



**California  
First-Year  
Law  
Students'  
Examination**

**Essay Questions  
and  
Selected Answers**

**June 2011**



The State Bar Of California  
Committee of Bar Examiners/ Office of Admissions

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## **ESSAY QUESTIONS AND SELECTED ANSWERS**

### **JUNE 2011 FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the essay questions from the June 2011 California First- Year Law Students' Examination and two selected answers for each question.

The answers received good grades and were written by applicants who passed the examination. The answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Applicants were given four hours to answer four essay questions. Instructions for the essay examination appear on page ii.

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# June 28, 2011



## California First-Year Law Students' Examination

**Answer all 4 questions.**

**Time allotted: 4 hours**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

You should answer the questions according to legal theories and principles of general application.

## Question 1

Mel suffers from a mental disorder that gives rise to a subconscious desire to commit homicide. Under the influence of the mental disorder, Mel formulated a plan to kill Herb by breaking into Herb's house and shooting him to death while he was asleep.

Brent, who had never met or communicated with Mel, learned of Mel's plan. Brent knew when and where Mel intended to kill Herb, and he desired to assist Mel in the crime.

On the night Mel intended to kill Herb, unbeknownst to Mel, Brent forced open the front door to Herb's house so as to effectuate Mel's entry and facilitate his killing of Herb. Mel arrived at Herb's house. He discovered the front door open and entered the house. Mel tiptoed to the bedroom and sprayed bullets into Herb's body. Unbeknownst to either Mel or Brent, Herb had died of a heart attack an hour before Mel fired the bullets.

1. Are Mel and/or Brent guilty of:
  - a. Murder? Discuss.
  - b. Attempted murder? Discuss.
  - c. Conspiracy to commit murder? Discuss.
2. Does Mel have a defense of insanity? Discuss.

## **Answer A to Question 1**

### **Question 1: Mel/Brent**

#### **State vs. Mel**

##### **a. Is Mel Guilty of Murder?**

#### Murder

Homicide at common law is the unlawful killing by a person of a human being. Murder at common law is the unlawful killing of a human being with malice aforethought. The element of malice aforethought can be met through (1) the intent to kill, (2) the intent to inflict serious bodily harm, (3) depraved heart/indifference, or (4) felony murder.

Most jurisdictions break murder into two degrees, first-degree murder and second-degree murder. First-degree murder is the unlawful killing of a human being with malice aforethought (see supra), along with either premeditation or a death that meets the Felony Murder rule. Felony Murder exists when the death of a person occurs during the commission of an inherently dangerous felony. At common law this included Burglary, Arson, Robbery, Rape, and Kidnapping.

Here, we are told that Mel desired to commit homicide and formulated a plan to kill Herb. The State will argue that the element of premeditation is present in that Mel formulated a plan to kill Herb by breaking into his house and shooting him while Herb was asleep.

Mel will counter that the definition of homicide and murder includes the unlawful killing of a human being. At common law a human being was defined as a person whose major organs, such as the heart, were still functioning. Modern definitions usually state that a person is a human being until their brain ceases to function, even if their organs are still working. Here, we are specifically told that when Mel entered Herb's room and

sprayed his body with bullets that Herb had already died of a heart attack an hour before Mel fired the bullets. Thus, while Mel had the requisite intent to kill Herb, and proceeded to take a substantial step towards killing Herb by spraying Herb's body with bullets, Herb no longer met the legal definition of a human being when Mel shot him. Thus, since Mel did not commit an unlawful killing of [a] human being, as Herb was already dead and therefore no longer met the legal definition of a human being, Mel is not liable for murder. However, he may be liable for attempted murder (see infra).

### **b. Is Mel Guilty of Attempted Murder?**

#### Attempted Murder

Attempt is a specific intent crime, where the defendant must specifically intend to commit the underlying crime of murder, and has either come dangerously close to completing the crime or has taken a substantial step towards the crime of murder. Under the common law, a defendant could be liable for the attempt of the underlying criminal act if their actions came dangerously close to completing the crime. This was often referred to as the proximity test. Under the modern approach, a defendant may be liable for attempt of the underlying crime if they have taken a substantial step towards completing the criminal act. Mere preparation for attempt is insufficient.

Here, the state will argue that Mel made a substantial step towards completing the act of murder when Mel entered Herb's house, tiptoed to the bedroom and sprayed bullets into Herb's body. The state will further argue that the spraying of Mel's body with bullets meets the dangerous close proximity test for murder. Specifically they will note that Mel met the element of malice aforethought when Mel showed an outward desire to cause serious bodily harm to Mel by spraying his body with bullets. Furthermore, we are told that Mel desired to kill Herb, thus meeting the intent to kill element of malice aforethought.

Mel will argue that he should not be guilty of attempted murder due to a mistake of fact. Specifically, Mel will state that he believed that Herb was alive when he shot him. Mel

will state that since Herb was already dead, and no longer a human being under the legal definition, that all Mel did was commit an act of shooting at a corpse. However, the state will counter that such a mistake of fact will not prevent Herb from being liable for attempted murder, since if the facts were as Mel believed them to be, Mel would have in fact committed murder (absent a valid defense).

Mel may claim that he knew that Herb was dead when he shot him, but this claim will likely fail because (a) Mel was going to kill Herb when he was asleep and would not easily know the difference between being asleep or dead except upon close inspection and (b) we are specifically told that Mel and Brent did not know that Herb had already died.

Thus, because Mel took a substantial step towards killing Herb when he entered Herb's home and sprayed his body with bullets, Mel has committed attempted murder. The mistake of fact that occurred in that Mel believed Herb was alive, although Herb had recently died of a heart attack, will not relieve Herb of liability for attempted murder. Attempt merges with the completed crime, but in this case, the crime of murder was legally impossible, therefore Mel will be liable for attempted murder absent a valid defense of insanity or self-defense.

