defects or claimed nonconformities.

D. The warranty of merchantability under UCC § 2-314 requires fitness for ordinary purposes; defenses include showing fitness, effective disclaimer, or buyer's acceptance discharging remedies.

85. A and B's contract specifies that breach results in liquidated damages of \$50,000. A breaches; actual damages are \$5,000. B sues for the \$50,000. The court will most likely:

A. Enforce the liquidated damages clause as a sum certain because parties to commercial contracts are free to allocate the consequences of breach through specified sums.

B. Refuse to enforce because liquidated damages clauses are disfavored under modern doctrine and the court should award only the actual damages proved by B at the trial.

C. Enforce the clause if both parties agreed to its terms at the time of contracting, regardless of any subsequent disparity between the stipulated amount and B's actual losses suffered.

D. Enforce the clause only if it is a reasonable forecast of damages at formation and actual damages were difficult to estimate; otherwise strike down as a penalty.

86. A's contract with B contains a clause prohibiting assignment of rights. A assigns rights to C. C seeks to enforce against B. The court will most likely:

A. Enforce C's claim because anti-assignment clauses are unenforceable as restraints on alienation that prevent the free transfer of valuable commercial contract rights between parties.

B. Bar C's claim entirely because A had no rights to assign once the contract restricted assignment by its express terms agreed to between A and B at the time of formation.

C. Construe the anti-assignment clause narrowly as prohibiting only delegation of duties (not assignment of rights), or render the assignment effective with A liable for breach.

D. Strike down the anti-assignment clause as void against public policy because such clauses prevent the free transfer of valuable rights between parties in commercial transactions.

87. A and B sign a written contract. A claims a separate oral agreement covered ancillary matters not addressed in the writing. The court will most likely:

A. Bar the oral agreement under the parol evidence rule because the writing represents the parties' final agreement and supersedes any prior or contemporaneous oral arrangements between them.

B. Permit the oral agreement automatically because additional terms supplement rather than contradict the writing and are admissible under modern liberal pleading and evidentiary standards.

C. Permit the oral agreement only if both parties signed it in connection with the written contract or otherwise reduced their oral understanding to writing in some form.

D. Permit the oral agreement if it is a separate, collateral agreement supported by separate consideration, distinct in subject matter, and not contradicting the writing.

88. A police officer observes a person in a high-crime area looking nervous and pacing. The officer stops and frisks the person. The person was carrying a weapon. The person moves to suppress. The court will most likely:

- A. Suppress the evidence because mere nervousness in a high-crime area does not establish reasonable suspicion to justify investigative seizure of an individual.
- B. Apply *Terry v. Ohio*'s reasonable suspicion standard, examining the totality of circumstances (high-crime area, nervousness, evasive behavior) and likely uphold the stop and frisk.
- C. Apply the probable cause standard to all stops because seizing a person requires more than reasonable suspicion under the Fourth Amendment's basic reasonableness requirement.
- D. Suppress the evidence because pacing and looking nervous are innocent behaviors that cannot, standing alone, support the level of suspicion required for a *Terry* stop.

89. A suspect in custody is being interrogated. The suspect says, "Maybe I should talk to a lawyer." The officer continues questioning. The suspect makes incriminating statements. The court will most likely:

- A. Suppress the statements because any mention of counsel invokes *Miranda* and requires immediate cessation of interrogation under *Edwards v. Arizona*'s bright-line rule.
- B. Apply *Davis v. United States*: invocation of counsel must be unambiguous and unequivocal; "maybe I should talk to a lawyer" is too equivocal to require cessation.
- C. Apply pre-*Davis* standards requiring clarification when the suspect's reference to counsel is ambiguous or unclear from the officer's perspective during the interrogation.
- D. Suppress the statements because once the suspect mentioned counsel, interrogation should have stopped and the statements were obtained in violation of the suspect's *Miranda* rights.

90. Police, hearing screams from inside a residence, enter without a warrant and discover evidence of a crime. The defendant moves to suppress. The court will most likely:

- A. Suppress because warrants are required for all home entries except where consent has been given by the occupants or owner before the police enter the dwelling.
- B. Apply the automobile exception by analogy because the residence presents a mobile threat that requires immediate police intervention to prevent flight or destruction.
- C. Apply the consent exception because the occupants of the residence implicitly invited police entry by audibly indicating distress during the moments before the officers entered.
- D. Uphold the entry under the exigent circumstances exception permitting warrantless home entry to render emergency assistance or prevent imminent harm under *Brigham City v. Stuart*.

91. A defendant in custody is questioned for several hours under harsh conditions. The defendant confesses. The defendant moves to suppress. The court will most likely:

- A. Admit the confession because Miranda warnings were given before questioning began and the defendant initially indicated understanding of the rights he was waiving in agreeing to talk.
- B. Apply the totality of circumstances test for voluntariness, considering age, education, length and intensity of detention, and pressure; likely suppress if not the product of free choice.
- C. Admit the confession because the defendant signed a Miranda waiver before the questioning began and continued to speak voluntarily with police throughout the lengthy session.
- D. Suppress on Sixth Amendment grounds because the defendant was not provided counsel during the prolonged custodial interrogation that produced the eventual confession to the alleged crime.

92. A magistrate issues a warrant based on a sworn affidavit that contains false statements. The defendant moves to suppress under *Franks v. Delaware*. The court will most likely:

- A. Admit the evidence because warrants are presumed valid once issued by a neutral and detached magistrate, regardless of subsequent challenges to the affidavit's accuracy.
- B. Suppress because any false statements in a warrant affidavit invalidate the warrant under the Fourth Amendment's requirement of probable cause based on accurate facts.
- C. Apply *Franks v. Delaware*, requiring suppression if the affidavit contains a knowing or reckless false statement and the remaining content is insufficient for probable cause.
- D. Suppress on Fourth Amendment grounds without further analysis because the affidavit contained false statements that undermined the validity of the magistrate's probable cause determination.

93. Police execute a warrant in objectively reasonable reliance on the magistrate's probable cause determination. The warrant is later found defective. The defendant moves to suppress. The court will most likely:

- A. Suppress because the warrant was defective when issued and the subsequent search violated the Fourth Amendment's requirement of a valid warrant supported by probable cause.
- B. Suppress because the Fourth Amendment requires a valid warrant for searches and the warrant's defects undermine the constitutional basis for the officers' authority to search the premises.

C. Apply Leon good faith exception only when the warrant was grossly deficient on its face and any reasonable officer would have recognized the constitutional infirmity at the time of execution.

D. Apply the Leon good faith exception, holding evidence admissible if officers' reliance was objectively reasonable; exceptions apply for false affidavits, abandoned judicial role, facial deficiency, or bare warrants.

94. Police stop a vehicle on probable cause that it contains contraband. The officers search the entire vehicle including closed containers. The defendant moves to suppress. The court will most likely:

A. Suppress because warrants are required for searches of closed containers even when those containers are found inside vehicles that have been lawfully stopped by police on probable cause.

B. Permit the search only of containers in plain view inside the vehicle but require a separate warrant for closed containers that the officers must open to view their contents.

C. Suppress because closed containers within a vehicle require their own warrant supported by independent probable cause specific to the containers and not merely to the vehicle itself.

D. Uphold the search under the automobile exception, which permits warrantless search of a vehicle on probable cause, extending to all containers that may contain the object of the search (Acevedo).

95. Police arrest a suspect who has just thrown away an object during a chase. The officer asks, "Where is the gun?" without Miranda warnings. The suspect responds. The court will most likely:

A. Admit the statement under New York v. Quarles public safety exception, which permits brief focused questioning to neutralize an immediate threat without prior Miranda warnings.

B. Suppress because Miranda warnings are required for all custodial interrogation regardless of any public safety concerns that may have existed at the time of questioning.

C. Suppress because the suspect was in custody at the time of questioning and was not properly warned before being asked the question that elicited the incriminating statement.

D. Admit because the suspect waived rights by responding to the officer's question voluntarily and without any objection or assertion of the privilege against self-incrimination.

96. A defendant has been indicted but has not yet retained counsel. Police interrogate the defendant about the charged offense. The defendant makes incriminating statements. The court will most likely:

- A. Admit because the defendant waived rights by responding to police questions voluntarily without any objection or assertion of the right to remain silent or to have an attorney present.
- B. Suppress on Miranda grounds only because the defendant was in custody at the time of the questioning and the warnings should have been given before the interrogation took place.
- C. Admit because Miranda was satisfied by the warnings the defendant received earlier in the case and the defendant's understanding of those rights remained intact throughout the proceeding.
- D. Suppress under the Sixth Amendment right to counsel (*Massiah*), which attaches at indictment; deliberately eliciting statements about the charged offense without counsel violates the right.

97. A defendant is on trial. The prosecution seeks to introduce statements made by a non-testifying witness to police during a formal interrogation. The defendant objects. The court will most likely:

- A. Admit under the residual hearsay exception because the statements were made to police during an investigation that produced reliable accounts of the events giving rise to the prosecution.
- B. Admit because the statements are reliable having been made to law enforcement officials during the course of an official investigation conducted in accordance with established procedures.
- C. Suppress under the Confrontation Clause only if the witness is unavailable to testify at trial and the defendant has not had a prior opportunity to question the witness about the statements.
- D. Suppress under *Crawford v. Washington* — testimonial statements (including those during formal police interrogation) are inadmissible unless declarant is unavailable and prior cross was available.

98. A defendant participates in an armed robbery during which a co-felon kills a victim. The defendant is charged with felony murder. The defendant's strongest defense is:

- A. The defendant did not personally kill anyone during the course of the underlying felony and therefore should not be held responsible for the resulting homicide committed by another participant.
- B. The killing was not foreseeable given the specific manner in which the underlying offense was committed and the unanticipated actions of the co-felon who actually fired the fatal shots.
- C. Felony murder requires the killing be during commission of an inherently dangerous felony and reasonably foreseeable; defenses include showing the offense was not inherently dangerous or the killing was outside foreseeable scope.
- D. Felony murder has been abolished in most modern jurisdictions and replaced with a requirement that the prosecution prove actual intent to kill or recklessness with respect to causing death.

99. A defendant is charged with attempted burglary. The defendant gathered tools and drove to the target, then turned away on seeing a police car. The defendant's strongest defense is:

- A. Mere preparation negates attempt because the defendant did not take any concrete action toward completing the underlying crime that would justify imposition of attempt liability under the criminal law.
- B. The defendant did not take a substantial step toward burglary; preparation (gathering tools, traveling, surveillance) is insufficient without conduct directed at the target corroborating criminal purpose.
- C. Attempt requires completion of the crime under common law and the defendant did not complete the underlying offense before turning away from the target location upon seeing the police car nearby.
- D. The defendant voluntarily abandoned the attempt before completion of any criminal conduct and therefore should be excused under the doctrine of voluntary abandonment of criminal undertakings.

100. A defendant is charged with conspiracy. The defendant participated in initial discussions but withdrew before any overt act. The defendant's strongest defense is:

- A. Conspiracy requires no overt act under common law and the prosecution may proceed on proof of the agreement alone, regardless of the defendant's subsequent withdrawal from the criminal enterprise.
- B. The defendant withdrew before completion of the conspiracy (agreement plus overt act under federal law); effective withdrawal — affirmative renunciation communicated to all co-conspirators — bars liability.
- C. The defendant did not intend to commit the underlying offense and merely participated in conversations that fell short of forming a binding criminal agreement to act on the underlying offense.
- D. Conspiracy requires actual harm to result from the agreement and the prosecution has not shown that any harm came from the discussions in which the defendant briefly participated.

### **AFTERNOON SESSION (Questions 101–200)**

101. Police execute a warrant and enter without knocking and announcing their presence. The defendant moves to suppress the evidence. The court will most likely:

- A. Apply the knock-and-announce rule but not suppress; *Hudson v. Michigan* holds violations do not require exclusion, although civil remedies remain available to the affected parties.

B. Suppress because all Fourth Amendment violations require exclusion of evidence obtained as a direct or indirect result of the unconstitutional conduct of law enforcement officers.

C. Suppress because the warrant required knock and announce as a precondition to lawful entry and the officers' failure to comply rendered the entry constitutionally invalid.

D. Apply the public safety exception because the officers reasonably concluded that announcement would create danger or facilitate the destruction of evidence inside the residence.

102. A defendant, provoked by the discovery of a spouse's adultery, immediately attacks and kills the lover. The defendant is charged with murder. The defendant's strongest defense is:

A. Voluntary manslaughter — heat of passion requires adequate provocation arousing passion in a reasonable person, actual loss of self-control, insufficient cooling time, and causal connection; reduces murder to manslaughter.

B. Justifiable homicide because the discovery of the spouse's adultery constituted such a severe affront to the defendant's dignity as to justify the killing under common-law principles.

C. Self-defense because the defendant was provoked into an attack and acted to defend personal interests against an immediate threat posed by the lover to the marital relationship.

D. Diminished capacity because the defendant's emotional state at the time of the killing reduced the defendant's ability to form the requisite intent to commit the charged offense.

103. Police request consent to search a home. The occupant says, "I guess so." The officers find evidence. The defendant moves to suppress. The court will most likely:

A. Suppress because consent to search must be expressed in clear and unambiguous terms by the occupant before any search of the residence can lawfully proceed under the Fourth Amendment.

B. Admit because any affirmative response to a request to search constitutes consent regardless of the level of enthusiasm or certainty expressed by the occupant during the encounter.

C. Apply *Schneekloth v. Bustamonte* totality of circumstances test for voluntariness; consent need not be express but must be free from coercion, with prosecution bearing the burden of proof.

D. Admit because the suspect did not affirmatively refuse the officers' request and silence or ambiguity in response to a request to search constitutes implied consent under modern law.

104. A defendant is arrested and handcuffed away from the vehicle. Police then search the vehicle's passenger compartment. The defendant moves to suppress. The court will most likely:

A. Admit under *Belton's* bright-line rule because the defendant was arrested in connection with the vehicle and the passenger compartment search was incident to that lawful custodial arrest.

B. Suppress under *Arizona v. Gant* — arrestee not within reaching distance, no reasonable basis to believe vehicle contains evidence of the offense of arrest, so search exceeds incident-to-arrest scope.

C. Admit under the automobile exception because vehicles are inherently mobile and the officers' search was supported by probable cause arising from the defendant's arrest at the scene.

D. Admit because the arrest itself was valid and supported by probable cause, which provides the constitutional basis for the subsequent search of the vehicle the defendant was operating.

105. At trial, an eyewitness identifies the defendant. The defense argues the identification is unreliable because of a suggestive pretrial procedure. The court will most likely:

A. Exclude the identification automatically because suggestive pretrial procedures taint subsequent identifications and render them inadmissible under Fourteenth Amendment due process protections.

B. Admit because in-court identification is independent of any pretrial procedure and represents the witness's own recollection of the events giving rise to the prosecution of the defendant.

C. Apply *Manson v. Brathwaite/Neil v. Biggers* totality test — opportunity to observe, attention, accuracy of description, certainty, time elapsed — admissible if reliable despite suggestion.

D. Exclude only if the procedure was specifically forbidden by a clear rule of law that has been recognized in the jurisdiction as a prerequisite to admissibility of identification evidence.

106. A witness is called to testify and asserts the Fifth Amendment privilege. The prosecution seeks to compel testimony, arguing the testimony would help convict others. The court will most likely:

A. Compel testimony because no Fifth Amendment basis exists when the testimony would help convict others rather than implicate the witness in any criminal conduct related to the offense.

B. Sustain the privilege because the witness invoked it and the assertion of the privilege is sufficient to halt the prosecution's effort to compel testimony from a reluctant witness in any case.

C. Sustain the privilege only if the witness shows a realistic basis for self-incrimination; the privilege protects against compelled self-incrimination, with broad protection under *Hoffman v. United States*.

D. Compel testimony with use immunity because granting immunity removes the basis for the privilege and permits the prosecution to compel testimony from the witness in connection with another case.

107. A defendant has been awaiting trial for two years. The defendant moves to dismiss on speedy trial grounds. The court will most likely:

A. Dismiss because delays of this length are presumptively excessive and warrant dismissal under both constitutional and statutory speedy trial protections applicable to federal prosecutions generally.

B. Admit on speedy trial grounds only if the defendant proves actual prejudice from the delay, such as loss of evidence or witnesses that would have aided the defense at trial.

C. Apply only the federal Speedy Trial Act and dismiss if the delay exceeds the statutory limits established by Congress for prompt prosecution of federal criminal cases.

D. Apply the *Barker v. Wingo* four-factor balancing test — length of delay, reason for delay, assertion of the right, and prejudice — to determine whether dismissal is warranted.