### **c. Is Mel Guilty of Conspiracy to commit murder?**

Conspiracy is when two or more persons agree to commit an unlawful act or a lawful act by unlawful means. Traditionally, conspiracy required that at least two or more of the parties had the criminal intent in what is referred to as the bilateral approach. Thus if Party A & Party B agreed to commit a crime, but Party B was a police officer only agreeing to catch Party A, then Conspiracy was not present. However, some modern jurisdictions will allow conspiracy even if only one party had the actual intent to commit the crime. Conspiracy requires either an express or implied consent of the conspiring parties, and most jurisdictions require that one of the conspirators complete a step

towards the completion of the agreed-to crime. However the smallest step, or even mere preparation, will suffice.

Here, we are told that Mel intended to kill Herb. Furthermore, we are told that Brent desired to assist Mel in the crime. The State will argue that the element of implied consent for conspiracy to commit murder existed by virtue of the fact that Brent assisted Mel by forcing the door of Herb's house open to facilitate Mel's killing of Herb. The state will further argue that the conspiracy was conspiracy to commit murder because Mel intended to kill Herb and Brent committed a step in furtherance of the conspiracy by helping Mel get into Herb's house (see definition of murder supra).

Mel will argue that he never met or communicated with Brent. Furthermore, although Brent helped facilitate Mel's planned killing of Herb by forcing open Herb's door, it was done unbeknownst to Mel. Mel will additionally argue that the facts do not indicate that Mel or Brent ever mutually agreed to commit a crime. There is no evidence that their actions were coordinated, discussed, or that they were even in each other's presence. Conspiracy requires a mutual meeting of the minds to commit a crime. While Brent desired to help Mel kill Herb, there is no evidence that any agreement existed between them. The mere fact that Brent wanted to help Mel does not rise to the level of conspiracy.

Mel will be found not liable for conspiracy to commit murder.

## **State vs. Brent**

### **a. Is Brent Guilty of Murder?**

Accomplice liability occurs when a person either aids, abets, or assists a person in the commission of a crime. Here, we are told that Brent desired to assist Mel in his plan to kill Herb. Although Brent did not communicate this desire to Mel, Brent did provide assistance for the planned murder when Brent forced open the door of Herb's house.

This likely would incur liability for murder as an accomplice but for the fact that Herb was already dead. Since Herb was in fact not a human being, under the legal definition, when Mel shot him, it was legally impossible for Brent to be an accomplice to murder when Mel shot Herb (see discussion supra of Mel liability for murder). However, Brent may be liable for attempted murder (see infra).

### **b. Is Brent Guilty of Attempted Murder?**

Accomplice liability occurs when a person either aids, abets, or assists a person in the commission of a crime. Here, we are told that Brent desired to assist Mel in his plan to kill Herb. Although Brent did not communicate this desire to Mel, Brent did provide assistance for the planned murder when Brent forced open the door of Herb's house. Brent took a substantial step towards his plan to help Mel commit murder when he forced open the door of Herb's house.

Brent will claim that he is not liable for attempted murder in that he never communicated with Mel, never discussed his desire to help Mel, and his actions to open the door were done unbeknownst to Mel. Brent will then state that he could not be an accomplice without Mel's conscious knowledge of his assistance. The state will counter that accomplice liability occurs when a person aids, assists, or abets another's criminal act. Furthermore, the state will be able to show that Brent was present the night that Mel shot Herb and helped facilitate Mel's entry and shooting of Herb. Based on these facts, Brent will be liable for attempted murder as an accomplice who assisted Mel's efforts to kill Herb.

### **c. Is Brent Guilty of Conspiracy to commit murder?**

As discussed supra, Brent never met with Mel, or even acted in concert. While conspiracy does not require an express agreement to commit a crime, there must be a meeting of the minds to commit a criminal act as implied by circumstantial evidence, or implied consent. Here, we are told that Brent never communicated with Mel, and that

his actions on the night Mel shot Herb was done unbeknownst to Mel. It is not enough for Brent to simply desire to help Mel. As discussed supra, Mel and Brent did not have an implied or express agreement to commit a crime, and thus Brent is not liable for conspiracy to commit murder.

## **Question 2: Does Mel have a defense of insanity?**

Mel's ability to successfully mount a defense of insanity revolves in part on the insanity approach used in Mel's jurisdiction, and the facts presented here. The four major insanity approaches used by most jurisdictions are (a) M'Naghten Test, (b) Irresistible Impulse, (c) MPC test, and, (d) Durham Product Test.

### **(a) M'Naghten Test**

Under the M'Naghten Test, a defendant may be found not guilty by reason of insanity if his actions were the product of a mental disease or defect such that he did not know right from wrong or was unable to understand the nature of his actions. The M'Naghten test is used in the majority of jurisdictions.

Here, we are told that Mel's mental disorder caused him to have a subconscious desire to commit homicide. We are further told that under the influence of the mental disorder, Mel planned to kill Herb. The facts do not indicate that Mel did not understand right from wrong, or was unable to understand the nature of his act. In fact, his pre-planning seems to indicate that he knew his act was wrong. It is unlikely that Mel would be found not guilty by reason of insanity under the M'Naghten test.

### **(b) Irresistible Impulse**

Under the irresistible impulse test, the defendant may be found not guilty by reason of insanity if their actions were the product of a mental disease or defect such that the defendant was unable to control his actions. In this approach, the defendant may know

that their actions were wrong, but the mental disease or defect they had caused them to be unable to resist the criminal act. It has been stated that such a defendant would be unable to resist performing the criminal act even if there was a policeman standing at their shoulder.

Here, we are told that Mel's subconscious desire to commit homicide was due to a mental disorder, and that under the influence of the mental disorder, Mel planned to kill Herb. It is possible that the desire that Mel experienced was so overwhelming that he was under an irresistible impulse to commit the killing of Herb. Further testimony is likely needed to establish this, but it is possible that the desire was so strong that Mel would be found not guilty by reason of insanity because he was unable to resist the desire to kill due to Mel's mental disorder.

(c) MPC Approach

The MPC (Model Penal Code) approach combines the M'Naghten Test and the irresistible impulse test such that a defendant may be found not guilty by reason of insanity if they were either unable to understand right from wrong or were unable [to] resist performing the criminal act as discussed in the Irresistible Impulse test supra.

Here, we are told that Mel's subconscious desire to commit homicide was due to a mental disorder, and that under the influence of the mental disorder, Mel planned to kill Herb. It is possible that the desire that Mel experience was so overwhelming that he was under an irresistible impulse to commit the killing of Herb. The MPC approach allows irresistible impulse and thus if shown, Mel would be [found] not guilty by reason of insanity under an MPC approach Further testimony is likely needed to establish this, but it is possible that the desire was so strong that Mel would be found not guilty by reason of insanity because he was unable to resist the desire to kill due to Mel's mental disorder.

(d) Durham Product Approach

Under the Durham Product approach, defendant may be found not guilty by reason of insanity if their criminal act was the product of a mental disease or defect. This approach has been criticized as being too broad and is rarely used in state jurisdictions.

Here, we are told that Mel's subconscious desire to commit homicide was due to a mental disorder, and that under the influence of the mental disorder, Mel planned to kill Herb. If it is shown that Mel's actions were a product of his mental disorder, and that he was unable to prevent himself from acting, he would likely be found not guilty by reason of insanity under the Durham approach.

## Answer B to Question 1

Criminal law rules apply to this question.

### **Mel v State: Murder**

Under majority of jurisdictions, murder is divided into 1<sup>st</sup>- and 2<sup>nd</sup>- degree and is defined as a homicide committed with malice.

A homicide is the killing of [a] human being by another human being. Here, Herb was already dead before Mel shot him; thus a homicide could not take place since you cannot kill someone who is already dead. Thus Mel is not guilty of murder.

### **Mel v State: Attempted Murder**

Attempt is where D acts with the intent to complete a specific unlawful act and performs an overt act which constitutes a substantial step towards the commission of that crime.

The crime of murder is defined as a homicide committed with malice. Murder type Malice can be proven by one of four mens rea of a deliberated and premeditated intent to kill, felony murder, intentional infliction of serious bodily injury, or wanton and willful disregard for human life. The type two are usually 1<sup>st</sup>-degree murder and the latter 2<sup>nd</sup>-degree. Intentional murder requires that D deliberates, which means they are capable of reflecting; here Mel had quite some time to think about his plan with a cool mind; thus Mel deliberated. Premeditation requires that D in fact deliberated before acting, which we are told that Mel planned carefully; thus he premeditated. Then, finally, the facts tell us that he desired to kill Herb coupled with shooting Herb's body all demonstrated intent, that is, a desire to kill Herb. All the elements are present for murder except that a homicide did not in fact take place; it was frustrated by Herb already being dead.

Attempt - Here, we are told that Mel desired to kill Herb, that he formulated a plan to kill him while he was asleep. These facts demonstrate an intent to commit a specific unlawful act [murder]. In addition, we are told that Mel takes a gun to Herb's house,

goes inside and shoots Herb's body. This is clearly a substantial step towards the commission of the unlawful offense. All the elements for attempted murder are present. Whether Mel is guilty of attempt will depend on the jurisdiction due to disputed impossibility.

Factual impossibility - if the jurisdiction uses factual impossibility then Mel will be found guilty since it does not excuse specific intent crimes - crimes where D intentionally acts with the intent to complete a specific crime. Factual impossibility occurs where facts unknown to D prevent him from completing the crime he intended. Here, Mel was prevented from completing his murder of Herb only because Herb was already dead.

Legal impossibility - this is a defense against specific intent crimes. This occurs where D believes he is committing a crime which in fact does not exist and thus no crime occurred. Here, Mel believes he is killing Herb who is already in fact dead; thus he did not commit the crime of murder.

So, whether Mel is found guilty of attempted murder will depend on the jurisdiction and whether they use factual or legal impossibility as a defense against specific intent crimes.

### **Brent v State: Murder**

An accomplice is someone who intentionally aids, abets or encourages another to commit a crime. Here, it could be said that Brent aided Mel by making sure that Herb's house was open so that Mel could complete the murder. However, for Brent to be guilty of murder as an accomplice, a murder had to have occurred and since no homicide occurred, Brent cannot be charged with murder.

### **Brent v State: attempted murder**

Attempt- supra

Homicide - supra

Murder -supra

Accomplice - supra

If Mel can be charged with attempted murder because a legal impossibility defense is available in the jurisdiction, then Brent will also likely be guilty since he was an accomplice even though Mel did not know about his assistance. Brent did intentionally assist by opening the door to Herb's house for Mel with the specific intent that Mel kill Herb as the facts tell us was his desire.

### **Mel & Brent: Conspiracy**

A conspiracy occurs where two or more people genuinely agree to commit an unlawful act and at least one performs an overt act in furtherance of the agreement. Here, we are told that Mel was not aware of Brent's assistance in trying to commit the murder, Brent was secretly helping him; thus there never was an agreement between the two. Without an agreement, they cannot be guilty of conspiracy.

### **Mel: Insanity Defense**

An insanity defense would excuse Mel's unlawful conduct. Under M'Naghten a person is insane where medical or mental illness causes a defect in reason such that at the time of D's actions he is unable to understand the wrongfulness of his conduct or to appreciate the nature and quality of his actions. Here, it appears that Mel appreciates the nature and quality of his actions. He wants to kill Herb and appears to understand that shooting will kill him, so that part of his conduct does not fit an insanity defense. The part we are uncertain about is whether he understands that his acts are wrong. While the facts do not clearly point this out, we are told that he went to kill Herb at night and snuck into his room. These actions seem to indicate a desire to hide one's conduct which would insinuate an understanding that the acts were wrong. Thus, it is not likely that Mel will have an insanity defense under M'Naghten.

However, Mel might have a defense under the Model Penal Code [MPC] Insanity Defense if he's being tried under a jurisdiction that follows it instead of the M'Naghten rule. The MPC states that where due to mental defect, D lacks the substantial capacity to appreciate the wrongfulness of his acts and to conform his conduct to the law. Here, Mel might be able to argue that due [to] his mental illness, he was unable to conform his

actions to the law, the mental illness left him without the ability to control his actions despite knowing they were wrong.

Mel might have an insanity defense under MPC, but not under M'Naghten.

## Question 2

Paula has owned property in a relatively undeveloped area near the top of Black Mountain for many years.