108. A defendant raises the insanity defense. The defendant suffers from a mental illness that affects judgment but understands the wrongfulness of conduct. The court will most likely:

A. Acquit under the M'Naghten rule because mental illness is established and the rule excuses defendants whose mental condition affects their judgment at the time of the offense.

B. Apply the Durham product test and acquit because the mental illness produced the conduct in question, regardless of whether the defendant could distinguish right from wrong at the time.

C. Apply the relevant jurisdictional test (M'Naghten, MPC, or irresistible impulse) and likely reject the defense because mere mental illness without inability to know wrongfulness or conform is insufficient.

D. Apply the MPC test and acquit because the defendant lacked substantial capacity to appreciate the criminality of conduct or conform to the law at the time of the conduct charged.

109. A prosecutor failed to disclose evidence that might have led to acquittal. The defendant moves for a new trial. The court will most likely:

A. Apply *Brady v. Maryland*, granting a new trial if evidence was favorable, suppressed, and material — a reasonable probability the result would have been different if disclosed to the defense.

B. Apply *Strickland v. Washington* because the failure to disclose evidence affected the defendant's ability to receive effective assistance of counsel at the trial that resulted in the conviction.

C. Apply harmless error analysis only because the failure to disclose evidence did not necessarily affect the outcome of the trial and may not have warranted relief from the conviction.

D. Refuse a new trial because the defendant has the burden of finding favorable evidence and the prosecutor's failure to disclose evidence does not give rise to a basis for postconviction relief.

110. A defendant is arrested at the front door of her home. Police then search the entire house. The defendant moves to suppress. The court will most likely:

A. Admit under the automobile exception because the residence is similar to a vehicle in that it contains potentially incriminating evidence that could be removed before officers obtain a warrant.

B. Admit under search incident to arrest because the search was contemporaneous with the arrest and the officers had probable cause to believe evidence of crime was present in the home.

C. Apply *Chimel v. California* — search incident to arrest limited to arrestee's person and immediate reaching area (wingspan); broader search exceeds scope and requires separate justification.

D. Admit if the warrant was valid because the underlying arrest itself was lawful and supported by sufficient grounds and the subsequent search was a routine incident of the arrest.

111. A defendant claims his trial counsel failed to investigate exculpatory leads. The defendant seeks post-conviction relief. The court will most likely:

A. Grant relief because effective counsel is required by the Sixth Amendment and the failure to investigate exculpatory leads necessarily fell below the standard of competent representation.

B. Deny relief because counsel made strategic decisions about whether to investigate particular leads and strategic choices are entitled to substantial deference under post-conviction review standards.

C. Apply only the prejudice prong because the defendant must show that the failure to investigate affected the outcome of the trial that resulted in the conviction now under post-conviction review.

D. Apply *Strickland v. Washington*'s two-part test — counsel's performance was deficient (objective standard) and prejudiced the defense (reasonable probability of different result if competent).

112. A defendant convicted of murder is sentenced to death. The defendant challenges the sentence as cruel and unusual. The court will most likely

- A. Apply the constitutional framework — Eighth Amendment permits capital punishment for serious crimes with procedural protection under *Furman/Gregg*, prohibitions in *Atkins* (intellectually disabled) and *Roper* (juveniles).
- B. Strike down the death penalty as per se unconstitutional in all cases because the Eighth Amendment categorically prohibits this form of punishment in modern American constitutional doctrine and analysis.
- C. Apply only the rational basis test because criminal sentencing involves a legitimate state interest in punishment that does not require heightened constitutional review under the Eighth Amendment.
- D. Apply *Roper v. Simmons* to all defendants because the prohibition on executing juvenile offenders extends to all defendants regardless of their age at the time of the offense.

113. A defendant was acquitted of murder in state court. The federal government prosecutes for the same conduct as a civil rights violation. The defendant moves to dismiss on double jeopardy grounds. The court will most likely:

- A. Dismiss because double jeopardy bars all subsequent prosecutions arising from the same factual conduct regardless of which sovereign brings the second prosecution against the defendant.
- B. Dismiss because federal and state crimes arising from the same conduct are equivalent offenses for double jeopardy purposes under modern constitutional doctrine governing successive prosecutions.
- C. Apply the dual sovereignty doctrine — Double Jeopardy Clause does not bar prosecution by a different sovereign for the same conduct; federal civil rights prosecution after state acquittal is permitted.
- D. Apply the Blockburger same-elements test to determine whether the federal civil rights offense requires proof of any element that the state murder charge did not require during the earlier prosecution.

114. A defendant who was entrusted with property converted it to her own use without consent. The defendant is charged with larceny. The defendant's strongest defense is:

- A. The defendant did not intend to permanently deprive the owner of the property and therefore lacks the specific intent required to support a conviction for the common-law offense of larceny.
- B. The defendant returned the property after using it temporarily for her own purposes and never intended a permanent deprivation of the owner's rights in the underlying personal property.
- C. The defendant had implied consent from the owner to use the property in the manner in which she ultimately used it during the period it was entrusted to her control.
- D. The offense is embezzlement, not larceny; embezzlement is conversion by a person to whom property was lawfully entrusted, distinguished from larceny's trespassory taking element.

115. Police arrest a suspect based on an anonymous tip plus corroboration of innocent details. The suspect moves to suppress. The court will most likely:

- A. Suppress because anonymous tips alone cannot establish probable cause for arrest under modern Fourth Amendment doctrine governing the reliability of information used to justify seizures.
- B. Admit because the arrest was based on reasonable suspicion supported by the corroboration of innocent details, which is sufficient to justify a warrantless arrest under modern constitutional analysis.
- C. Apply the Aguilar-Spinelli two-prong test requiring proof of the informant's veracity and basis of knowledge as separate prerequisites for finding probable cause based on an anonymous source.
- D. Apply Illinois v. Gates' totality test, examining veracity, basis of knowledge, and police corroboration as a unified inquiry into whether circumstances establish a fair probability of crime.

116. Police, having probable cause to arrest a suspect, force entry into the suspect's home without a warrant to make the arrest. The defendant moves to suppress evidence found incident to the arrest. The court will most likely:

- A. Admit under search incident to arrest because the entry was supported by probable cause and the resulting search was a routine incident of the suspect's lawful custodial arrest at the residence.
- B. Apply Payton v. New York — warrantless nonconsensual entry into a suspect's home to make a routine felony arrest is unreasonable under the Fourth Amendment, even with probable cause.
- C. Admit because probable cause exists and the Fourth Amendment permits warrantless arrests when officers have sufficient grounds to believe the suspect has committed a felony at the time of the entry.
- D. Admit under the automobile exception by analogy because the residence is similar to a vehicle in containing potentially mobile evidence that could be removed before officers obtain a warrant for entry.

117. At trial, the prosecution seeks to introduce the defendant's prior statement against the defendant. The defendant objects on hearsay grounds. The court will most likely:

- A. Exclude under the hearsay rule because out-of-court statements offered for their truth are inadmissible unless they fall within a recognized exception to the rule against hearsay in federal court.
- B. Admit under the present sense impression exception because the defendant's prior statement was made while or immediately after perceiving an event giving rise to the case being prosecuted.

C. Admit under Rule 801(d)(2)(A) — opposing party statement is non-hearsay; the defendant's own statement offered against the defendant is admissible without requiring a separate exception.

D. Admit only under the residual exception because the defendant's prior statement does not fall within any other specific exception to the hearsay rule under the Federal Rules of Evidence.

118. At trial, the proponent offers a record kept by a business in the regular course of business. The opposing party objects on hearsay grounds. The court will most likely:

A. Exclude as inadmissible hearsay because business records are out-of-court statements offered for their truth and fall within the general bar on hearsay evidence in federal court proceedings.

B. Admit only with testimony of the original record-keeper because business records can only be authenticated by the person who actually created the records in the regular course of business.

C. Apply Rule 803(6) — admit if made at or near the time by a person with personal knowledge, kept in regular course, made as regular practice, authenticated by qualified witness or certification.

D. Admit under the present sense impression exception because business records reflect contemporaneous observations made by employees in the regular course of their duties for the business.

119. At trial in a homicide case, the prosecution offers a statement made by the victim shortly before death, identifying the defendant. The defendant objects on hearsay grounds. The court will most likely:

A. Admit under the residual exception because the dying declaration has sufficient indicia of reliability to overcome the general bar on hearsay evidence in homicide and other criminal proceedings.

B. Apply Rule 804(b)(2) — dying declaration admissible if the declarant believed death was imminent, the statement concerns cause or circumstances of impending death, and the declarant is unavailable.

C. Admit under the excited utterance exception because the victim's statement was made under the stress of the startling event that led to the declarant's imminent death from the assault.

D. Exclude as inadmissible hearsay because the declarant is unavailable to testify and the statement does not fall within any specific exception to the hearsay rule applicable in homicide cases.

120. A witness made a statement immediately after observing a startling event. The opposing party objects on hearsay grounds. The court will most likely:

- A. Exclude as hearsay because the witness's statement was made out of court and is now being offered for the truth of the matter asserted by the witness during the moments after the startling event.
- B. Admit under the present sense impression exception only because the witness described the event as it was occurring or immediately after perceiving it in the ordinary course of observation.
- C. Admit if the statement is supported by other evidence presented at trial that corroborates the truth of the matter asserted by the witness during the moments after the startling event occurred.
- D. Apply Rule 803(2) excited utterance — admit if the statement relates to a startling event and was made while the declarant was under the stress of excitement caused by the event.

121. At trial, the prosecution offers evidence of the defendant's prior convictions. The defense objects under Rule 404(b). The court will most likely:

- A. Exclude all prior convictions as inadmissible character evidence because the prosecution may not use prior crimes to suggest the defendant's propensity to commit the charged offense at trial.
- B. Apply Rule 404(b)(2) — permit prior convictions for noncharacter purposes (motive, opportunity, intent, plan, knowledge, identity, absence of mistake); prosecution must articulate permissible purpose with Rule 403 balancing.
- C. Admit all prior convictions if related to the same crime because the relevance of similar prior conduct outweighs the prejudice associated with the propensity inference under modern doctrine.
- D. Apply only the residual exception because the prior convictions are reliable and probative on issues other than propensity that the prosecution has identified as relevant to its case in chief.

122. A witness has prior convictions for various crimes. The proponent seeks to impeach using these convictions. The court will most likely:

- A. Admit all prior convictions because impeachment by conviction is permitted under the Federal Rules and the convictions are relevant to the witness's credibility on the stand in the present case.
- B. Exclude all prior convictions because impeachment by conviction is generally disfavored under modern doctrine and the convictions have only attenuated relevance to the witness's current testimony at trial.
- C. Apply Rule 609 — crimes of dishonesty admissible automatically (no balancing); felonies over one year subject to Rule 403 balancing (heightened for defendants); old convictions face additional restrictions.
- D. Apply Rule 404(b) because the prior convictions are character evidence and are admissible only for noncharacter purposes such as proof of motive, opportunity, or absence of mistake or accident.

123. A witness made a statement describing an event as she was perceiving it. The opposing party objects on hearsay grounds. The court will most likely:

- A. Admit under the excited utterance exception because the witness was describing an event as it occurred and the description was made while the declarant was under the stress of the event.
- B. Exclude as inadmissible hearsay because the witness's statement was made out of court and is now being offered for the truth of the matter asserted regarding the event being described.
- C. Admit under the residual exception because the statement has sufficient indicia of reliability to overcome the general bar on hearsay evidence in federal civil and criminal proceedings.
- D. Apply Rule 803(1) present sense impression — admit if the statement describes an event or condition made while or immediately after perceiving it, without requiring startling event or unavailability.

124. At trial, a witness cannot remember the details of an event but had previously made a record of it when fresh in memory. The proponent seeks to introduce the record. The court will most likely:

- A. Admit under the residual exception because the recorded recollection has sufficient indicia of reliability to overcome the general bar on hearsay evidence in federal court trials of civil and criminal cases.
- B. Admit only if the original witness has total recall of the event because reliance on previously made records requires confirmation that the witness's memory matches the content of the record at trial.
- C. Admit as a business record under Rule 803(6) because the previously made record was created by the witness in connection with regular activities that involve documenting observations and events.
- D. Apply Rule 803(5) recorded recollection — admit if witness once had knowledge but cannot now recall, record was made when fresh, accurately reflects knowledge, read into evidence but not received as exhibit.

125. A witness testifies to her opinion. The proponent argues she is offering a lay opinion. The opponent argues she requires expert qualification. The court will most likely:

- A. Admit lay opinion regardless of basis because witnesses are permitted to offer opinions on matters within their personal observation and experience without specific qualification under the rules.
- B. Apply Rule 701 — admit as lay opinion only if rationally based on perception, helpful to fact, and not based on scientific/technical/specialized knowledge within Rule 702; otherwise expert qualification required.

C. Admit any opinion testimony as long as the witness has personally observed the matter and is offering a reasonable opinion based on the witness's observation of the events under consideration at trial.

D. Apply Rule 702 because all opinion testimony falls within the scope of expert evidence and must satisfy the requirements applicable to expert testimony in federal civil and criminal trials.

126. A client retains an attorney for legal advice. The attorney asks the client a question concerning the client's plans. The client responds. The opposing party seeks the communication. The court will most likely:

A. Admit because attorney-client conversations are not privileged when they involve the client's plans rather than the attorney's advice or legal analysis of past conduct undertaken by the client.

B. Sustain the privilege if the communication was made in confidence for the purpose of obtaining legal advice, the privilege has not been waived, and no crime-fraud exception applies.

C. Admit only with the client's express consent because the privilege belongs to the client and may be waived by any conduct that demonstrates an intent to share the privileged information with others.

D. Admit because attorney consultations involve the sharing of information between parties and disclosure to the attorney inherently waives any privilege that might otherwise apply to those communications.

127. At trial, the prosecution offers a statement made by a co-conspirator. The defendant objects on hearsay and Confrontation Clause grounds. The court will most likely:

A. Exclude as inadmissible hearsay because co-conspirator statements are out-of-court statements offered for their truth and do not fall within any specific exception that would justify their admission against an objecting defendant.

B. Admit under the public records exception because the co-conspirator's statements were made in connection with an investigation that produced reliable accounts of the events being investigated by police.

C. Apply Rule 801(d)(2)(E) — admit as non-hearsay if conspiracy existed, declarant and defendant were members, and statement was made during and in furtherance; Crawford may still apply if testimonial.

D. Admit under the residual exception because the co-conspirator's statements have sufficient indicia of reliability to overcome the general bar on hearsay evidence in federal criminal proceedings against multiple defendants.

128. A witness testifies, and the opposing party seeks to introduce a prior statement that is inconsistent with the testimony. The court will most likely:

- A. Apply Rule 613 for impeachment by prior inconsistent statement; for substantive use under Rule 801(d)(1)(A), the prior statement must have been given under oath at a deposition, trial, or grand jury.
- B. Exclude as inadmissible hearsay because prior inconsistent statements are out-of-court statements offered for their truth and do not fall within any specific exception under the hearsay rule.
- C. Admit only with the witness's consent because the prior statement is the witness's own out-of-court statement and may be used only to the extent the witness agrees to its introduction at the trial.
- D. Admit substantively without any oath requirement because prior inconsistent statements are admissible to impeach a witness's credibility and may be used for any purpose once the witness has been confronted.

129. A party offers evidence that has some tendency to make a fact more or less probable. The opposing party objects on relevance grounds. The court will most likely:

- A. Apply Rule 401 — admit evidence having any tendency to make a fact of consequence more or less probable than without it, subject to Rule 403 balancing for unfair prejudice, confusion, or wasting time.
- B. Exclude any evidence not directly probative of the central issue in the case because indirect probative value is insufficient to overcome the general presumption against admitting marginal evidence.
- C. Apply only Rule 402 because the basic rule of admissibility is the controlling provision and additional considerations under Rule 403 do not apply unless specifically invoked by the opposing party.
- D. Apply only Rule 403 because the balancing test is the controlling provision and additional considerations under Rule 401 do not apply once the basic test for admissibility has been satisfied.

130. A party seeks to admit expert testimony based on scientific methodology. The opposing party challenges the reliability. The court will most likely:

- A. Apply only Rule 702 because the basic rule governing expert testimony provides the framework for evaluating reliability and additional considerations from common-law tests are no longer applicable.
- B. Apply the Frye general acceptance test because the traditional test for scientific evidence remains the controlling standard in federal court for evaluating the reliability of scientific methodology.
- C. Admit if the expert is qualified because the qualifications of the witness are the primary consideration and the reliability of the methodology is a secondary issue for the jury to assess at trial.
- D. Apply Daubert (codified in Rule 702) requiring the trial court to determine reliability by considering testability, peer review, error rate, controlling standards, and general acceptance.

131. A witness previously identified the defendant in a lineup. At trial, the witness identifies the defendant again. The proponent offers the prior identification. The court will most likely:

- A. Exclude as cumulative because the prior identification adds nothing to the in-court identification and would only serve to bolster the witness's testimony in a manner that prejudices the defendant unfairly.
- B. Admit under the present sense impression exception because the prior identification was made shortly after the witness observed the defendant at the scene of the events giving rise to the prosecution.
- C. Apply Rule 404(b) because the prior identification is character evidence and may be admitted only for noncharacter purposes such as proof of identity or absence of mistake or accident.
- D. Apply Rule 801(d)(1)(C) — non-hearsay prior identification; witness must testify and be subject to cross, and the rule admits prior identifications regardless of consistency with in-court testimony.

132. At trial in a criminal case, the prosecution offers a written affidavit by a non-testifying witness identifying the defendant. The defendant objects on Confrontation Clause grounds. The court will most likely:

- A. Sustain under *Crawford v. Washington* — testimonial hearsay (including a witness's affidavit made for use at trial) is inadmissible unless the declarant is unavailable AND there was a prior cross opportunity.
- B. Admit under the present sense impression exception because the affidavit reflects contemporaneous observations made by the witness in connection with the events giving rise to the prosecution of the defendant.
- C. Admit under the residual exception because the written affidavit has sufficient indicia of reliability to overcome the general bar on hearsay evidence in federal criminal proceedings against multiple defendants at trial.
- D. Admit under business records because the written affidavit was made in connection with the regular activities of law enforcement officers investigating the events that gave rise to the prosecution of the defendant.

133. After an injury, a defendant takes remedial measures. The plaintiff offers evidence of these measures. The court will most likely:

- A. Admit under Rule 401 because the subsequent remedial measures are relevant to whether the defendant's conduct was negligent at the time of the events giving rise to the plaintiff's injuries.

B. Admit because the remedial measures show that the defendant could have prevented the injury and therefore was negligent in failing to take those measures before the events that injured the plaintiff.

C. Admit under business records because the documentation of the remedial measures was made in the regular course of the defendant's business operations and the records have indicia of trustworthiness.

D. Apply Rule 407 — exclude subsequent remedial measures offered to prove negligence, culpable conduct, or product defect; may be admitted for impeachment, ownership, control, or feasibility when controverted.

134. The court considers whether to exclude evidence under Rule 403. The court will most likely:

A. Apply Rule 401 only because relevance is the basic standard for admissibility and additional considerations under Rule 403 only apply when specifically invoked by the opposing party at the time of objection.

B. Apply Rule 403's balancing test — exclude relevant evidence only if its probative value is substantially outweighed by unfair prejudice, confusion, misleading the jury, delay, or wasting time, or cumulative evidence.

C. Apply Rule 404(b) only because the limitations on other-acts evidence provide the controlling framework for evaluating the admissibility of potentially prejudicial evidence in federal civil and criminal proceedings.

D. Apply Rule 802 only because the hearsay rule provides the controlling framework for evaluating the admissibility of out-of-court statements and additional balancing considerations do not apply.

135. A witness is asked to testify against her spouse in a criminal case. The witness's spouse is the defendant. The court will most likely:

A. Compel testimony because spousal privilege has been abolished in federal court and witnesses must testify regardless of their relationship to the defendant in the underlying criminal prosecution.

B. Apply only the marital communications privilege because the testimonial spousal privilege has been replaced by a narrower protection for specific confidential communications between spouses in modern federal practice.

C. Apply the testimonial spousal privilege under Trammel — privilege belongs to the testifying spouse, who chooses whether to testify; the separate confidential marital communications privilege also applies.

D. Apply the marital privilege absolutely because both spousal privileges combine to bar testimony by a spouse against a defendant spouse in any criminal prosecution regardless of the witness's preferences.

136. A declarant made a statement about her current state of mind. The proponent offers the statement to prove her state of mind. The court will most likely:

- A. Exclude as inadmissible hearsay because the declarant's statement about her state of mind was made out of court and is now being offered for the truth of the matter asserted by the declarant in the case.
- B. Admit under business records because the declarant's statement about her state of mind was made in connection with the regular activities of her employer or business and reflects routine documentation.
- C. Apply Rule 803(3) state-of-mind exception — admit statements of declarant's then-existing state of mind, emotion, sensation, or physical condition; admissible directly with limits on proving past conduct.
- D. Admit only with corroboration because the declarant's statement about her state of mind requires additional indicia of reliability beyond the statement itself before it may be admitted at trial.

137. The proponent offers a public record showing the activities of a government office. The opposing party objects on hearsay grounds. The court will most likely:

- A. Apply Rule 803(8) public records — admit records of a public office setting out its activities, matters observed by an officer with duty to report, or factual findings from a legally authorized investigation.
- B. Exclude as inadmissible hearsay because the public record is an out-of-court statement offered for its truth and does not fall within any specific exception to the hearsay rule applicable in federal court.
- C. Admit only with testimony of the original officer because public records can only be authenticated by the person who created the records in connection with the official duties giving rise to the document.
- D. Apply Rule 803(6) business records only because public records are a subset of business records and must satisfy the requirements for that exception rather than a separate exception for public records.

138. A party seeks to prove the content of a written contract. The opposing party objects, arguing the original is required. The court will most likely:

- A. Apply Rule 1002 best evidence — require the original (or Rule 1003 duplicate); with Rule 1004 exceptions for lost originals, originals not obtainable, originals in opponent's possession, or collateral matters.

B. Admit any evidence about the writing because secondary evidence of the contents of a writing is permitted under modern federal evidence law without restriction once the writing's existence has been established at trial.

C. Exclude all secondary evidence about the writing because federal evidence law strictly requires the original writing to be produced in court before any party may prove its content through other means.

D. Apply Rule 1002 strictly without exception because the best evidence rule requires the original writing to be produced in every case where the content of a writing is offered to be proved in any way at all.

139. A party seeks discovery of documents prepared by the opposing party's attorney in anticipation of litigation. The court will most likely:

A. Order production because attorney work product is not protected under modern federal civil discovery rules and the opposing party is entitled to discover all documents that bear on the underlying litigation.

B. Bar production under attorney-client privilege because work product prepared by the attorney falls within the broader scope of the attorney-client relationship and is therefore privileged from discovery in federal court.

C. Apply Rule 26(b)(3) — protect documents and tangible things prepared in anticipation of litigation; may yield with substantial need and undue hardship, but opinion work product receives heightened protection.

D. Order production with appropriate protective order because the work product doctrine has been narrowed under modern federal practice and protective orders adequately balance the competing interests of the parties.

140. A non-testifying declarant made a statement against her own interest. The proponent offers the statement at trial. The court will most likely:

A. Exclude as inadmissible hearsay because the declarant is not available to be cross-examined about the statement and the bar on hearsay applies regardless of the declarant's own interests at the time.

B. Admit under business records because the declarant's statement was made in the regular course of the declarant's business activities and the record-keeping practices of the declarant's organization or employment.

C. Admit under the residual exception because the statement against interest has sufficient indicia of reliability to overcome the general bar on hearsay evidence in federal court proceedings against any party.

D. Apply Rule 804(b)(3) — declarant unavailable, statement against pecuniary/proprietary/penal interest at time made, reasonable person would not have made unless true; criminal-liability statements require corroboration.

141. A criminal defendant seeks to compel a psychotherapist's testimony about a victim's communications. The court will most likely:

A. Compel testimony because psychotherapist-patient communications are not privileged in federal court and the witness must testify regardless of the relationship to the underlying mental health professional and patient.

B. Apply only the attorney-client privilege framework because no separate privilege exists for psychotherapist-patient communications under the federal common law that governs evidentiary privileges in federal court litigation.

C. Apply state law because federal courts apply state privilege law in cases that arise under state law and the federal common law does not recognize a separate psychotherapist-patient privilege in such cases.

D. Apply *Jaffee v. Redmond* — recognize psychotherapist-patient privilege in federal court covering confidential communications for diagnosis or treatment; privilege belongs to patient, not subject to balancing.

142. A party seeks to introduce hearsay that does not fall within any specific exception. The opposing party objects. The court will most likely:

A. Admit automatically because the residual exception is liberally construed under federal court practice and permits the admission of hearsay that has any indicia of reliability or trustworthiness on the record.

B. Apply Rule 807 residual exception — admit hearsay only if it has equivalent guarantees of trustworthiness, is more probative than alternatives, and adequate notice was given; applied sparingly.

C. Exclude as inadmissible hearsay because the absence of a specific exception means the evidence is per se inadmissible regardless of any indicia of reliability that the proponent may demonstrate at trial.

D. Apply Rule 803 framework because the public records exception or another specific exception under Rule 803 will likely apply to the proffered hearsay if it has any indicia of reliability at all in the case.

143. A party seeks to prove a person's character. The opposing party objects. The court will most likely:

- A. Apply Rule 401 only because character evidence is relevant to the underlying claims in the case and additional restrictions under the character evidence rules do not apply to all uses of such evidence at trial.
- B. Admit any evidence about the character because federal evidence law permits broad use of character evidence to prove conduct in conformity with the character that has been demonstrated by the relevant evidence.
- C. Apply Rule 405 governing methods of proof — when character is in issue, specific instances may be proved; when offered under Rule 404 for permissible purposes, reputation/opinion on direct, specific instances on cross.
- D. Apply Rule 404(a) prohibition only because the basic prohibition against character evidence to prove conduct on a particular occasion provides the controlling framework regardless of additional methods-of-proof considerations.

144. A party in a civil case asserts the Fifth Amendment privilege against self-incrimination. The opposing party seeks an adverse inference. The court will most likely:

- A. Bar the inference because the Fifth Amendment applies only in criminal cases and does not authorize any consequences from the assertion of the privilege in civil litigation between private parties.
- B. Compel testimony because the privilege against self-incrimination does not apply in civil cases and witnesses must testify regardless of any potential exposure to criminal liability arising from their answers.
- C. Sustain the privilege without consequence because the assertion of the Fifth Amendment privilege in a civil case carries no evidentiary implications under the federal rules of evidence as currently constituted.
- D. Apply *Baxter v. Palmigiano* — permit adverse inference in civil cases from Fifth Amendment invocation; the inference is not compelled but courts may draw it from the party's silence in civil litigation.

145. A grants Blackacre to B "for so long as the land is used for educational purposes." After several years, B begins commercial use. A claims title. The court will most likely:

- A. Permit B to continue commercial use because the grant's restriction is invalid as an unreasonable restraint on alienation and does not control the property's modern use after several years of operation.
- B. Apply the fee simple determinable rule — the durational language ("so long as") creates automatic forfeiture upon the limiting event; A's possibility of reverter vests upon B's commercial use.
- C. Require A to file suit before recovering title because the grant created a fee simple subject to condition subsequent rather than a fee simple determinable that operated automatically upon breach.

D. Treat the grant as a fee simple absolute because the language was insufficiently clear to create a defeasible fee and the modern preference is for unrestricted ownership in property law.

146. A conveys Blackacre to B "for so long as the land is used for residential purposes." A retains an interest. The court will most likely:

A. Hold A retained a reversion because the grant did not convey a fee simple absolute and A retains some future interest in the property that arises upon the limiting event coming to pass at any time.

B. Hold A retained a right of entry because the grant created a defeasible fee subject to condition subsequent that requires affirmative action by A to recover the property upon the limiting event.

C. Apply the rule that fee simple determinable creates a possibility of reverter — the future interest that automatically vests upon occurrence of the limiting event, distinct from right of entry/power of termination.

D. Hold A retained no interest because the language of the grant transferred all of A's interests in the property to B and A retained no future interest in connection with the conveyance to B.

147. A and B own adjacent parcels. They sign a written covenant requiring B not to develop commercial enterprises. A sells to A1; B sells to B1. A1 sues B1 to enforce the covenant. The court will most likely:

A. Enforce the covenant only if A1 and B1 explicitly agreed to be bound by the covenant in their respective sales transactions and the document expressly assigned the covenant to each successor in interest.

B. Refuse to enforce because covenants are personal arrangements between original parties and do not bind subsequent owners regardless of any provision for assignment to successors in the original document.

C. Apply the test for whether the covenant runs with the land — intent, touch and concern, notice, horizontal privity (where required), and vertical privity with successors — to determine enforceability.

D. Enforce as a personal contract between the original parties and the successors who took the property with knowledge of the covenant's terms and the obligations imposed on the prior owners of the parcels.

148. A owns two parcels. One has a driveway used to access the other. A sells the parcels separately. The grantee of the dominant estate claims an implied easement. The court will most likely:

- A. Apply the requirements for an easement implied from prior use — common ownership at severance, apparent and continuous use before severance, reasonable necessity, and existence at severance — to determine grant.
- B. Refuse to imply an easement because implied easements are disfavored under modern law and the parties should have expressly provided for the easement in their sales contract or deed transfer documents.
- C. Require an express easement only because implied easements have been disfavored under modern real property doctrine and the parties should have provided for any necessary easements expressly in writing.
- D. Apply easement by necessity instead because the easement is required for the use of the dominant estate and the implied easement from prior use doctrine has been replaced by the easement by necessity doctrine.

149. A and B contract for the sale of real estate. A's title has an undisclosed easement. B refuses to close. A sues for specific performance. The court will most likely:

- A. Order B to close because the undisclosed easement is a minor encumbrance that does not materially affect the value of the property and B should accept the property as it is now constituted under existing conditions.
- B. Refuse specific performance because B has the right to a marketable title at closing without specific exceptions and any undisclosed encumbrance gives B the right to refuse to perform under the contract.
- C. Apply the marketable title rule — seller's title must be free from reasonable doubt and undisclosed defects; an undisclosed easement materially affecting value or use renders title unmarketable, permitting refusal.
- D. Apply the doctrine of laches because B's refusal to close was untimely and B has waived the right to insist on marketable title by failing to raise the issue promptly after the easement was discovered by B.

150. In a notice jurisdiction, A conveys Blackacre to B (unrecorded). A then conveys to C, a bona fide purchaser without notice. B records first. The court will most likely:

- A. Hold for B because she recorded first under the recording statute and the first to record receives priority over subsequent grantees from the same grantor regardless of notice or value given by the parties.
- B. Apply notice jurisdiction rules — a subsequent BFP for value without notice (actual, record, or inquiry) prevails over a prior unrecorded grantee regardless of which records first; C prevails over B.
- C. Hold for B because she received the property first and the first-in-time rule governs priorities between successive grantees from the same grantor unless the recording act provides otherwise in the case.

D. Apply race-notice rules because the modern recording statute combines race and notice principles and requires the subsequent purchaser without notice to record first to prevail over the prior unrecorded grantee.

151. A executes a deed conveying Blackacre to B. A keeps the deed in her safe deposit box. A dies. B claims title. The court will most likely:

A. Deny title to B — effective delivery requires the grantor's present intent to pass title, evidenced by physical transfer or conduct showing relinquishment of control; mere execution without delivery is insufficient.

B. Award title to B because the deed was executed and the document is sufficient to transfer title without regard to the question of delivery between the grantor and the grantee in connection with the transaction.

C. Award title to B because the deed was found in A's possession and the existence of the document is sufficient to establish A's intent to transfer the property to B at the time of A's death.

D. Apply intestate succession because A died before the property was effectively transferred to B and the residue of A's estate passes to A's heirs under the relevant state statute governing succession.

152. A and B's parcels are subject to an easement. A and B convey to a third party who acquires both parcels. The court will most likely:

A. Maintain the easement because easements are property interests that survive changes in ownership and continue to bind subsequent owners of both the dominant and the servient estates in the case.

B. Apply the merger doctrine — when dominant and servient estates come into common ownership, the easement terminates by merger because one cannot have an easement over their own land; it does not automatically revive.

C. Apply abandonment doctrine because the third party's acquisition of both parcels suggests an intent to abandon the easement and terminate its existence as a separate property right in connection with the parcels.

D. Apply release doctrine because the third party's acquisition of both parcels effectively releases the easement and terminates its existence as a separate property right in connection with the two parcels.

153. A enters and possesses Blackacre adversely under a deed (color of title) describing the entire parcel, though her actual possession is only of a portion. After the statutory period, A claims title to the entire parcel. The court will most likely:

A. Award title only to the actual possessed portion because adverse possession is limited to the land actually occupied by the possessor during the statutory period of adverse possession that is required by the relevant law.