Six years ago, Telephone Company erected a cell phone transmission tower on Black Mountain not far from Paula's property.

Four years ago, Paula built a cabin on her property and began to spend most of her free time there engaging in bird watching and other outdoor activities.

Last year, Telephone Company leased space on the tower for an emergency alert siren and agreed to install the siren and to test it regularly. The site was chosen because it allows the siren's warning to carry farther than from any other site.

Telephone Company promptly installed the siren. Since its installation, it has tested the siren for a five-minute period weekly. The resulting sound is so loud as to cause Paula to stop whatever she is doing and cover her ears. It also greatly reduces the local bird population.

Two months ago, Paula sent a letter to Telephone Company outlining the effects of the siren and demanding that it cease its activities. Telephone Company has not responded to Paula's demand.

Does Paula have any claim against Telephone Company? Discuss.

## Answer A to Question 2

Nomenclature: Paula = P; Telephone Company = T

P v. T - P may be able to sue T for the following outlined torts if all the elements outlined below are satisfied and there are no valid defenses from T on each of the torts.

**1. Nuisance** - Nuisance can be established either under the private nuisance theory or the public nuisance theory as outlined below.

**a. Private Nuisance** is present when there is a volitional act on part of the defendant that causes an unreasonable and substantial interference with the use and enjoyment of the plaintiff's property.

1. Volitional Act - is present when the defendant affirmatively undertakes an act. Here, T leases space on the tower for an emergency alert siren. In addition, T agreed to test the siren regularly. Therefore, it can reasonably be argued that there was a volitional act on part of T.

2. Unreasonable and Substantial Interference - is present when an ordinary reasonable person suffers an interference that [is] substantial and one that is unreasonable under the circumstances. Here, T's act that may be considered unreasonable would be the installation of the tower and thereafter the installation of the siren on the tower and testing it regularly. Here, P may argue that the siren did not exist 4 years ago when P built a cabin on her property. Therefore, P's argument would be that T's building of the siren on the tower was an unreasonable conduct. Usually, coming to a nuisance is not considered as a defense; however, court may consider it as a factor in determining whether the conduct of the defendant was unreasonable under the circumstances. Here, T decided to install the emergency siren at the said location because that specific location allowed the siren's warning to be carried farther than from any other site. An emergency siren is typically installed to warn people of an

impending emergency and an important factor of installing such a siren is to test it regularly. Comparing the utility of T's conduct with that of P's utility in observing birds and engaging in other activities, it is likely that a court may not consider such an activity as unreasonable under the circumstances. Furthermore, facts indicate that the siren rings for 5 minutes every week. Although during those 5 minutes, P has to stop doing anything that she is doing and cover her ears, a 5 minute inconvenience for the larger good of the community may not be considered as a substantial interference. It is unlikely that P may be able to present arguments for unreasonableness and substantial interference. However, if P is able to show this to the jury, then we move ahead.

3. Use and Enjoyment - is the typical activities that are performed by ordinary reasonable people that present any use to the property and the enjoyment of the plaintiff. Here, P began to spend most of her free time at the said property engaging in bird watching and other outdoor activities. Such activities undertaken by P that may potentially be interfered with due to the defendant's act may be utilized to show that the defendant's act was impairing the use and enjoyment of P because she could not perform those activities when the siren rang.

4. Plaintiff's property - For a nuisance claim it is essential that the property belong to the plaintiff or that the plaintiff be a land occupier of that property. Here facts indicate that P owned the property. There are no discussable issues in this regard.

For any tort, it must be shown that there exists causation between the defendant's act and the injury suffered by the plaintiff. Such causation can be shown to exist by showing that actual causation exists because the defendant's act was the but for cause of the plaintiff's injuries and proximate causation can be shown to exist, if foreseeability is established that the defendant's cause would result in those injuries or harm to the plaintiff. Here, but for the defendant's act of testing the siren, P would not have to stop doing whatever she is doing and presumably the loss of bird population can be established due to the siren. It can also be argued that there is no causal link between the siren and the disappearance of the birds, but it is not done so here in absence of

such facts. Furthermore, it can reasonably be argued that a person may have to cover their ears and in order to do so may have to stop doing what they are doing, and therefore such harm to the plaintiff is foreseeable. Also an argument can be made that birds would be scared of loud noises and it may cause them to move away. Causation is not an issue here.

**Necessity** - Public necessity is a defense if the defendant did an act for the greater good of the public and in effect caused a tort to the individual plaintiff. Here, the arguments presented above for the reasonableness and the importance of the emergency siren may be utilized and may prove to be a proper public necessity in this case.

It is likely that P may be able to sue T on [the] basis of a private nuisance. However, the biggest hurdle [is] with the showing the unreasonableness and the substantial interference element of this tort. If P is able to pass that hurdle, then an appropriate action can be maintained for this tort.

**b. Public Nuisance** is present when the defendant's volitional act causes an interference with the health, safety and the property rights of the community at large. Usually, an action for a public nuisance is actionable only by a public representative. However, if the individual defendant suffers harm that is distinct from the harm suffered by the community at large, then an individual defendant may be able to sustain such an action. Here, the volitional element arguments will be similar to those described above. The main issue is whether P suffered a harm that was distinct from that suffered by the community at large and whether that harm was substantial as to have a cause of action. Here, the arguments for substantial will be similar as private nuisance. P will argue that her harm was different from that suffered by the community at large because she was engaged in bird watching and that facts indicate that due to the presence of the siren and its use on a regular basis, the local bird population was reduced. The facts do not indicate whether anyone else was engaged in such an activity and that they suffered such a loss. In addition, it can reasonably be argued by P that due to the location of the

house the siren was probably louder for her that caused her to stop doing anything that she was doing when the siren rang. If such is the case, then P may be able to establish a case under public nuisance. However, a counterargument to this is that there may be other individuals who may be bird watching and that they may also be suffering similar cases where they have to stop their work. Usually in a nuisance case, the heightened sensitivity of the plaintiff is generally not a determining factor. Therefore, if other individuals in the community experience similarly as P or that the defendant T is able to show that P has heightened sensitivity to sound, then it is likely that P may not be able to sustain an action here under public nuisance. In absence of such facts, P may be able to sustain an action. The causation arguments will be similar as above and the damages are discussed in the preceding arguments. The necessity defense arguments will be similar as above.

## **2. Trespass to Land - Not likely for sound**

A trespass to land is the volitional act on [the] part of the defendant that causes a physical invasion of the plaintiff's property. However, in a majority of the jurisdictions, a physical invasion of tangible things constitutes this tort. Sound may not be sufficient to establish a physical invasion in this case. However, in a minority of those jurisdictions that recognize that a sound may be sufficient invasion, we move ahead with this tort.

The volitional act on part of the defendant will be similar as above. Here, P will have to show that T intended an act that caused the physical invasion. This is also not an issue here because T leased the space with the intention to install the siren and test it regularly. If sound is a tangible thing, then it can be reasonably argued that T knew with substantial certainty that his act of testing the siren might cause the sound to invade onto other nearby properties. The elements of this tort may therefore be established in this case.

**Necessity**: defense argument will be similar as above.

### **3. Negligence - Land Occupier - Activity on the Land**

Negligence is present when the defendant owes a duty to the plaintiff, that such duty is breached, that causation - actual and proximate causation- is present and the defendant suffers a physical injury or property damage and that there are no valid defenses available to the defendant. Here, P did not suffer a physical injury or property damage as a result of the defendant's act. Facts only outline that P had to cover her ears and that she had to stop doing whatever she had to do. In absence of such a harm, a tort of negligence may not be actionable. Duty is present when the defendant places the plaintiff within the zone of danger created by his unreasonable act. The duty element may be established because T would be a land occupier and the presence and the operation of the siren would be considered as an activity on the land. In addition, P would be considered as a plaintiff on an adjacent property. Here, T may owe a duty towards P. However, the biggest fact would be the breach of duty. A breach of duty may be established under the Learned Hand test whereby if the burden on the defendant to take appropriate action is less than the probability of the type of the injury and the magnitude of the injury then a breach may be established. Here, as argued in the nuisance section for the unreasonableness of the conduct, it is unlikely that a breach may be established. T may not have valid defenses here.

This tort may not be actionable because a breach of duty and actual damages may not be established here.

**4. Battery** is the volitional act on part of the defendant with the requisite intent to cause a harmful or an offensive touching to the plaintiff's person. Here the volitional act will be similar as explained above. Here, intent may be established if it can be shown that T knew with substantial certainty that his act would cause the result. Here, T did not desire that the loud sound cause the residents in the area to have discomfort. However, T knew that the sound was very loud. Therefore, it can reasonably be argued that T knew with substantial certainty that the sound may reach the residents in the area and that such sound may cause a touching. Any minor touching or offensive touching may

be sufficient for the charge of battery. Here, P would argue that the sound was so loud that it bothered her and that as a result she had to leave what she was doing and cover her ears. Such a sound may be considered to be offensive under the circumstances. However, it is possible that T may again present the necessity defense as presented above.

**5. Strict Liability for abnormally dangerous activities - loud sound** is actionable if P is able to show that such activity poses a high foreseeable risk, that no matter of due care would reduce that risk and that such activity is typically not conducted in the area. Here, P may be able to argue that loud sound may severely interfere with a person's hearing capability, which is evident from the fact that every time the siren rang, P had to leave whatever she was doing and cover her ears. In addition, there may be nothing that T could do because the purpose of such siren was to notify people in the community and therefore the siren had to be loud. If P is able to show that such sirens are usually not placed in the area, which is unlikely under the facts because there existed a telephone tower and that such tower could reasonably be utilized for placing a siren, and in addition facts also indicated that there was no better place for the utility of the siren. This tort may not be actionable.

**6. Invasion of Privacy - Unreasonable Invasion into plaintiff's seclusion**

This tort is actionable if the defendant causes an unreasonable intrusion into the plaintiff's seclusion. Here, T merely placed a siren on the tower and then tested it regularly. It was this sound that P may argue to have unreasonably intruded into her seclusion because P would argue that bird watching is typically done in silent conditions and that the siren interfered with that activity of hers. It is unlikely that a court may consider mere sound to invade someone's seclusion although the sound invaded onto the plaintiff's property.

## Answer B to Question 2

Does Paula have a claim against Telephone Company?

### Trespass to Land

An intrusion onto the land of another. Paula will have to establish the Telephone Company (D) intentionally intruded upon or caused a thing to intrude upon her land, causation and damages.

### Act

The D must have performed a volitional act.

Here, Paula will show the telephone company placed the siren on the tower and intentionally tested it weekly because the telephone company did install and tested the siren weekly and knew or should have known the sound waves would come onto her property; therefore Paula would have established intent.

### Intent

The D must have intended the harm.

Here, the D intended the harm because D agreed to test it regularly; therefore this element is met.

### Causation

The D must be the but-for cause of the harm suffered by Paula.

Here, Paula will show D intent and act of testing the siren was the but-for cause of the intrusion upon her land because but for the D testing the siren the sound waves would not have traveled upon her land and hurt her ears; therefore this element is met.

### Damages

Only nominal damages need be shown in a trespass to land case.

Here, Paula will show she has damages because weekly she has to stop what she is going to cover her ears; therefore she will have established damages.

### Defenses

The phone company will contend that sound waves are not the type of intrusion upon which a trespass to land case typically supports. Therefore it is likely the court will not support Paula's claim.

### Private Nuisance

For a plaintiff to be successful in a private nuisance claim they must establish a substantial interference to the use and enjoyment of their land and that the substantial interference is unreasonable under the circumstances.

### Substantial Interference

An interference is substantial if a reasonable prudent person (RPP) would find the interference disturbing and annoying to the use and enjoyment of her land.

Here, the interference would be substantial because an RPP would be disturbed and annoyed at a noise so loud that it caused pain to their ears such that they would stop their current activity to protect their ears by covering them on a weekly basis; therefore this element is met.

### Unreasonable

The plaintiff must show that substantial interference is unreasonable under the circumstances by comparing the nature of the interference; effect of the interference; the value society places on the use and enjoyment; the appropriateness of the location to the use and enjoyment; and the benefit of substantial interference.