B. Apply constructive adverse possession under color of title — possession under a defective deed describing the parcel, with actual possession of a portion, may extend to the entire parcel described in the color.

C. Award title only with the original owner's consent because the original owner's consent is required to transfer property and adverse possession does not transfer title without the consent of the record owner of the property.

D. Bar adverse possession because the deed is defective and the possessor cannot rely on a defective deed to extend possession beyond the area actually occupied during the statutory period of adverse possession.

154. A and B sign a contract for the sale of real estate. Before closing, the property is destroyed by fire. The court will most likely:

A. Hold for A as buyer because the buyer retained legal title until closing and the seller bore the risk of loss before closing under the doctrine of legal title controlling risk of loss in real estate sales.

B. Hold for B as seller because the seller had legal title at execution of the contract and remained the legal owner until closing, retaining all risks of loss before the transfer of title to the buyer at closing.

C. Apply equitable conversion — buyer becomes equitable owner at contract execution; risk of loss passes to buyer at execution under the English (majority) rule; UVDA places risk on seller until possession.

D. Apply implied warranty of habitability because the seller warranted the property's condition at the time of the contract and the buyer is entitled to receive the property in the condition warranted by the seller at execution.

155. A landlord rents a residential apartment to a tenant. The premises become uninhabitable due to landlord neglect. The tenant withholds rent. The landlord sues for rent. The tenant's strongest defense is:

A. Implied warranty of habitability — residential leases include an implied warranty that premises will remain habitable; substantial breach permits withholding rent, terminating, or seeking damages, and is non-waivable.

B. Constructive eviction defense because the tenant has been effectively deprived of the use and enjoyment of the leased premises and is entitled to withhold rent without further action by the tenant in any case.

C. Quiet enjoyment defense because the landlord's neglect has interfered with the tenant's quiet enjoyment of the leased premises and the landlord's breach of this duty justifies the tenant's withholding of rent.

D. Statute of frauds defense because the lease was oral and the landlord cannot enforce an oral lease against the tenant in the absence of a written agreement signed by the tenant evidencing the rental terms.

156. A conveys Blackacre to B for life, then to B's first child to reach the age of 25. B has no children at conveyance. The court will most likely:

A. Enforce the conveyance because B will likely have children at some point and the contingency will be resolved within a reasonable time after B's death under the modern wait-and-see doctrine of RAP analysis.

B. Apply the Rule Against Perpetuities — the interest must vest within 21 years of a life in being; B's first child to reach age 25 could be born after B's death ( $25 > 21$ ), voiding the gift under classical RAP.

C. Strike down the entire conveyance because the gift to the unborn child is invalid under RAP and the entire conveyance fails as a result of the perpetuities violation in the granting clause of the deed of conveyance.

D. Apply wait-and-see doctrine without further inquiry because the modern wait-and-see approach permits the validity of contingent interests to be determined based on the actual events that unfold during the period.

157. A and B own Blackacre as joint tenants. A mortgages her interest to a bank. A then dies. B claims sole ownership through right of survivorship. The court will most likely:

A. Apply lien-theory states' rule that mortgage does not sever joint tenancy because the mortgage is a lien only and does not transfer title in lien-theory jurisdictions that constitute the modern majority view.

B. Apply title-theory states' rule because the mortgage operates as a transfer of title in title-theory jurisdictions and the transfer destroys the unity of title required for the continuation of joint tenancy.

C. Apply intermediate-theory states' rule because the mortgage operates as a hybrid arrangement and the rules of severance depend on the specific provisions of the mortgage and the jurisdiction's treatment of mortgages.

D. Apply the relevant jurisdictional rule — title theory severs joint tenancy (becomes tenancy in common); lien theory (majority) does not sever and survivorship operates with bank's lien extinguished at A's death.

158. A conveys Blackacre to B by a deed containing covenants of title. B later discovers a defect in title predating A's ownership. B sues A for breach. The court will most likely:

A. Apply the warranty covenants — seisin, right to convey, and against encumbrances are present covenants breached at delivery; warranty, quiet enjoyment, and further assurance are future covenants breached upon interference.

B. Bar B's claim because warranty deeds protect only against the grantor's acts and do not extend to defects that arose before the grantor acquired title to the property at issue in the underlying transaction.

C. Bar B's claim because the defect predates A's ownership and warranty deeds do not extend protection to defects that arose before the grantor's acquisition of title to the property at issue in the case.

D. Apply only special warranty because the deed protects against defects arising during the grantor's ownership only and the defect predates A's ownership and falls outside the scope of the warranty in the deed.

159. A owns a parcel that is landlocked. A's parcel was previously part of a larger parcel owned by B that was severed and sold to A. A seeks an easement of necessity across B's remaining parcel. The court will most likely:

A. Apply the elements of easement by necessity — common ownership at severance, strict necessity for access to the landlocked parcel, and necessity arising at severance — granting the easement based on these elements.

B. Deny the easement because B is unwilling to grant access and the parties should have provided for the easement in their original conveyance or subsequent agreements between A and B regarding the parcels.

C. Require A to purchase the easement from B because easements by necessity do not arise as a matter of law and the parties should negotiate for access to the landlocked parcel through the seller's remaining parcel.

D. Apply implied easement from prior use instead because the elements of an easement by necessity are stricter than those of an implied easement and the latter doctrine provides a more flexible framework for access.

160. A and B, who are married, own Blackacre as tenants by the entirety. A attempts to convey her interest to C without B's consent. The court will most likely:

A. Permit the conveyance because A has a separate ownership interest in the property and is free to convey her interest to a third party without the consent of B in connection with the property.

B. Permit the conveyance subject to B's interest because A has a divisible interest in the property and the conveyance is effective subject to B's continuing rights in the property as a co-tenant by the entirety.

C. Sever the tenancy because A's attempt to convey her interest constitutes a unilateral severance of the tenancy by the entirety and converts the estate to a tenancy in common between A's grantee and B.

D. Apply tenancy by the entirety rules — neither spouse may unilaterally convey or encumber the property without the other's consent; creditors of one spouse generally cannot reach the property; A's conveyance is ineffective.

161. A grants B a written easement to use a driveway across A's property. The easement is recorded. A later sells the property to C. C seeks to terminate the easement. The court will most likely:

A. Apply the rule that an express easement granted in writing and recorded binds subsequent purchasers — C took with constructive notice through recording, the easement runs with the land of the servient estate.

B. Allow C to terminate if A consented because the original grantor's consent is required to terminate an easement and A's consent permits the termination of the easement in the absence of any other contrary considerations.

C. Apply the merger doctrine because C's acquisition of the servient estate merges with the easement's burden on the property and terminates the easement through merger of the dominant and servient estates in C.

D. Allow termination by abandonment because the easement has not been used for a sufficient period and the failure to use the easement supports an inference of abandonment that justifies termination by the servient owner.

162. A has a first mortgage on Blackacre. B has a second mortgage recorded later. The borrower defaults. The court will most likely:

A. Apply equitable apportionment because the foreclosure proceeds should be divided equitably between the two mortgagees rather than according to a strict priority rule based on the time of recording the security interest.

B. Apply first-in-time, first-in-right priority — A's first mortgage, with earlier recording priority, satisfied from foreclosure proceeds before B's second mortgage, subject to specific subordination agreements or exceptions.

C. Apply pro rata distribution because the foreclosure proceeds should be distributed pro rata between the two mortgagees rather than according to a strict priority rule based on the time of recording the security.

D. Apply the lis pendens rule because the foreclosure constitutes notice to all potential creditors and the priority of the mortgages is determined by the time of the lis pendens rather than the original recording.

163. A conveys Blackacre to B (unrecorded). B records two days later. Meanwhile, A conveys the same property to C, who has no actual knowledge but the deed is recorded after B's. In a race-notice jurisdiction, the court will most likely:

A. Apply race-notice rules — subsequent BFP without notice prevails only if she records first; here, B recorded first (before C), so B prevails and C is bound by B's recorded interest.

B. Apply for C because C has constructive notice through the recording system and the recording statute protects subsequent purchasers regardless of when they record relative to the prior unrecorded grantee in the case.

C. Apply intestate succession because the conveyance to B was effective at the time of execution and the subsequent conveyance to C was ineffective because A had no further interest to convey in the property.

D. Apply common-law first-in-time rule because the recording statute is silent on the question of priority between B and C and the common-law rule of first-in-time governs in the absence of statutory provision.

164. A conveys Blackacre to B for life, then to B's eldest child (currently age 10) if she survives B. B's eldest child is identified at the time of conveyance. The court will most likely:

A. Treat the interest as a contingent remainder because the child has not yet been identified at the time of the conveyance and the interest in the child remains contingent until the child's identity is established.

B. Treat the interest as an executory interest because the gift to the child operates to cut short the life estate in B at the time of B's death and is therefore an executory interest rather than a remainder.

C. Apply the distinction — a remainder is vested when the holder is ascertained and there is no condition precedent; here, the child is identified but subject to survival, making it a contingent remainder.

D. Apply the Rule Against Perpetuities because the gift to the child is subject to a condition precedent and the perpetuities period must be calculated to determine whether the gift is valid under the rule.

165. A subdivision contains a restrictive covenant against commercial use, recorded in the original developer's documents. A subsequent purchaser bought a lot without seeing the covenant directly but the document was recorded. The purchaser opens a commercial business. Neighbors sue. The court will most likely:

A. Bar enforcement because the purchaser did not have actual notice of the covenant and the covenant cannot be enforced against a purchaser who did not have actual knowledge of its existence at the time of the purchase.

B. Enforce the covenant under the law of covenants only because the covenant satisfies the requirements for a real covenant and runs with the land regardless of any considerations of equity that may apply to the case.

C. Apply equitable servitude doctrine — enforceable against successor with notice (actual, record, or inquiry) if original parties intended to bind successors, covenant touches and concerns land; horizontal privity not required (Tulk).

D. Apply only common-law nuisance because the commercial use may constitute a nuisance under common-law principles and the neighbors may seek to enjoin the use on nuisance grounds rather than covenant grounds.

166. A and B own Blackacre as tenants in common. A wants to sell, B does not. The court will most likely:

A. Order partition by sale upon A's motion if physical division would cause disproportionate loss (partition in kind preferred where feasible); the court cannot force B to continue ownership against A's wishes.

B. Refuse partition because B objects and the partition action requires the consent of all tenants in common before the court may order the division or sale of the property held by the tenants in common.

C. Apply only partition in kind because partition by sale is disfavored under modern law and the court should attempt to divide the property physically before considering a forced sale of the underlying real estate.

D. Apply forced buyout doctrine because the court may order B to purchase A's interest as an alternative to partition and the forced buyout is preferred over partition because it maintains B's continued ownership of the property.

167. An easement holder has not used the easement for many years. The servient owner seeks to terminate. The court will most likely:

A. Apply the abandonment doctrine — an easement is terminated by abandonment when the holder shows both non-use and an affirmative act or conduct manifesting intent to abandon permanently; mere non-use is insufficient.

B. Apply termination by merger because the easement holder's failure to use the easement effectively merges the easement with the servient estate and the merger terminates the easement as a separate property right.

C. Apply termination by release because the easement holder's failure to use the easement effectively releases the easement to the servient owner and the release terminates the easement as a separate property right.

D. Apply automatic termination after the statutory period of non-use because most jurisdictions provide for automatic termination of easements after a statutory period of non-use, which has been satisfied in the case.

168. A holds an easement appurtenant benefiting Parcel X (dominant) over Parcel Y (servient). A sells Parcel X to B. The court will most likely:

A. Hold the easement is personal to A and cannot transfer to B because easements appurtenant are personal property rights belonging to the original grantee and do not transfer to subsequent owners of the dominant estate.

B. Apply the rule that an easement appurtenant transfers automatically with the dominant estate to its new owner; it is incident to the land, requiring no separate transfer or notice beyond the conveyance of the dominant parcel.

C. Require separate easement documentation because the easement is a separate property right that requires its own transfer document to be effective between the original grantee and any subsequent owners of the dominant estate.

D. Apply easement in gross rules because the easement benefits a specific person rather than the dominant estate and the transfer of the easement requires the consent of the servient owner to be effective.

169. A subsequent purchaser claims to have taken without notice. Other facts suggest she should have known of a prior unrecorded interest. The court will most likely:

A. Find no notice because she had no actual knowledge of the prior unrecorded interest and the recording system did not give her any constructive notice of the prior interest in the property at issue.

B. Find no notice because she relied on the recording system and the recording system did not give her any constructive notice of the prior interest in the property at the time of her purchase from the seller.

C. Apply only actual notice because constructive notice is a narrow concept that requires the recording of a document and the prior unrecorded interest does not give rise to constructive notice in the case.

D. Apply inquiry notice — a purchaser is charged with knowledge of facts a reasonable inquiry would have revealed; if circumstances would lead a reasonable purchaser to investigate, failure to inquire destroys good faith.

170. A landlord begins construction activities that significantly disturb the tenant. The tenant claims breach of quiet enjoyment. The court will most likely:

A. Apply the covenant of quiet enjoyment — landlord covenants undisturbed possession for the lease term; substantial interference (constructive eviction) permits termination, withholding rent, or damages with notice and timely vacation.

B. Apply only the implied warranty of habitability because the construction activities affect the habitability of the leased premises and the implied warranty of habitability provides the controlling framework for this case.

C. Apply only nuisance doctrine because the construction activities may constitute a nuisance to the tenant under common-law principles and the nuisance doctrine provides the controlling framework for evaluating the case.

D. Apply only express covenant analysis because the lease does not contain an express covenant of quiet enjoyment and the tenant cannot rely on an implied covenant in the absence of express provision in the agreement.

171. Two tenants in common own Blackacre. One tenant has been in sole possession and has received rents from third parties. The other tenant seeks an accounting. The court will most likely:

A. Refuse accounting because cotenants share equally in the use and enjoyment of the property and the sole possession by one cotenant does not give rise to any obligation of accounting to the other cotenant in the case.

B. Apply the rule — a cotenant in sole possession owes an accounting to other cotenants for net rents received from third parties (not for the cotenant's own use absent ouster); other cotenant entitled to share of net rents.

C. Apply ouster doctrine to all sole-possession scenarios because the sole possession by one cotenant constitutes an ouster of the other cotenant and the ouster gives rise to a claim for damages by the dispossessed cotenant in any case.

D. Order partition automatically because the sole possession by one cotenant creates an irreconcilable conflict between the cotenants and partition is the only remedy for the dispute between the cotenants in connection with the property.

172. A conveys Blackacre to B for life, then to C if C survives B, otherwise to D. The court will most likely:

A. Treat C as the absolute owner because the gift to C is the primary remainder and the alternative gift to D does not affect the validity of the primary gift to C in the conveyance to the named beneficiaries of the deed.

B. Apply the analysis — C has a contingent remainder (subject to surviving B); D has an alternative contingent remainder; both are valid; one or the other will vest at B's death depending on survival; subject to RAP analysis.

C. Apply intestate succession because the conveyance fails as a result of the alternative contingent remainder and the property passes to A's heirs under the relevant state statute governing intestate succession to real property.

D. Strike down the conveyance because the alternative contingent remainder violates the rule against contingent remainders and the conveyance fails as a result of the violation under the doctrine of contingent remainders.

173. A intentionally pushed B from behind in a crowded area. B was not injured but was offended. B sues for battery. The court will most likely:

A. Find battery — battery requires intentional act causing harmful or offensive contact with the plaintiff's person; the contact need not be harmful, only offensive to a reasonable person, with general intent sufficient.

B. Find no battery because no injury resulted from the contact and battery requires actual physical harm to the plaintiff before liability may be imposed on the defendant for the alleged intentional contact in the case.

C. Find no battery because the push was unintentional and battery requires specific intent to cause harm to the plaintiff before liability may be imposed on the defendant for the alleged contact in the case.

D. Apply assault doctrine instead because the conduct created reasonable apprehension of imminent harmful or offensive contact and the assault doctrine provides the controlling framework for evaluating the conduct in the case.

174. A claimed B had stolen merchandise and detained B for an extended period in a back room. The merchandise was not actually stolen. B sues for false imprisonment. A's strongest defense is:

A. The shopkeeper's privilege automatically excuses any detention because the privilege provides absolute immunity to shopkeepers who detain customers suspected of theft regardless of the duration or manner of the detention.

B. A had probable cause to suspect theft regardless of duration because the shopkeeper's privilege protects against false imprisonment claims when the shopkeeper has reasonable grounds to suspect theft from the store at issue.