### Nature of the interference

What is the type of the substantial interference (SI)?

Here, the SI is a weekly blast of sound lasting for five minutes; therefore the SI occurs every week for 5 minutes.

### Effect of the SI

How is the resulting effect of the SI upon the use and enjoyment?

Here, the SI encompasses all of Paula's land and beyond because the sound waves travel in all directions and are not stopped at any point; therefore the effect permeates all of Paula's land.

### Value of the use and enjoyment

Is the use and enjoyment interfered with valued by society?

Here, the value of the enjoyment interfered with would be of value to society because a reasonable person would expect to enjoy their land without the interference of sounds so loud that result is pain to their ears; therefore the value of the use and enjoyment interfered with would be high.

### Appropriateness of location

Is the location of the use and enjoyment with SI appropriate?

Here, the location is appropriate because one should be able to enjoy peace and quiet and avoid weekly noises loud enough to hurt their ears on their own land; therefore the location for the use and enjoyment interfered with is appropriate.

### Benefit of the SI

Is the SI a benefit to the public?

Here, the D will contend the SI is of benefit to the public because by testing the siren weekly for five minute intervals the D ensures the siren works in case of an emergency; further the location ensures the siren's warning reaches farther than from any other site.

Conclusion: After weighing the factors above the SI to Paula's use and enjoyment is substantial.

### Causation

Is the defendant the cause of Paula's harm?

Here, Paula can show D is the cause of her harm because but for D testing the siren weekly for a five minute period her use and enjoyment would not be substantially interfered with; therefore D is the cause of her harm.

### Damages

For a nuisance action the plaintiff can receive monetary damages or an injunction to abate the nuisance.

General Damages - Paula could be awarded damages for her pain and suffering to her ears.

Injunction - Paula could obtain a court order requiring the D to cease or test less frequently the siren.

### Defenses

#### Coming to the nuisance

If a party comes to the nuisance they typically will not be able to recover from the D.

Here, D will state Paula came to the nuisance because she built a cabin on what was undeveloped property two years after the installation of the tower on which the siren was placed; therefore D will assert Paula came to the nuisance.

Here, Paula will concede that she did build two years after the erection of the tower; however the siren was placed on the tower four years after she built that cabin and as such she did not come to the nuisance; therefore Paula will have rebutted D's claim that she came to the nuisance.

### Public Nuisance

A public nuisance action is typically brought by the Attorney General or another government agency to address a nuisance that effects the community at large. For a private party to bring a public nuisance claim they must suffer a harm different than the public at large. For a plaintiff they must establish a substantial interference to the use and enjoyment of their land and that the substantial interference is unreasonable under the circumstances.

Here, Paula can bring a public nuisance claim, because as analyzed above the use and enjoyment of her land is SI and the public at large is affected because the local bird population is greatly reduced; therefore Paula will have distinguished the harm she suffers from the harm suffered by the public at large.

As analyzed above the harm to her is apparent; the harm to the public at large is a reduction in bird population. If this effect on the bird population is substantial the court may require the D to change the frequency of the siren test or find another solution that provides the same benefit without causing a nuisance.

### Question 3

Buyer wished to upgrade its 5,000 lighting fixtures to meet new energy conservation standards, but had been unable to find compatible lighting elements.

Buyer wrote to Seller, explaining its needs.

On July 1, Seller e-mailed Buyer:

We believe we can manufacture the lighting elements that you require. We are prepared to supply 5,000 at \$100 each. We understand that this is much more than you anticipated paying, but the redesign to meet your specifications will not be easy. We need to do this deal by September 1. If not, we will have to turn our attention elsewhere.

Buyer was relieved that it would not need to replace its existing lighting fixtures. Buyer felt sufficiently confident that it would be able to secure funding for the purchase so it terminated ongoing negotiations with manufacturers for replacement lighting fixtures.

On August 1, Buyer received notice that funds would be available. It immediately attempted to e-mail Seller: "We got the money. We have a done deal." Seller did not, however, receive the message because Buyer sent it to the wrong e-mail address.

On August 10, Seller e-mailed Buyer:

We have reconsidered. Because of new commitments, we will not be able to supply the lighting elements as planned. Sorry.

Because its computer was down on August 10 and 11, Buyer was unaware of Seller's August 10th e-mail message.

On August 12, Buyer telephoned Seller and the following exchange ensued:

Buyer: Our computers have been down for a couple of days, but we assume you got our message. Our people are real excited about this.

Seller: What message? And we told you two days ago we could not do the lighting elements.

Seller has refused to supply the lighting elements. It will be very difficult and expensive for Buyer to acquire replacement lighting fixtures.

Can Buyer prevail in a breach of contract action against Seller? Discuss.

## **Answer A to Question 3**

### What Law Governs?

This contract involves a sale of lighting fixtures--that is, movable goods within the meaning of the UCC.

Buyer and Seller are apparently "merchants" within the meaning of the UCC--that is, persons [who] have special knowledge of or who regularly deal in the type of goods involving in the transaction.

Accordingly, the UCC will apply and the parties will be held to a higher standard of good faith dealing as merchants--and will also be held to other special rules applying to merchants under the UCC.

### Formation

Here, the rights of the parties (and whether Buyer can successfully sue for breach of contract) will depend, first, on whether there is an enforceable contract.

For an enforceable contract, there must be (1) mutual assent, including (a) a valid offer and (b) a valid acceptance. In addition, there must [be] valid consideration (or some valid substitute for consideration), and no defenses to formation.

### Preliminary Negotiations

Here, Buyer's initial letter to Seller "explaining its needs" would be considered preliminary negotiations, or a manifestation on the part of Buyer to bargain.

There are no sufficient "words of commitment," or "sufficiently definite terms," as yet; accordingly, there is no offer at this point.

### Offer

An offer is the offeror's manifestation of present intent to enter a bargain, sufficiently definite terms, communicated to the offeree such that the offeree would be justified in understanding that its assent is invited and will conclude the bargain.

Seller's 7/1 [e-mail] is a manifestation of Seller's "intent to enter a bargain of sufficiently definite terms."

The terms are 5,000 lighting fixtures (subject matter and quantity), at \$100 each (price).

Seller is inviting Buyer's assent to the proposed bargain and Buyer would be justified, so to understand; also, it is specifying the manner in which Buyer must communicate its acceptance (by September 1).

Accordingly, as of 7/1 there is a valid offer.

### Acceptance

An acceptance is the offeree's manifestation of intent to be bound by the terms of the agreement, communicated to the offeror in the authorized manner (or otherwise in any reasonable manner under the circumstances).

Here, Buyer's 8/1 e-mail was an attempted acceptance (i.e., "We got the money. We have a done deal.")

However, as the facts indicate, Buyer's attempted acceptance was never "communicated" to Seller, where Buyer accidentally "sent it to the wrong e-mail address."

### Mailbox Rule / Risk of Loss of Acceptance

Generally, under the mailbox rule, an acceptance is effective "upon dispatch."

However, if the offeree fails to properly transmit his acceptance, then the acceptance is not valid "upon dispatch," and the offeree bears any risk of loss.

Here, where offeree fails to properly direct his attempted acceptance to the correct e-mail address, the acceptance is not effective "upon dispatch," and the offeree "bears the risk" of its subsequent loss.

Accordingly, here, there is no valid acceptance.

### Revocation / Lapse

An offer may be terminated at any time prior to acceptance, in any of several ways, including (1) rejection, (2) counteroffer, (3) impossibility (due to death or incapacity, destruction of subject matter, or supervening illegality), (4) lapse, and (5) revocation.

A revocation is the offeror's withdrawal of its offer, communicated either directly or indirectly to the offeree, at any time prior to acceptance.

In its e-mail, Seller has communicated to Buyer its intent to withdraw its offer and has done so to Buyer's acceptance.

Accordingly, Seller's 8/10 e-mail would be considered a revocation.

### Mailbox Rule, Risk of Loss of Revocation

Under the mailbox rule, the offeror's revocation is normally not effective until it is actually, physically received by the offeree.

Here, Seller properly addresses and sends the e-mail revoking its offer on August 10. However, Buyer never "receives" Seller's e-mail prior to Buyer's and Seller's telephone conversation on August 12.

Under the mailbox rule, where Seller properly addressed its e-mail, but it was never received because of the failure on Buyer's end to have functioning computers, with which to check its e-mail, Buyer would likely "bear the risk" of the loss of Seller's revocation up to that point.

In any case, as [per] Buyer's and Seller's 8/12 telephone conversation, Seller's has definitively revoked its offer by confirming the content of the e-mail sent two days prior.

Accordingly, as 8/12 Seller has terminated Buyer's "power of acceptance" and there is no enforceable contract between the parties.

#### Promissory Estoppel

An issue arises here as to whether Seller's initial offer of 7/1 to sell Buyer the fixtures it requires--and Buyer's subsequent reliance on that promise--entitles Buyer to enforcement of Seller's promise on a theory [of] promissory estoppel.

Promissory estoppel applies where the offeror (1) has made a promise; (2) should anticipate that the making of that promise will likely induce the offeree upon that promise; (3) the offeree is in fact induced to reasonably rely on the offeror's promise; and (4) to not enforce the offeror's promise would result in an injustice, despite the absence of an enforceable contract between the parties.

Here, we are told that the lighting fixtures Buyer seeks are a special order item, that Buyer is depending on being able to obtain this specific type of new energy saving fixtures, that Buyer has terminated ongoing negotiations with other potential supplies in reliance on Seller's promise, and gone to considerable lengths to obtain the necessary financing for the transaction.

Buyer has relied on Seller's initial promise--and perhaps reasonably so. Moreover, where Seller assured Buyer that its offer would remain open until 9/1, Seller is perhaps

justified in understanding that it can rely on Buyer's promise, even where Seller did not receive its initial acceptance.

Accordingly, a court may enforce Seller's promise despite the absence of an enforceable contract, based on a theory of promissory estoppel.

### UCC Firm Offer

Under the UCC, a merchant may hold an offer open for up to three months, so long as that offer is made in writing and signed "by the party to be charged" (here, Seller).

Since Seller's 7/1 offer assuring Buyer it will hold its offer open through 9/1 is not a signed writing, Buyer will be unable to assert that Seller's 7/1 offer is a UCC firm offer.

However, as noted, a court may still enforce the contract on a theory of promissory estoppel.

### Breach

A material breach is a party's failure to perform a contractual duty which substantially deprives the non-breaching party of his or her expectation under the contract.

Here, there is no breach because, as noted, there is no enforceable contract.

Nonetheless, as noted, a court may enforce Seller's promise on a theory of promissory estoppel.

### Damages

### Specific Performance

A court may order specific performance of a sale contract where the goods involved are unique.

Here, the light fixtures in question are apparently difficult to find and will require special manufacturing by Seller.

Accordingly, because the light fixtures in question are "unique," the court may order specific performance of the contract, on a theory of promissory estoppel.

### Expectation Damages

Alternately, the court may award Buyer compensatory damages equivalent to Buyer's expected "benefit-of-the-bargain," for the purpose of placing Buyer in the same position Buyer would have been had Seller completely performed its promise.

Here, the amount of compensatory damages would be either the difference between the market price and the contract price of the fixtures or, if Buyer is able to "cover" through another supplier, the difference between the "cover price" and the "contract price" of the fixtures.

In addition, Buyer would [be] entitled to incidental or consequential damages incurred as a result of Seller's breach of its promise.

### **Answer B to Question 3**

Buyer v. Seller

In order to prevail in a breach of contract action, Buyer will have to show he has an enforceable contract with Seller.

If a contract involves the sale of goods, the UCC will be the governing law. Otherwise, the common law will govern. When a contract involves both services and a sale of goods, courts look to the predominant aspect of the contract and whether it is divisible. If it is divisible, parts can be governed by separate, relevant law. If not, the predominant aspect will determine which law will take precedence. Here, this potential contract is not divisible since both sides cannot be divided into two or more equal parts. Buyer will simply buy the fixtures (i.e. one act). Therefore, it must be determined whether service or a sale of a product is the predominant aspect of this contract. Since the facts state that the "redesign ... will not be easy," this would suggest that the service is the predominant aspect. Also, Buyer "had been unable to find compatible lighting elements." This might suggest Seller's work to redesign is highly unique, once again making this contract predominantly a service one. However, the product was the final desired product of the potential contract. It is debatable which law will govern; therefore, both laws will be referred to below.