C. B's detention was voluntary because B did not actively resist the detention and the failure to resist constitutes implied consent to the detention by the shopkeeper at the back of the store at issue in the case.

D. The shopkeeper's (Merchant's) privilege permits reasonable detention for a reasonable period in a reasonable manner with reasonable grounds; extended detention beyond what is reasonable destroys the privilege defense.

175. A bystander failed to assist a person in distress, although there was no special relationship. The injured person sues for negligence. The court will most likely:

A. Apply duty broadly to all strangers because the law of negligence imposes a duty to assist on anyone who has the opportunity to do so and the failure to assist constitutes a breach of that duty under modern doctrine.

B. Apply the no-duty-to-rescue rule — a stranger has no duty to rescue absent special relationship, creation of danger, or voluntary undertaking; the rescuer-once-undertaking must complete with reasonable care.

C. Find duty based on moral obligation because the failure to assist a person in distress violates a moral obligation that gives rise to a corresponding legal duty to assist under the modern law of negligence on these facts.

D. Apply rescuer doctrine because the bystander assumed a duty to assist when she observed the person in distress and the rescuer doctrine imposes a corresponding duty to complete the assistance with reasonable care in the case.

176. A is a professional service provider. A renders services that fall short of common standards. The court will most likely:

A. Apply the reasonable person standard because the law of negligence applies a uniform standard to all defendants regardless of professional qualifications and the reasonable person standard governs all cases in modern doctrine.

B. Apply only the contract standard because the parties have agreed to the services and the contract standard provides the controlling framework for evaluating the adequacy of the services rendered by the defendant in the case.

C. Apply the professional standard of care — a professional must exercise the skill, knowledge, and care commonly possessed by other professionals in good standing in the same field; departure from this standard is breach.

D. Apply criminal liability because the failure to render services to common standards may constitute criminal negligence and the criminal law provides the controlling framework for evaluating the adequacy of the services in the case.

177. A consumer is injured by a product. The consumer alleges design defect. The court will most likely:

A. Apply only manufacturing defect doctrine because the design defect doctrine has been merged with the manufacturing defect doctrine under modern products liability law and the manufacturing defect doctrine governs all defect cases.

B. Apply modern design defect tests — consumer expectation (unreasonably dangerous beyond ordinary consumer expectation) and risk-utility (Restatement Third) requiring proof of a reasonable alternative design.

C. Apply only the negligence standard because the design defect doctrine has been subsumed within the negligence standard under modern products liability law and the negligence standard governs all defect cases.

D. Apply only the manufacturing defect standard because the design defect doctrine has been replaced with the manufacturing defect standard under modern products liability law and the manufacturing defect standard governs all cases.

178. A public figure sues for defamation following a statement published in a newspaper. The statement is critical and contains some inaccuracies. The court will most likely:

A. Apply the negligence standard because the publication of the statement constitutes negligent conduct by the newspaper and the negligence standard provides the controlling framework for evaluating the publication in the case.

B. Apply strict liability because the publication of the statement constitutes a wrongful act by the newspaper and the strict liability standard provides the controlling framework for evaluating the publication in the case.

C. Apply only constitutional analysis because the First Amendment provides the controlling framework for evaluating the publication and the constitutional analysis governs all defamation cases involving public figures and the press.

D. Apply *New York Times v. Sullivan* — a public official or public figure must prove actual malice (knowledge of falsity or reckless disregard for truth) to recover for defamation under the constitutional standard.

179. A enters B's land without permission. The court will most likely:

A. Find no trespass without harm because the law of trespass requires actual damage to the property before liability may be imposed on the defendant for the alleged unauthorized entry to the property at issue in the case.

B. Apply the rule — trespass to land requires intentional, voluntary, unauthorized entry onto another's land; harm is not required for the basic tort, but damages may include nominal; intent is to enter, not to trespass.

C. Find trespass only if A knew the property belonged to B because the law of trespass requires actual knowledge of the property's ownership before liability may be imposed on the defendant for the alleged unauthorized entry.

D. Apply nuisance doctrine because the unauthorized entry may constitute a nuisance to the landowner under common-law principles and the nuisance doctrine provides the controlling framework for evaluating the conduct in the case.

180. A consumer is injured by a defective product. The consumer brings a strict liability claim against the manufacturer. The court will most likely:

A. Apply only negligence doctrine because strict liability has been merged with negligence under modern products liability law and the negligence doctrine provides the controlling framework for evaluating the manufacturer's liability.

B. Apply Section 402A — one who sells a product in defective condition unreasonably dangerous is subject to strict liability for physical harm caused, provided seller is in the business and the product reaches user without substantial change.

C. Apply only consumer expectation test because the modern test for product defects is the consumer expectation test and the consumer expectation test provides the controlling framework for evaluating the alleged defects in the case.

D. Apply only design defect doctrine because the modern test for product defects is the design defect doctrine and the design defect doctrine provides the controlling framework for evaluating the alleged defects in the case.

181. A's negligence caused a chain of events leading to B's injury. The chain included an intervening act by C. The court will most likely:

A. Apply proximate cause analysis — A's negligence is the proximate cause if it was a substantial factor and the harm was within the foreseeable risk; an intervening act by C breaks the chain only if it was unforeseeable and superseding.

B. Cut off A's liability automatically because the intervening act by C constitutes an independent cause of the injury and the independent cause cuts off A's liability for the alleged negligence under the proximate cause doctrine.

C. Apply only but-for causation because the but-for test is the only relevant inquiry under modern proximate cause analysis and the but-for test governs all causation questions in modern negligence law.

D. Apply only foreseeability because the foreseeability of the harm is the only relevant inquiry under modern proximate cause analysis and the foreseeability test governs all causation questions in modern negligence law.

182. A's name is used without permission in a commercial advertisement. A sues for invasion of privacy. The court will most likely:

A. Apply public disclosure of private facts doctrine because the advertisement disclosed A's name to the public without permission and the public disclosure doctrine provides the controlling framework for evaluating the disclosure in the case.

B. Apply intrusion upon seclusion doctrine because the advertisement intruded upon A's seclusion by using her name without permission and the intrusion doctrine provides the controlling framework for evaluating the conduct in the case.

C. Apply only defamation doctrine because the unauthorized use of A's name may constitute defamation and the defamation doctrine provides the controlling framework for evaluating the unauthorized use in the case at issue.

D. Apply appropriation of name or likeness tort — a defendant who uses the plaintiff's name or likeness for the defendant's benefit, without permission, is liable for invasion of privacy, particularly in commercial contexts.

183. A pointed a fake gun at B, who believed it was real and felt fear. The court will most likely:

A. Find assault — assault requires intentional conduct creating reasonable apprehension of imminent harmful or offensive contact; B's reasonable apprehension is sufficient even if A had no actual ability to carry out the threat.

B. Find no assault because the gun was fake and the law of assault requires actual ability to inflict harm before liability may be imposed on the defendant for the alleged conduct in the case at issue.

C. Find no assault because no contact occurred and the law of assault requires actual contact with the plaintiff before liability may be imposed on the defendant for the alleged conduct in the case at issue.

D. Apply battery doctrine because the pointing of the gun constitutes a battery on B and the battery doctrine provides the controlling framework for evaluating the conduct in the case at issue.

184. A engaged in extreme and outrageous conduct that caused B severe emotional distress. The court will most likely:

A. Require physical injury for IIED because the law of intentional infliction of emotional distress requires actual physical harm to the plaintiff before liability may be imposed on the defendant for the alleged conduct in the case.

B. Apply only NIED doctrine because the modern test for emotional distress is the negligent infliction of emotional distress doctrine and the NIED doctrine provides the controlling framework for evaluating the conduct.

C. Apply IIED elements — extreme and outrageous conduct, intent or recklessness regarding distress, causation, and severe emotional distress; the conduct must be beyond all bounds of decency tolerated in a civilized society.

D. Apply only intentional tort doctrine because the conduct constitutes an intentional tort and the intentional tort doctrine provides the controlling framework for evaluating the conduct in the case at issue here at trial.

185. A's industrial operation creates noise and pollution that substantially interferes with B's use and enjoyment of her property. The court will most likely:

A. Apply trespass doctrine because the pollution constitutes a physical invasion of B's property and the trespass doctrine provides the controlling framework for evaluating the invasion in the case at issue.

B. Apply strict liability because the industrial operation is inherently dangerous and the strict liability doctrine provides the controlling framework for evaluating the operation in the case at issue.

C. Apply private nuisance — substantial and unreasonable interference with B's use and enjoyment of land caused by A's conduct without physical entry; balance gravity against utility, with remedies of damages, abatement, or injunction.

D. Apply intentional tort doctrine because the operation constitutes an intentional tort against B and the intentional tort doctrine provides the controlling framework for evaluating the operation in the case at issue.

186. A private individual sues for defamation following a publication. The court will most likely:

A. Apply *NYT v. Sullivan* actual malice standard because the actual malice standard provides the controlling framework for all defamation cases under modern constitutional doctrine governing the law of defamation.

B. Apply *Gertz v. Robert Welch* — private-figure plaintiffs must prove at minimum negligence; states may require higher but not lower; presumed and punitive damages require actual malice if matter of public concern.

C. Apply strict liability because the publication constitutes a wrongful act by the defendant and the strict liability standard provides the controlling framework for evaluating the publication in the case at issue.

D. Apply rational basis because the publication is a matter of state law and the rational basis test provides the controlling framework for evaluating the publication in the case at issue under modern doctrine.

187. A consumer is injured by a product that lacks adequate warnings about a known hazard. The court will most likely:

A. Apply the failure to warn standard — a manufacturer has a duty to warn of foreseeable risks of harm not obvious to the user; warning must be adequate given the nature of the danger; failure is a basis for product liability.

B. Apply only manufacturing defect doctrine because the product was manufactured to specifications and any defect in the product arose from inadequate warnings rather than a defect in the manufacturing process at the plant.

C. Apply only design defect doctrine because the absence of warnings constitutes a design defect in the product and the design defect doctrine provides the controlling framework for evaluating the product in the case.

D. Apply only express warranty doctrine because the manufacturer's failure to warn constitutes a breach of the express warranty of safe operation and the express warranty doctrine provides the controlling framework in the case.

188. A hires B as an independent contractor. B negligently injures a third party. The third party sues A. The court will most likely:

A. Apply respondeat superior to A because the hiring of an independent contractor creates a master-servant relationship between A and B and respondeat superior holds A liable for B's negligence on the job during the work.

B. Bar all liability for independent contractors because the independent contractor doctrine immunizes the principal from liability for the contractor's conduct regardless of the circumstances surrounding the work being performed for the principal.

C. Apply the rule — employer generally not vicariously liable for independent contractor's negligence; exceptions for non-delegable duties (premises for invitees), inherently dangerous activities, and negligence in selection or supervision.

D. Apply joint and several liability because the independent contractor's negligence is attributable to A through the hiring relationship and joint and several liability holds both A and B jointly responsible for the contractor's torts.

189. A and B were both at fault. A's negligence contributed 70%, B's 30%. The court will most likely:

A. Apply pure contributory negligence because the modern majority approach is pure contributory negligence and pure contributory negligence bars recovery whenever the plaintiff bears any fault for the underlying injury at issue.

B. Apply joint and several liability without apportionment because the modern majority approach is joint and several liability without apportionment and the doctrine holds all defendants jointly liable for the full damages.

C. Apply comparative fault apportionment — damages reduced by plaintiff's percentage of fault; pure comparative allows recovery of percentage of damages; modified comparative bars if exceeding threshold; defendants apportioned among themselves.

D. Apply joint and several liability without modification because the modern majority approach is joint and several liability without modification and the doctrine holds all defendants jointly liable for the full damages incurred.

190. A intentionally interfered with B's possession of personal property, causing minor harm. The court will most likely:

A. Apply only conversion doctrine because conversion is the modern tort for interference with personal property and the conversion doctrine provides the controlling framework for all cases involving interference with chattels.

B. Apply the distinction — trespass to chattels involves intentional, less-than-serious interference; conversion involves serious interference justifying forced sale of the chattel; severity of interference distinguishes the two torts.

C. Apply only trespass to chattels regardless of severity because the modern tort for interference with personal property is trespass to chattels and the doctrine governs all cases involving interference with chattels.

D. Apply battery doctrine because the interference with B's chattels constitutes a battery on B and the battery doctrine provides the controlling framework for evaluating the interference in the case at issue.

191. A product was defective due to a manufacturing flaw. The court will most likely:

A. Apply only consumer expectation test because the modern test for product defects is the consumer expectation test and the consumer expectation test provides the controlling framework for evaluating manufacturing defects.

B. Apply only design defect doctrine because the modern test for product defects is the design defect doctrine and the design defect doctrine provides the controlling framework for evaluating all alleged product defects at trial.

C. Apply manufacturing defect rule — product departed from intended design even with all possible care in construction; plaintiff shows defect existed when product left manufacturer's control; strict liability without proof of negligence.

D. Apply only failure to warn doctrine because the manufacturing flaw constitutes a failure to warn the consumer about the existence of the flaw and the failure to warn doctrine provides the controlling framework for the case.

192. A's conduct would otherwise be a battery, but B consented to the contact. The court will most likely:

A. Apply consent as a complete defense — consent given freely, with capacity, and within scope authorized bars recovery; consent may be express or implied; consent given under fraud, duress, mistake, or beyond scope is invalid.

B. Apply self-defense because the conduct was reasonable under the circumstances and the self-defense doctrine provides the controlling framework for evaluating the conduct in the case at issue at trial here today.

C. Apply privilege doctrine because the conduct was privileged under the circumstances and the privilege doctrine provides the controlling framework for evaluating the conduct in the case at issue at trial here today.

D. Apply assumption of risk doctrine because the plaintiff assumed the risk of the contact and the assumption of risk doctrine provides the controlling framework for evaluating the conduct in the case at issue at trial here today.

193. An employee causes injury while engaged in conduct partly within and partly outside the scope of employment. The court will most likely:

A. Bar all vicarious liability automatically because the conduct fell partly outside the scope of employment and the partial conduct outside the scope cuts off all vicarious liability for the conduct at issue in the case.

B. Apply strict liability because the conduct caused harm to a third party and the strict liability doctrine provides the controlling framework for evaluating the employer's liability in connection with the conduct at issue.

C. Apply scope-of-employment test — employer vicariously liable for torts within scope; the conduct must be of the kind employed to perform, within authorized time and space, and actuated by purpose to serve employer; mixed conduct may permit partial liability.

D. Apply joint enterprise doctrine because the employee was engaged in a joint enterprise with the employer at the time of the conduct and the joint enterprise doctrine provides the controlling framework for evaluating the case.

194. A condition affects the rights of the public generally. A private plaintiff sues. The court will most likely:

A. Bar suit because public nuisance is government-only because public nuisance suits can be brought only by government plaintiffs and private plaintiffs lack standing to bring public nuisance actions in any case under modern doctrine.

B. Apply public nuisance — substantial and unreasonable interference with a right common to the general public; private plaintiff may recover only by showing particular damage different in kind from that suffered by the general public.

C. Apply only private nuisance because the modern test for nuisance is private nuisance and the private nuisance doctrine provides the controlling framework for evaluating the conduct in the case at issue at trial here.

D. Apply only trespass doctrine because the condition constitutes a physical invasion of the plaintiff's property and the trespass doctrine provides the controlling framework for evaluating the invasion in the case at issue.

195. A witnessed her child being seriously injured by B's negligence. A sues for NIED. The court will most likely:

A. Apply only zone of danger doctrine because the modern test for NIED is the zone of danger test and the zone of danger test provides the controlling framework for evaluating the alleged emotional distress in the case.

B. Apply bystander recovery under *Dillon v. Legg*/Restatement Third — plaintiff closely related, present at the scene at the time of the injury-producing event, and suffered distress beyond a disinterested witness; some require physical manifestation.

C. Bar recovery because A was not physically injured because the modern test for NIED requires actual physical injury to the plaintiff before liability may be imposed on the defendant for the alleged emotional distress in the case.

D. Apply IIED doctrine because the conduct constitutes intentional infliction of emotional distress on A and the IIED doctrine provides the controlling framework for evaluating the conduct in the case at issue at trial here today.

196. Two defendants caused an indivisible harm. The plaintiff recovers from one. That defendant seeks contribution from the other. The court will most likely:

A. Bar contribution because the modern majority approach is to bar contribution between joint tortfeasors and the doctrine governs all cases involving joint tortfeasors in connection with indivisible harms in modern tort law.

B. Apply only joint and several liability without contribution because the modern majority approach is joint and several liability without contribution and the doctrine holds all defendants jointly liable without right of recovery between them.

C. Apply modern contribution rule — a defendant who paid more than her proportionate share of an indivisible judgment may recover from co-tortfeasors their proportionate shares (typically based on percentage of fault); generally available unless immune.

D. Apply only indemnity doctrine because the modern test for recovery between tortfeasors is indemnity and the indemnity doctrine provides the controlling framework for evaluating recovery between tortfeasors in the case.

197. A made a defamatory statement about B in good faith and in a privileged context. B sues. A's strongest defense is:

A. Apply only truth defense because truth is the only defense to defamation and the truth defense provides the controlling framework for evaluating the defamation in the case at issue at trial here today in the case.

B. Apply only consent defense because consent is the only defense to defamation and the consent defense provides the controlling framework for evaluating the defamation in the case at issue at trial here today in this case.

C. Apply absolute and qualified privilege defenses — absolute (judicial, legislative, executive, marital, fair report) provides complete immunity regardless of malice; qualified (common interest, public concern, fair comment) protects good faith without actual malice.

D. Apply only fair report privilege because the fair report privilege is the only privilege available to defamation defendants and the fair report privilege provides the controlling framework for evaluating the defamation in the case.

198. A engages in blasting in a populated area. B is injured by the blast. The court will most likely:

A. Apply only negligence doctrine because the modern test for blasting is negligence and the negligence doctrine provides the controlling framework for evaluating the blasting in the case at issue at trial here today.

B. Apply intentional tort doctrine because the blasting constitutes an intentional tort on B and the intentional tort doctrine provides the controlling framework for evaluating the conduct in the case at issue at trial here today.

C. Apply nuisance doctrine because the blasting constitutes a nuisance to B and the nuisance doctrine provides the controlling framework for evaluating the conduct in the case at issue at trial here today in the case.

D. Apply strict liability for abnormally dangerous activities under Restatement Third — strictly liable for harm from an activity creating foreseeable and highly significant risk even with reasonable care, not in common usage; blasting typically meets this standard.

199. A statute requires a specific safety measure. A failed to comply. The plaintiff was injured. The court will most likely:

A. Apply the negligence per se doctrine — defendant's unexcused statutory violation may constitute negligence per se if statute imposes specific safety duty, plaintiff is in protected class, and harm is of type statute was intended to prevent; defenses include impossibility, emergency, reasonableness.

B. Apply only the reasonable person standard because the modern test for negligence is the reasonable person standard and the reasonable person standard provides the controlling framework for evaluating the conduct in the case.

C. Bar negligence claim if no statute is involved because the modern test for negligence is negligence per se and the doctrine requires the existence of a statute before the plaintiff may bring a negligence claim against the defendant.

D. Apply strict liability automatically because the failure to comply with a statute constitutes a wrongful act by the defendant and strict liability provides the controlling framework for evaluating the conduct in the case.

200. A engages in willful and wanton misconduct that injures B. B seeks punitive damages. The court will most likely:

A. Apply the requirements for punitive damages — malicious, fraudulent, wanton, willful, or grossly reckless conduct (more than ordinary negligence) that caused harm, with a reasonable ratio to actual damages under *State Farm v. Campbell* due process limits.

B. Award punitive damages automatically for any intentional tort because the modern approach is to award punitive damages for any intentional tort and the automatic award provides the controlling framework for evaluating the case.

C. Apply only compensatory damages because the modern approach is to award only compensatory damages and the compensatory damages doctrine provides the controlling framework for evaluating the case at issue at trial.

D. Bar punitive damages because the modern approach is to bar punitive damages in all tort cases and the bar provides the controlling framework for evaluating the case at issue at trial here today in the case.

## Practice Exam 4: Answer Key with Explanations

1. B — Specific personal jurisdiction requires purposeful availment plus relatedness. The manufacturer's deliberate use of a distribution arrangement to place products in State B, combined with the plaintiff's injury arising from that conduct, satisfies the Ford/McIntyre framework. Mere nationwide sales or website accessibility are insufficient without targeted conduct, and injury alone does not establish jurisdiction.

2. D — Defendant B is a citizen of its state of incorporation (State X) under § 1332(c)(1). Because the plaintiff is also a State X citizen, complete diversity is destroyed regardless of the second defendant's diverse citizenship or the amount in controversy.

- 3. C** — Under *Erie/Hanna*, a federal court in diversity applies state substantive law unless a valid federal rule directly controls the issue. Where the federal statute does not directly govern the standard of care, the court applies the state standard while still respecting any preemptive effect on related conduct.
- 4. A** — *Mullane v. Central Hanover Bank* holds that due process requires service reasonably calculated to apprise the defendant. Publication is a last-resort method permitted only after diligent search and exhaustion of more reliable means, with court authorization.
- 5. B** — Section 1404(a) permits transfer for the convenience of parties and witnesses and the interests of justice, considering the *Gulf Oil* private factors (witness convenience, access to proof) and public factors (local interest, court congestion). The transferee district must also be one where the action could have been brought.
- 6. C** — Rule 23(b)(3) requires common questions to predominate over individual issues and that class adjudication be superior. Common liability and standard-conduct issues overwhelming individualized damages support predominance under *Amchem* and *Tyson Foods*.
- 7. B** — *Forum non conveniens* dismissal requires an adequate alternative forum and a strong showing that *Gulf Oil* private and public interest factors favor that forum. *Piper Aircraft* confirms that location of evidence, witnesses, and applicable law abroad supports dismissal in favor of the foreign forum.
- 8. D** — Under *Spokeo* and *TransUnion*, standing requires a concrete injury fairly traceable to the defendant's conduct and redressable by judicial decision. Paying for a mislabeled product is a concrete economic injury satisfying all three prongs; mere statutory violation alone is not enough without concrete injury.
- 9. A** — A forum selection clause constitutes consent to personal jurisdiction, and *Burger King* recognizes that purposefully contracting with a forum resident for performance affecting the forum supplies purposeful availment. Combined consent plus purposeful contracting satisfies due process minimum contacts.
- 10. C** — *Hickman v. Taylor* and Rule 26(b)(3) protect work product but make ordinary work product discoverable on a showing of substantial need and undue hardship. Opinion work product containing attorney mental impressions remains protected almost absolutely.
- 11. C** — Rule 19(b) directs the court to consider four equity-and-good-conscience factors when a required party cannot be joined: prejudice, ability to shape relief to mitigate prejudice, adequacy of judgment, and existence of alternative forums. The court then decides whether to proceed or dismiss for non-joinder.
- 12. A** — Rule 15(c)(1)(B) permits relation back of an amendment asserting a claim arising out of the same conduct, transaction, or occurrence as the original pleading. Same-transaction relation back saves new claims added during the limitations period.
- 13. D** — *Twombly* and *Iqbal* require factual content plausibly suggesting liability, not bare legal conclusions. Conclusory recitations like "engaged in unlawful price-fixing" without specific factual allegations fail the plausibility standard and warrant dismissal under Rule 12(b)(6).

- 14. B** — Under the well-pleaded complaint rule, federal question jurisdiction exists when federal law appears on the face of the complaint. Removal is proper if the federal court has original jurisdiction under § 1331, defeating remand.
- 15. C** — Rule 56 requires summary judgment when no genuine dispute of material fact exists. Celotex permits the movant to point to the absence of evidence on an essential element, and the non-movant must produce specific record evidence rather than rest on pleadings.
- 16. B** — Claim preclusion bars relitigation of claims arising from the same transaction or occurrence as the prior action, including damages theories that could have been raised. Federated Department Stores enforces the transactional test regardless of new legal theories.
- 17. D** — Defensive nonmutual issue preclusion under *Blonder-Tongue* bars relitigation when the issue was actually litigated and necessary to the prior judgment and the party against whom preclusion is asserted had a full and fair opportunity. B's litigated non-negligence bars the vicarious claim against the employer.
- 18. A** — Rule 23(f) permits discretionary interlocutory appeal of orders granting or denying class certification within 14 days of the order. The court of appeals may accept or decline review, providing immediate appellate scrutiny where warranted.
- 19. A** — Single-contact specific jurisdiction is available only when the claim arises from that contact and the defendant purposefully availed itself of the forum. Isolated unrelated contacts neither support specific jurisdiction (no relatedness) nor general jurisdiction (not at home).
- 20. C** — Under § 1441(b)(2), the forum-defendant rule bars diversity removal when any properly joined and served defendant is a citizen of the forum state. A State A defendant filed in State A state court cannot remove to federal court on diversity grounds.
- 21. A** — Rule 15(c)(1)(C) permits relation back for amendments changing a party when the claim arises from the same conduct, the new defendant received timely notice within the Rule 4(m) period without prejudice, and the new defendant knew or should have known the action would have been brought against it but for a mistake of identity.
- 22. A** — Rule 9(b) requires fraud to be pleaded with particularity — the who, what, when, where, and how of the fraudulent statements. Intent, knowledge, and other states of mind may be alleged generally, but the specific circumstances of fraud must be detailed.
- 23. B** — Rule 41(a)(1)(A)(i) permits voluntary dismissal as of right before the opposing party serves an answer or summary judgment motion. The first dismissal is without prejudice; the two-dismissal rule makes a subsequent voluntary dismissal with prejudice.
- 24. D** — *Guaranty Trust Co. v. York* holds that statutes of limitations are substantive for Erie purposes; a federal court in diversity applies the state limitations period unless a federal statute directly governs the specific cause of action being litigated.

- 25. D** — *Grable & Sons Metal Products v. Darue* permits federal question jurisdiction over a state-law claim embedding a federal issue only when the federal issue is necessarily raised, actually disputed, substantial, and capable of resolution in federal court without disturbing the federal-state balance.
- 26. B** — Attorney-client privilege protects confidential communications between a client and attorney made for the purpose of obtaining legal advice, with exceptions for crime-fraud and waiver. The court must analyze these elements before compelling or sustaining the privilege claim.
- 27. B** — Rule 16 authorizes pretrial conferences and scheduling orders that govern case management, including the order and timing of witnesses, expert disclosures, and discovery deadlines. The court issues such orders after consulting the parties.
- 28. C** — Rule 52(a)(6) provides that findings of fact made by a district court after a bench trial may be set aside only if clearly erroneous; the reviewing court must have a definite and firm conviction that a mistake has been committed. Credibility determinations receive especially strong deference.
- 29. C** — *Foman v. Davis* lists futility as a recognized ground for denying leave to amend under Rule 15(a)(2). A claim barred by limitations and otherwise non-viable is futile, justifying denial despite the "freely given when justice so requires" standard.
- 30. B** — *Abbott Laboratories v. Gardner* establishes ripeness as a two-factor inquiry: fitness of the issues for judicial decision and hardship to the parties from withholding consideration. A credible threat of prosecution plus immediate compliance burdens satisfies both prongs.
- 31. C** — *Wickard v. Filburn* and *Gonzales v. Raich* permit Congress to regulate intrastate activity that, in the aggregate, substantially affects interstate commerce. Personal-use production aggregated across producers substantially affects the interstate market, sustaining the regulation.
- 32. C** — *Printz v. United States* and *New York v. United States* establish the anti-commandeering doctrine, prohibiting Congress from compelling state legislatures to enact or state executive officials to enforce federal regulatory programs. Background-check mandates on state officials fall within this prohibition.
- 33. D** — *McDonald v. City of Chicago* incorporated the Second Amendment against the states through the Fourteenth Amendment Due Process Clause. State firearms regulations are accordingly subject to Second Amendment constraints.
- 34. D** — Public parks are quintessential traditional public forums under *Hague v. CIO*. A complete leafleting prohibition is a content-neutral restriction that fails intermediate scrutiny because it is not narrowly tailored to a significant interest and forecloses ample alternative channels.
- 35. A** — *Memorial Hospital v. Maricopa County* and related cases permit reasonable durational residency requirements when the state has a substantial interest in subsidizing actual residents. A one-year requirement often survives heightened or rational basis review depending on the right involved.

- 36. B** — *Williamson v. Lee Optical* applies rational basis review to economic regulations. A price regulation rationally related to consumer protection survives substantive due process challenge under the highly deferential modern economic-rights standard.
- 37. A** — *Pleasant Grove City v. Summum* holds that permanent monuments donated to and displayed by a city in a public park are government speech, not subject to forum analysis or content-neutrality requirements. The city may select among proposed monuments based on its own message.
- 38. A** — *NFIB v. Sebelius* reaffirmed that conditional spending exceeds Congress's spending power when the amount of funding is so large that the state has no real choice — crossing the line into compulsion. Coercion is the strongest constitutional limit on the Spending Clause.
- 39. D** — Modern Establishment Clause analysis after *Kennedy v. Bremerton* emphasizes historical practices and original meaning rather than the formal Lemon test. A neutral moment of silence with secular purpose and no advancement of religion satisfies this analysis.
- 40. A** — *Students for Fair Admissions v. Harvard* (2023) invalidated race-conscious admissions absent narrow tailoring with measurable, time-bound endpoints. Strict scrutiny applies to all facial racial classifications, including diversity-based admissions decisions that the Court found unable to satisfy this demanding standard.
- 41. A** — *Ward v. Rock Against Racism* applies intermediate scrutiny to content-neutral time, place, and manner restrictions in public forums. A general sign-permitting ordinance, if narrowly tailored to a significant interest and leaving ample alternatives, survives the test.
- 42. D** — *Craig v. Boren* applies intermediate scrutiny to gender classifications, and *United States v. Virginia* (VMI) requires an "exceedingly persuasive justification" untethered to archaic stereotypes about parenting roles. Custody preferences based on gender stereotypes typically fail this standard.
- 43. B** — *Flast v. Cohen* recognizes federal taxpayer standing for Establishment Clause challenges to specific congressional spending under the Spending Clause. The doctrine has been narrowed by *Hein* and *Arizona Christian School Tuition Org. v. Winn* to direct legislative appropriations.
- 44. D** — *Saenz v. Roe* recognizes the right to travel under the Fourteenth Amendment Privileges or Immunities Clause, protecting new residents' right to be treated equally with longer-term residents. Durational residency requirements for benefits face strict scrutiny.
- 45. A** — *Dean Milk Co. v. Madison* and other Dormant Commerce Clause cases apply virtually per se invalidity to state laws facially discriminating against interstate commerce. The state must demonstrate the law is necessary to achieve a legitimate local purpose with no nondiscriminatory alternative.
- 46. A** — *Baker v. Carr* identifies political question factors: textual constitutional commitment to another branch, lack of judicially manageable standards, and prudential considerations. Federal courts decline review of issues committed to political branches.

**47. D** — *Texas v. Johnson* holds that flag burning is symbolic speech protected by the First Amendment, and statutes punishing it because of the political message conveyed are content-based, subject to strict scrutiny, and unconstitutional.

**48. D** — *Connally v. General Construction* and modern vagueness doctrine void statutes that fail to give ordinary people fair notice of prohibited conduct or lack meaningful enforcement guidelines. "Annoying" lacks both elements, rendering the statute unconstitutionally vague under due process.

**49. A** — The Supreme Court has selectively incorporated most provisions of the Bill of Rights against the states through the Fourteenth Amendment Due Process Clause. Procedural rights of the Fourth, Fifth, Sixth, and Eighth Amendments now bind state governments.

**50. B** — *Stone v. Graham* struck down a state law requiring Ten Commandments displays in public schools because the predominant purpose was religious. Modern Establishment Clause analysis continues to invalidate clear governmental endorsement of religious doctrine in schools.

**51. A** — *Rosenberger v. University of Virginia* holds that excluding religious viewpoints from a limited public forum constitutes impermissible viewpoint discrimination. Equal funding rules cannot exclude expression based on its religious viewpoint.

**52. D** — *Washington v. Glucksberg* establishes that fundamental rights — deeply rooted in history and tradition and implicit in the concept of ordered liberty — receive strict scrutiny under substantive due process. Non-fundamental liberty interests receive rational basis review.

**53. D** — Voting is a fundamental right under Equal Protection doctrine (*Reynolds v. Sims*; *Kramer v. Union Free School District*). Restrictions on the franchise receive strict scrutiny, requiring narrow tailoring to a compelling government interest.

**54. A** — Article III requires a live case or controversy. Once the dispute ends, the case is moot, with recognized exceptions for conduct capable of repetition yet evading review, voluntary cessation, and class actions where the named plaintiff's claim becomes moot.

**55. B** — *Central Hudson* applies intermediate scrutiny to commercial speech: lawful subject and not misleading, substantial government interest, direct advancement, and no more extensive than necessary. A complete prohibition on advertising a lawful product typically fails the narrow tailoring prong.

**56. B** — *Youngstown Sheet & Tube Co. v. Sawyer* holds that presidential power is at its "lowest ebb" when acting against Congress's express or implied will. Without specific constitutional authority, such action is likely invalid under Justice Jackson's framework.

**57. C** — *Massachusetts Board of Retirement v. Murgia* applies rational basis review to age classifications because age is a non-suspect classification. The law is sustained if rationally related to a legitimate state interest.

**58. B** — Congressional power must rest on enumerated grants. The Tenth Amendment is a residual reservation; if Congress has enumerated authority, the Amendment does not independently invalidate the statute under *New York v. United States*.

**59. D** — Revocation by reliable information of the offeror's inconsistent act (*Dickinson v. Dodds*) terminates an offer before acceptance. B's "I'll think about it" may also be a counteroffer or rejection; absent effective acceptance before revocation, no contract was formed.

**60. D** — Under UCC § 2-206(1)(a) and the modern Restatement view, an offer invites acceptance in any reasonable manner unless unambiguously limited to a stipulated method. Whether the telephone acceptance is effective depends on whether the offeror's stipulation is construed as permissive or exclusive.

**61. A** — Restatement (Second) of Contracts § 90 enforces a promise inducing reasonable, foreseeable reliance when injustice can be avoided only by enforcement. B's reliance by quitting her job supplies the consideration substitute under promissory estoppel.

**62. C** — *Lefkowitz v. Great Minneapolis Surplus Store* establishes that advertisements are generally invitations to deal rather than offers, unless unmistakably definite with specific terms. A generic price advertisement is not an offer; B's call is itself an offer that A may accept or reject.

**63. B** — The Statute of Frauds bars enforcement of oral contracts for the sale of land without a writing signed by the party to be charged. Even substantial agreement on terms cannot overcome the writing requirement.

**64. A** — UCC § 2-207(2) provides that between merchants, additional terms in an acceptance become part of the contract unless the offer expressly limits acceptance, the terms materially alter, or timely objection is given. This replaces the mirror-image rule for merchants.

**65. B** — Common law applies the pre-existing duty rule with exceptions; UCC § 2-209 dispenses with consideration for good-faith modifications. Restatement § 89 also permits common-law modification without consideration under unforeseen circumstances making it fair and equitable.

**66. C** — The parol evidence rule bars prior or contemporaneous evidence that contradicts a fully integrated writing. An integration clause strengthens the presumption of full integration, barring extrinsic terms contradicting the writing's express terms.

**67. A** — Under UCC § 2-610, anticipatory repudiation permits the non-breaching party to await performance for a commercially reasonable time or resort immediately to remedies including cover under § 2-712, damages, and specific performance where appropriate.

**68. B** — UCC § 2-316 permits disclaimer of implied warranties when conspicuous and using specific language. The merchantability disclaimer must specifically mention "merchantability"; "AS IS" or similar specific language also suffices.

- 69. C** — Expectation damages restore the non-breaching party to the position she would have occupied had the contract been performed, including loss in value, foreseeable consequential damages under *Hadley v. Baxendale*, and incidental damages caused by the breach.
- 70. C** — A third-party beneficiary's rights vest when she materially relies, brings suit, or assents to the contract. Before vesting, the contracting parties may modify or rescind freely; after vesting, modification requires the beneficiary's consent.
- 71. B** — UCC § 2-601 perfect tender rule permits the buyer to reject the entire delivery, accept the entire delivery, or accept any commercial unit and reject the rest when the goods fail to conform in any respect in a single-delivery contract.
- 72. A** — Until the obligor receives notice of an assignment, payment to the assignor discharges the obligation. After notice, the obligor must pay the assignee or risk paying twice — the rule protecting unsuspecting obligors.
- 73. C** — Mutual mistake under Restatement (Second) § 152 permits the adversely affected party to avoid the contract if the mistake concerned a basic assumption, had a material effect on the agreed exchange, and the adversely affected party did not bear the risk. A forgery believed to be an original satisfies these elements.
- 74. D** — Impracticability under UCC § 2-615 and Restatement (Second) § 261 excuses performance when an unforeseeable event makes performance impracticable (not merely costlier), the event defeats a basic assumption, and the party did not assume the risk.
- 75. D** — UCC § 2-205 makes a merchant's signed written firm offer irrevocable for the stated period (not exceeding three months) without consideration. Revocation during the firm period is ineffective, so the buyer's acceptance forms a contract.
- 76. B** — UCC § 2-609 permits a party with reasonable grounds for insecurity to demand adequate assurance in writing and suspend performance pending receipt. Failure to provide assurance within a reasonable time (not exceeding 30 days) constitutes repudiation.
- 77. C** — Reliance damages under Restatement (Second) § 349 compensate the non-breaching party for expenditures made in reasonable, foreseeable reliance on the promise, less any expenses saved by not performing. Reliance is the appropriate measure when expectation damages are uncertain.
- 78. A** — The parol evidence rule does not bar evidence of formation defects — fraud, duress, mistake, illegality — even when the writing is fully integrated. Such evidence challenges the validity of the contract itself rather than varying its terms.
- 79. D** — UCC § 2-207(2)'s automatic incorporation of additional terms applies only between merchants. Where one party is a non-merchant, additional terms in the acceptance require express assent by the offeror to become part of the contract.

- 80. D** — Only intended beneficiaries have enforceable rights under Restatement (Second) § 302. Incidental beneficiaries — those who benefit only by happenstance, without the contracting parties intending to confer rights — cannot enforce the contract.
- 81. A** — UCC § 2-312 implies a warranty of title in all sales of goods unless specifically excluded by language or circumstances giving the buyer reason to know the seller does not claim title in himself, or is selling only such interest as he or a third party has.
- 82. D** — The avoidable-consequences doctrine reduces damages by the amount that could have been avoided through reasonable mitigation efforts. The plaintiff is not barred from recovery but cannot recover damages he could reasonably have prevented.
- 83. C** — UCC § 2-206(2) provides that when the offer invites acceptance by either promise or performance, beginning performance is a reasonable mode of acceptance but the offeror must be notified within a reasonable time, or the offer may be treated as having lapsed.
- 84. D** — UCC § 2-314 imposes the implied warranty of merchantability requiring goods to be fit for ordinary purposes. Defenses include showing fitness for ordinary purposes, effective disclaimer under § 2-316, or buyer's acceptance discharging remedies.
- 85. D** — Modern liquidated damages doctrine requires the stipulated amount to be a reasonable forecast of damages at formation and that actual damages were difficult to estimate. A grossly disproportionate clause is struck down as a penalty unenforceable at law.
- 86. C** — Modern doctrine narrowly construes anti-assignment clauses, often reading them to prohibit delegation of duties rather than assignment of rights. The assignment may be effective even where the assignor is in breach of the no-assignment promise.
- 87. D** — The collateral contract exception to the parol evidence rule permits proof of a separate, collateral agreement supported by separate consideration, distinct in subject matter from the writing, and not contradicting the writing. Partial integration analysis reaches similar results.
- 88. B** — *Terry v. Ohio* permits a brief investigative stop on reasonable suspicion based on specific articulable facts examined under the totality of circumstances. High-crime area, nervousness, and evasive behavior collectively support reasonable suspicion, with a Terry frisk justified by reasonable suspicion of armed danger.
- 89. B** — *Davis v. United States* holds that invocation of counsel during custodial interrogation must be unambiguous and unequivocal. Equivocal references like "maybe I should talk to a lawyer" do not require cessation of questioning under *Edwards v. Arizona*.
- 90. D** — *Brigham City v. Stuart* and related cases permit warrantless home entry under exigent circumstances to render emergency assistance or prevent imminent harm. Audible screams establish exigency justifying warrantless entry.

**91. B** — Confession voluntariness is assessed under the totality of circumstances — defendant's age, education, intelligence, length and intensity of detention, physical or psychological pressure, and Miranda compliance. A coerced confession is suppressed despite Miranda warnings under *Colorado v. Connelly*.

**92. C** — *Franks v. Delaware* requires suppression when the warrant affidavit contains a knowing or reckless false statement and the remaining content after the false statement is set aside is insufficient to establish probable cause. Negligent misstatements are not enough.

**93. D** — *United States v. Leon* establishes the good-faith exception: evidence is admissible if officers reasonably relied on a facially valid warrant later determined defective. Exceptions apply for affidavits with knowing falsity, abandoned judicial role, facially deficient warrants, or warrants so lacking in probable cause that reliance was unreasonable.

**94. D** — *California v. Acevedo*, building on *Carroll v. United States* and *Chambers v. Maroney*, permits a warrantless search of a vehicle on probable cause that contraband is present, extending to all containers in the vehicle that may contain the object of the search.

**95. A** — *New York v. Quarles* establishes the public safety exception, permitting brief, focused questioning to neutralize an immediate threat to public safety without Miranda warnings. "Where is the gun?" falls squarely within the exception.

**96. D** — *Massiah v. United States* holds that the Sixth Amendment right to counsel attaches at the initiation of adversary judicial proceedings (e.g., indictment). Deliberately eliciting incriminating statements from the defendant about the charged offense without counsel violates the Sixth Amendment regardless of Miranda compliance.

**97. D** — *Crawford v. Washington* holds that testimonial hearsay — including statements made during formal police interrogation — is inadmissible against a criminal defendant unless the declarant is unavailable AND the defendant had a prior opportunity to cross-examine.

**98. C** — Felony murder requires the killing to occur during commission of an inherently dangerous felony and (in most jurisdictions) to be reasonably foreseeable to all participants. Defenses include showing the offense was not inherently dangerous as committed, the killing was outside the foreseeable scope, or the agency/independent-cause doctrine.

**99. B** — Modern attempt doctrine requires a substantial step strongly corroborative of criminal purpose, beyond mere preparation. Gathering tools, traveling, or surveillance generally constitutes preparation rather than attempt; without conduct directed at the target, the substantial step is missing.

**100. B** — Conspiracy under federal law requires an agreement plus an overt act in furtherance. Effective withdrawal — affirmative renunciation communicated to all co-conspirators or steps to defeat the conspiracy — before completion bars liability for the inchoate conspiracy.

**101. A** — *Hudson v. Michigan* holds that violations of the knock-and-announce rule do not require exclusion of evidence found during the subsequent search. Civil remedies remain available, but the exclusionary rule does not extend to this Fourth Amendment violation.

**102. A** — Voluntary manslaughter requires adequate provocation (sufficient to arouse passion in a reasonable person), actual loss of self-control, insufficient cooling time, and a causal connection. Discovery of spousal adultery with immediate killing has historically satisfied the heat-of-passion doctrine, reducing murder to manslaughter.

**103. C** — *Schneckloth v. Bustamonte* requires consent to search to be voluntary under the totality of circumstances. Consent need not be express, but voluntariness — free from coercion — must be shown by the prosecution; awareness of the right to refuse is a factor but not determinative.

**104. B** — *Arizona v. Gant* narrows vehicle search incident to arrest to two scenarios: arrestee within reaching distance of the passenger compartment, or reasonable basis to believe the vehicle contains evidence of the offense of arrest. Handcuffed and removed arrestees fall outside both prongs.

**105. C** — *Manson v. Brathwaite* and *Neil v. Biggers* establish the reliability test for suggestive identifications: opportunity to observe, degree of attention, accuracy of prior description, certainty, and elapsed time. Identifications passing this totality test are admissible despite suggestion.

**106. C** — *Hoffman v. United States* holds that the Fifth Amendment privilege requires only a realistic basis for self-incrimination, broadly construed. The witness invokes the privilege only against compelled self-incrimination, not testimony that incriminates others alone.

**107. D** — *Barker v. Wingo* balances four factors for Sixth Amendment speedy trial claims: length of delay, reason for delay, defendant's assertion of the right, and prejudice from the delay. Dismissal is warranted only when the balance favors the defendant.

**108. C** — Recognized insanity tests vary by jurisdiction: M'Naghten (cognitive), irresistible impulse (volitional), Durham (product), and MPC (substantial capacity to appreciate criminality or conform conduct). Mere mental illness without the requisite incapacity is insufficient to excuse criminal liability.

**109. A** — *Brady v. Maryland* requires the prosecution to disclose evidence favorable to the defendant when it is material — meaning a reasonable probability that the result would have been different had the evidence been disclosed. Failure to disclose warrants a new trial.

**110. C** — *Chimel v. California* limits search incident to arrest to the arrestee's person and the wingspan area within immediate reaching distance at the time of arrest. Broader searches of the house require separate justification — warrant, protective sweep, or exigent circumstances.

**111. D** — *Strickland v. Washington* requires (1) deficient performance falling below an objective standard of reasonableness under prevailing professional norms, and (2) prejudice — a reasonable probability that the result would have been different but for the deficient performance.

**112. A** — The Eighth Amendment permits capital punishment for the most serious crimes within a constitutional framework: *Furman v. Georgia* (no arbitrary application), *Gregg v. Georgia* (guided discretion with aggravating/mitigating factors), *Atkins v. Virginia* (no execution of intellectually disabled), and *Roper v. Simmons* (no execution for juveniles).

**113. C** — The dual sovereignty doctrine holds that the Double Jeopardy Clause does not bar prosecution by separate sovereigns for the same conduct. Federal civil rights prosecution after state acquittal is constitutional under *Heath v. Alabama* and *Gamble v. United States*.

**114. D** — Embezzlement is conversion of property by a person to whom it was lawfully entrusted, distinguished from larceny by the absence of trespassory taking. The defendant lawfully obtained possession before converting, defeating the larceny charge but supporting embezzlement.

**115. D** — *Illinois v. Gates* abandoned the rigid *Aguilar-Spinelli* two-prong test in favor of a totality-of-circumstances analysis. Veracity, basis of knowledge, and police corroboration are evaluated as a unified inquiry into whether a fair probability of crime exists.

**116. B** — *Payton v. New York* holds that warrantless nonconsensual entry into a suspect's home to make a routine felony arrest is unreasonable under the Fourth Amendment, even with probable cause. An arrest warrant (or exigent circumstances or consent) is required for residential arrest.

**117. C** — Rule 801(d)(2)(A) classifies a party's own statement offered against that party as non-hearsay, not requiring an exception. Opposing-party statements are categorically excluded from hearsay's definition under the Federal Rules.

**118. C** — Rule 803(6) admits records of regularly conducted activity when made at or near the time by a person with personal knowledge, kept in the regular course of business, made as a regular practice, and authenticated by a qualified witness or Rule 902(11) certification.

**119. B** — Rule 804(b)(2) admits dying declarations in homicide prosecutions and civil cases when the declarant believed death was imminent, the statement concerns the cause or circumstances of impending death, and the declarant is unavailable.

**120. D** — Rule 803(2) admits an excited utterance — a statement relating to a startling event made while the declarant was under the stress of excitement caused by the event. Contemporaneity is not required, but the stress condition is.

**121. B** — Rule 404(b)(2) permits other-crimes evidence for noncharacter purposes — motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. The prosecution must articulate the specific permissible purpose and satisfy Rule 403 balancing.

**122. C** — Rule 609(a)(2) admits *crimen falsi* (dishonesty or false statement) convictions automatically without Rule 403 balancing. Rule 609(a)(1) admits felonies subject to Rule 403 balancing, with a heightened standard for criminal defendants; convictions over 10 years old face Rule 609(b) restrictions.

**123. D** — Rule 803(1) admits a present sense impression — a statement describing or explaining an event or condition made while or immediately after the declarant perceived it. Contemporaneity is the touchstone; startling event and unavailability are not required.

**124. D** — Rule 803(5) admits a recorded recollection when the witness once had knowledge but cannot now recall sufficiently, the record was made or adopted when fresh in memory, and the record accurately

reflects the witness's knowledge. The record may be read but is received as an exhibit only if offered by the adverse party.

**125. B** — Rule 701 admits lay opinion that is rationally based on the witness's perception, helpful to the fact-finder, and not based on scientific, technical, or other specialized knowledge within Rule 702. Specialized knowledge testimony requires expert qualification.

**126. B** — Attorney-client privilege protects confidential communications between client and attorney made for the purpose of obtaining legal advice, with exceptions for crime-fraud (Upjohn/Zolin) and waiver. The privilege belongs to the client.

**127. C** — Rule 801(d)(2)(E) treats statements by co-conspirators made during the course of and in furtherance of the conspiracy as non-hearsay against any member. Crawford v. Washington may still bar testimonial statements, but co-conspirator statements in furtherance are typically non-testimonial.

**128. A** — Rule 613 permits impeachment by prior inconsistent statement subject to procedural requirements. Rule 801(d)(1)(A) allows substantive use only when the prior statement was given under oath at a deposition, trial, or other proceeding (including grand jury).

**129. A** — Rule 401 defines relevance as any tendency to make a fact of consequence more or less probable. Even marginally probative evidence is admissible unless excluded by Rule 403 or another rule.

**130. D** — Daubert v. Merrell Dow Pharmaceuticals (codified in Rule 702) requires the trial court to evaluate the reliability of expert testimony by considering factors including testability, peer review, error rate, controlling standards, and general acceptance in the relevant community.

**131. D** — Rule 801(d)(1)(C) classifies a prior identification of a person as non-hearsay when the declarant testifies and is subject to cross-examination. The rule applies regardless of whether the in-court identification is consistent with the prior identification.

**132. A** — Crawford v. Washington holds that testimonial hearsay — including a non-testifying witness's affidavit prepared for use at trial — is inadmissible against a criminal defendant unless the declarant is unavailable AND the defendant had a prior opportunity to cross-examine.

**133. D** — Rule 407 bars evidence of subsequent remedial measures when offered to prove negligence, culpable conduct, or product defect. The evidence may be admitted for impeachment, proving ownership or control, or proving feasibility when controverted.

**134. B** — Rule 403 permits exclusion of relevant evidence when its probative value is substantially outweighed by unfair prejudice, confusion of issues, misleading the jury, undue delay, wasting time, or needless presentation of cumulative evidence.

**135. C** — Trammel v. United States holds that the testimonial spousal privilege belongs to the testifying spouse, who may choose whether to testify in a criminal case against the defendant spouse. The separate marital communications privilege independently protects confidential spousal communications.

**136. C** — Rule 803(3) admits statements of the declarant's then-existing state of mind, emotion, sensation, or physical condition. The exception applies regardless of declarant availability but is limited when offered to prove past conduct (with an exception for the declarant's will).

**137. A** — Rule 803(8) admits records and statements of a public office setting out the office's activities, matters observed by a public officer with a duty to report (with criminal-case limits on law-enforcement observations), or factual findings from legally authorized investigations.

**138. A** — Rule 1002 requires the original (or Rule 1003 duplicate) to prove the content of a writing. Rule 1004 provides exceptions for lost originals, originals not obtainable through judicial process, originals in the opponent's possession, and collateral matters.

**139. C** — Rule 26(b)(3) protects documents and tangible things prepared in anticipation of litigation. Ordinary work product yields upon substantial need and undue hardship; opinion work product containing attorney mental impressions, conclusions, or legal theories receives heightened, near-absolute protection.

**140. D** — Rule 804(b)(3) admits a statement against interest when the declarant is unavailable, the statement was contrary to pecuniary, proprietary, or penal interest at the time made, and a reasonable person would not have made it unless believing it true. Criminal-liability statements require corroborating circumstances clearly indicating trustworthiness.

**141. D** — *Jaffee v. Redmond* recognizes the psychotherapist-patient privilege in federal court, covering confidential communications between a patient and a licensed psychotherapist (including licensed social workers performing therapy). The privilege belongs to the patient and is not subject to balancing.

**142. B** — Rule 807 permits residual admission only when the hearsay has equivalent guarantees of trustworthiness to enumerated exceptions, is more probative than other reasonably available evidence, and adequate notice has been given. The residual exception is to be applied sparingly.

**143. C** — Rule 405 governs methods of proving character: where character is an essential element (Rule 405(b)), specific instances may be proved; where character is offered under Rule 404 for permissible purposes (Rule 405(a)), reputation and opinion testimony are used on direct, with specific instances available only on cross-examination.

**144. D** — *Baxter v. Palmigiano* permits an adverse inference in civil cases from a party's invocation of the Fifth Amendment privilege. The inference is not constitutionally compelled, but courts may draw it from silence in civil litigation, unlike in criminal cases.

**145. B** — Durational language ("so long as," "until," "while") creates a fee simple determinable that terminates automatically upon the limiting event, with the grantor retaining a possibility of reverter that vests without affirmative action.

**146. C** — A fee simple determinable creates a possibility of reverter in the grantor — the future interest that automatically vests upon occurrence of the limiting event. This contrasts with a fee simple subject to condition subsequent, which creates a right of entry requiring affirmative reclamation.

**147. C** — A real covenant binds successors only if the original parties intended it to run, the covenant touches and concerns the land, horizontal privity existed between original parties, vertical privity exists with the successor, and notice (actual, record, or inquiry) is shown. Each element must be satisfied for enforceability against successors.

**148. A** — An easement implied from prior use requires common ownership at severance, apparent and continuous use before severance, reasonable necessity for the dominant estate, and existence at the time of severance. All four elements must be present.

**149. C** — Marketable title is free from reasonable doubt of validity and free from significant undisclosed defects or encumbrances. An undisclosed easement materially affecting the property's value or use renders title unmarketable, permitting the buyer to refuse to close.

**150. B** — In a notice jurisdiction, a subsequent bona fide purchaser for value without notice (actual, record, or inquiry) prevails over a prior unrecorded grantee regardless of who records first. The race to record is irrelevant under pure-notice statutes.

**151. A** — Effective deed delivery requires the grantor's present intent to pass title, evidenced by physical transfer, words, or conduct showing relinquishment of control. Merely executing a deed and retaining it in a safe deposit box, without manifesting intent to presently pass title, does not effect delivery.

**152. B** — Merger terminates an easement when the same person owns both the dominant and servient estates because one cannot have an easement over their own land. The easement does not automatically revive upon later separation of the parcels.

**153. B** — Constructive adverse possession under color of title permits a possessor entering under a defective deed describing the entire parcel — with actual possession of a portion — to claim title to the whole parcel after the statutory period, provided the other adverse possession elements are satisfied.

**154. C** — Equitable conversion treats the buyer as the equitable owner upon execution of an enforceable land sale contract; the seller's interest becomes personal property (the right to receive purchase money). Under the English/majority rule, risk of loss passes to the buyer at execution.

**155. A** — The implied warranty of habitability in most jurisdictions requires the landlord to maintain residential premises in habitable condition. Substantial breach permits the tenant to withhold rent, terminate, or seek damages, and the duty is generally non-waivable.

**156. B** — Under classical RAP, an interest must vest, if at all, within 21 years after the death of a life in being at creation. A gift to B's "first child to reach 25" could vest more than 21 years after B's death because B's first such child might be born after B dies, voiding the gift.

**157. D** — Mortgages and joint tenancy depend on jurisdictional theory: in title-theory jurisdictions, the mortgage transfers title and severs the joint tenancy; in lien-theory jurisdictions (majority), the mortgage is a lien only, the joint tenancy survives, and the bank's lien is extinguished at the mortgagor's death.

**158. A** — Warranty deed covenants are classified as present (breached at delivery — seisin, right to convey, against encumbrances) or future (breached upon interference — warranty, quiet enjoyment, further assurance). A general warranty deed covers defects whether arising before or during the grantor's ownership.

**159. A** — Easement by necessity requires common ownership at severance, strict necessity for access (not mere convenience), and necessity arising at the time of severance. A landlocked parcel arising from severance of common ownership satisfies these elements.

**160. D** — Tenancy by the entirety requires both spouses' consent for any conveyance or encumbrance of the property, and creditors of one spouse cannot reach the property to satisfy individual debts. A unilateral conveyance by one spouse is ineffective.

**161. A** — A recorded express easement runs with the land of the servient estate and binds subsequent purchasers, who take with constructive notice through the recording system. The successor cannot unilaterally terminate the easement.

**162. B** — Mortgage priority follows the first-in-time, first-in-right rule, modified by recording statutes. A first mortgage with priority through earlier recording is satisfied from foreclosure proceeds before subsequent mortgages, subject to specific subordination agreements.

**163. A** — In a race-notice jurisdiction, a subsequent bona fide purchaser without notice prevails over a prior unrecorded grantee only if she records first. Since B recorded before C, B prevails; C took with constructive notice of B's recorded interest.

**164. C** — A remainder is vested when the holder is ascertained and there is no condition precedent. Where the eldest child is identified but must survive B, the survival language operates as a condition precedent, making the remainder contingent under classical analysis.

**165. C** — An equitable servitude is enforceable against a successor with notice (actual, record, or inquiry) when the original parties intended to bind successors and the covenant touches and concerns the land. *Tulk v. Moxhay* establishes that horizontal privity is not required for equitable enforcement.

**166. A** — Tenants in common may seek partition by court order. Partition in kind (physical division) is preferred where feasible without disproportionate loss; partition by sale is ordered when physical division is impracticable, with proceeds distributed to the cotenants.

**167. A** — Abandonment of an easement requires both non-use and an affirmative act or conduct manifesting intent to abandon permanently. Mere non-use without intent, however long, is generally insufficient to terminate the easement.

**168. B** — An easement appurtenant transfers automatically with the dominant estate to its new owner. The easement is incident to the dominant land and benefits whoever holds it, without requiring separate transfer documentation.

**169. D** — Inquiry notice charges a purchaser with knowledge of facts that reasonable inquiry would have revealed. Circumstances suggesting a prior interest — visible possession, suspicious gaps in title, unusual references — trigger a duty to investigate; failure to inquire destroys good-faith notice protection.

**170. A** — The covenant of quiet enjoyment ensures the tenant's undisturbed possession during the lease term. Substantial interference by the landlord amounts to constructive eviction, permitting the tenant to terminate the lease, withhold rent, or recover damages, provided notice is given and the tenant vacates within a reasonable time.

**171. B** — A cotenant in sole possession owes an accounting to other cotenants for net rents received from third parties. The cotenant does not owe accounting for the cotenant's own use of the property absent ouster of the other cotenants.

**172. B** — Alternative contingent remainders are valid: C has a contingent remainder (subject to surviving B), D has the alternative contingent remainder. One or the other will vest at B's death depending on whether C survives; both must be analyzed under RAP.

**173. A** — Battery requires an intentional act causing harmful or offensive contact with the plaintiff's person. The contact need not cause injury — offensive contact suffices — and only intent to cause the contact is required, not intent to harm. Pushing in a crowded area satisfies these elements.

**174. D** — The shopkeeper's (Merchant's) Privilege permits reasonable detention for a reasonable period in a reasonable manner upon reasonable grounds to suspect theft. Extended detention beyond what is reasonable destroys the privilege as a defense to false imprisonment.

**175. B** — The no-duty-to-rescue rule provides that a stranger has no duty to assist a person in distress, absent a special relationship (common carrier-passenger, custodian-prisoner, employer-employee), creation of the danger, or voluntary undertaking. A rescuer who undertakes assistance must complete with reasonable care.

**176. C** — Professionals must exercise the skill, knowledge, and care commonly possessed by other professionals in good standing in the same field, under similar circumstances. Departure from this professional standard establishes breach in negligence.

**177. B** — Modern design defect tests include the consumer expectation test (was the product unreasonably dangerous beyond ordinary consumer expectation?) and the risk-utility test (Restatement Third), requiring proof that a reasonable alternative design would have reduced or avoided the foreseeable risks.

**178. D** — *New York Times v. Sullivan* requires a public official or public figure to prove actual malice — knowledge of falsity or reckless disregard for the truth — to recover for defamation. This constitutional standard applies whenever the plaintiff is a public figure or official.

**179. B** — Trespass to land requires an intentional, voluntary, unauthorized entry onto land in another's possession. Harm is not required for the basic tort (nominal damages or restitution may follow), and the intent required is to enter, not specifically to trespass.

**180. B** — Restatement (Second) § 402A imposes strict liability on one who sells a product in a defective condition unreasonably dangerous, when the seller is engaged in the business of selling such products and the product reaches the user without substantial change. Privity is not required.

**181. A** — Proximate cause requires the defendant's conduct to be a substantial factor in causing the injury, with the harm within the foreseeable scope of risk. An intervening act breaks the chain only if it was unforeseeable and superseding; foreseeable intervening acts (medical malpractice, rescue) do not cut off liability.

**182. D** — Appropriation of name or likeness is the privacy tort imposing liability when the defendant uses the plaintiff's name or likeness for the defendant's benefit without permission. The tort applies particularly in commercial advertising and is distinct from defamation.

**183. A** — Assault requires intentional conduct creating reasonable apprehension of imminent harmful or offensive contact. The plaintiff's reasonable apprehension suffices; the defendant's actual ability to inflict harm is not required, so a fake gun reasonably believed to be real supports assault liability.

**184. C** — IIED requires extreme and outrageous conduct, intent or recklessness regarding causing emotional distress, causation, and severe emotional distress. The conduct must be beyond all bounds of decency tolerated in a civilized society; mere insults or annoyances do not suffice.

**185. C** — Private nuisance requires substantial and unreasonable interference with the plaintiff's use and enjoyment of land, caused by the defendant. The court balances gravity of harm against utility of conduct; remedies include damages, abatement, or injunction. No physical entry is required.

**186. B** — *Gertz v. Robert Welch* establishes that private-figure plaintiffs must prove at least negligence regarding the statement's truth. States may impose higher standards but not lower; presumed and punitive damages require actual malice for matters of public concern.

**187. A** — Failure to warn imposes liability when the manufacturer fails to provide adequate warning of foreseeable risks of harm not obvious to the user. Restatement (Third) of Torts: Products Liability § 2(c) requires warnings adequate given the nature of the danger, the user, and the intended use.

**188. C** — An employer is generally not vicariously liable for the negligence of an independent contractor. Exceptions include non-delegable duties (e.g., maintenance of premises for invitees), inherently dangerous activities, and negligence in selecting, retaining, or supervising the contractor.

**189. C** — Comparative fault apportions damages by percentage of fault. Pure comparative fault permits the plaintiff to recover her percentage regardless of magnitude; modified comparative fault bars recovery if the plaintiff's fault exceeds the 50% or 51% threshold; multi-defendant cases also apportion among defendants.

**190. B** — Trespass to chattels involves intentional, less-than-serious interference causing minor harm or temporary deprivation. Conversion involves intentional dominion that seriously interferes with the owner's right of control, justifying forced sale of the chattel. The seriousness of the interference distinguishes the two torts.

**191. C** — A manufacturing defect exists when the product departed from its intended design even when all possible care was exercised in construction or marketing. The plaintiff must show the defect existed when the product left the manufacturer's control; strict liability applies without proof of negligence.

**192. A** — Consent is a complete defense to intentional torts when given freely, with capacity, and within the scope authorized. Consent may be express or implied from custom or conduct; consent given under fraud, duress, mistake about a material fact, or beyond the scope authorized is invalid.

**193. C** — Respondeat superior holds the employer liable for an employee's torts within the scope of employment. The conduct must be of the kind employed to perform, occur substantially within authorized time and space, and be actuated, at least in part, by a purpose to serve the employer.

**194. B** — Public nuisance involves substantial and unreasonable interference with a right common to the general public. A private plaintiff may recover only by showing a particular damage different in kind from that suffered by the general public; otherwise, only government plaintiffs may sue.

**195. B** — Bystander NIED under *Dillon v. Legg* and Restatement (Third) of Torts permits recovery when the plaintiff was closely related to the directly injured person, present at the scene at the time of the injury-producing event, and suffered emotional distress beyond a disinterested witness. Some jurisdictions require physical manifestation.

**196. C** — Modern contribution doctrine allows a tortfeasor who has paid more than her proportionate share of an indivisible judgment to recover from co-tortfeasors their proportionate shares (typically based on percentage of fault). Contribution is generally available unless the contributing tortfeasor is immune from suit.

**197. C** — Defamation defenses include absolute and qualified privileges. Absolute privileges (judicial proceedings, legislative proceedings, executive functions, marital, fair report) provide complete immunity regardless of malice; qualified privileges (common interest, public concern, fair comment) protect good-faith statements without actual malice and may be lost through abuse.

**198. D** — Strict liability for abnormally dangerous activities under Restatement (Third) of Torts applies when the activity creates a foreseeable and highly significant risk of physical harm even with reasonable care, and the activity is not a matter of common usage. Blasting in populated areas typically satisfies these elements.

**199. A** — Negligence per se imposes liability when the defendant violated a safety statute, the plaintiff is within the class the statute was designed to protect, and the harm is of the type the statute was intended to prevent. Some jurisdictions treat the violation as conclusive; others apply a presumption.

**200. A** — Punitive damages require conduct more culpable than ordinary negligence — malicious, fraudulent, wanton, willful, or grossly reckless. The amount must bear a reasonable relationship to actual damages under *State Farm Mutual Automobile Insurance Co. v. Campbell's* due process limits.