#### Did Buyer have an enforceable contract with Seller?

Contract formation requires mutual assent plus consideration. There must be an offer and an acceptance supported by consideration.

#### Was there an offer?

An offer is an objectively manifested intent to be bound by definite, certain terms communicated to an identified offeree. Here, Seller's e-mail on July 1st contains an intent to be bound (i.e. "We are prepared to supply ..."). And, this intent was communicated to Buyer by e-mail. The UCC requires only one term to make a sufficient

offer while other terms may be filled by the courts. This term is quantity. Here, Seller's e-mail identifies the quantity of elements to be supplied, so it would be sufficient terms for the UCC. At common law, the terms required were subject matter, parties, quantity, price and time of performance. Here, Seller's e-mail identifies the parties, subject matter, quantity and price, yet it leaves the time for performance out. This would not be necessarily fatal as courts could imply a reasonable amount of time if the work were to begin by September 1st. It appears that most likely Buyer did receive a valid offer.

### Could Seller revoke his offer?

An offer may be revoked at any time before it is accepted unless it is irrevocable. There are three types of irrevocable offers: an option, a Merchant's Firm Offer and an equitable option. No consideration was paid by Buyer to keep Seller's offer open, so an option is not applicable here. Under the UCC, an offer made in a signed writing by a merchant will remain irrevocable for the time stated in the writing without consideration. Here, Seller's e-mail was in writing, and courts will most likely find its electronic identification sufficient for a signature. Also, Seller appears to be a merchant since it manufactures lighting elements. The factual debate would occur as to whether Seller's statement "We need to do this deal by September 1" is suggesting Buyer has until that time to accept. The language is not definitive; however, Seller goes on to write "If not, we will have to turn our attention elsewhere." This following statement does seem to suggest that Seller will make itself available to Buyer's needs until September 1. It is likely Seller's e-mail will be considered a Merchant's Firm Offer and irrevocable if the governing law is the UCC. Also, Buyer might rely on an equitable option theory. When an offeree detrimentally, reasonably and foreseeably relies upon a promise, the offeror cannot revoke his offer. Here, Buyer "terminated ongoing negotiations" in reliance upon Seller's offer. However, there are no facts to suggest that Seller knew or could foresee that Buyer would rely on their offer in this regard. It is likely that an equitable option would not be found, and Seller could revoke his offer at common law.

### Did Buyer accept the offer on August 1st?

An acceptance is an objectively manifested intent to be bound to the terms of an offer communicated in a manner invited by the offer. Here, Buyer attempted to communicate his intent to be bound by Seller's offer, but he e-mailed the wrong address. Under the mailbox rule, an acceptance is effective upon dispatch if it is properly addressed. It is likely that the courts would find that this attempted acceptance was not effective upon dispatch since it was addressed incorrectly.

### Did Seller revoke his offer on August 10th?

A revocation is a communication by an offeror received by the offeree stating that the offer is no longer available and the offeree no longer has the power to accept and form a contract. Here on August 10th, Seller e-mailed Buyer and attempted to revoke its offer. However since Buyer's computers were down, it is arguable whether he received the attempted revocation or not. This would be a debatable point. It would have to be decided if electronic reception that is stored and unable to be accessed by a person's usual computers is sufficient to constitute reception of a revocation. Since persons can usually check their e-mail on the internet, it will most likely be determined that this revocation was received and effective. Nevertheless if the UCC governs this claim, Seller could not revoke his offer since it would most likely be deemed a Merchant's Firm Offer.

### Did Buyer accept the offer on August 12th?

Please reference the required elements of an acceptance above. Here, Buyer referred Seller to his message from August 1st which Seller did not receive. Since this reference does not explicitly communicate an acceptance and the previous message is most likely ineffective due to the incorrect e-mail address, it is highly unlikely this statement constitutes an acceptance. Furthermore, Seller expresses the revocation directly afterwards, and this time, Buyer hears it (i.e. receives it). So, the offer is highly likely to be deemed revoked here. Buyer would then not have an enforceable contract and would have no recovery. Yet once again if the UCC is governing, Buyer still could accept, which according to the facts there is no evidence he ever did.

Would this contract have sufficient consideration?

Consideration exists when there is a current, bargained-for exchange and both parties incur new legal detriment as a result of the bargain. Here, Seller will have to manufacture and sell lighting fixtures which it is not legally obligated to do, and Buyer will have to purchase them. And since both parties bargained with each other for these rights, consideration would exist if a valid acceptance could be found by Buyer's reference to his undelivered e-mail.

Would Seller be able to raise any defenses?

The Statute of Frauds requires the sale of goods for \$500 or more to be in writing. Seller's e-mail from July 1 would be a sufficient signed writing by the party to be charged since it includes the quantity, price and an electronic signature. This defense would not be successful.

## Question 4

Victoria lived in a house with her roommates Ben and Carl. One night, Albert entered the house through an unlocked, but closed, back door and went into Victoria's bedroom. Albert removed a partially full bottle of whiskey and a knife from his pockets, and threatened to harm Victoria if she screamed.

At that point, Ben and Carl discovered Albert in Victoria's room. Catching sight of Ben and Carl, Albert took off running. Ben said to Carl, "Let's get him!" Ben and Carl chased Albert out of the house and down the front stairs. Albert got into a vehicle and drove away. Ben and Carl jumped into a neighbor's vehicle, which had its keys in the ignition, and sped after Albert.

Ben and Carl caught up with Albert in a deserted shopping center. Ben drove into the passenger side of Albert's vehicle and pushed it until its driver's side came to rest against the wall of a building, trapping Albert inside. No one was injured. At that time, the police arrived and arrested Albert, Ben, and Carl.

1. What crimes, if any, might Albert reasonably be charged with, and what defenses, if any, might he reasonably assert? Discuss.
2. What crimes, if any, might Ben and Carl reasonably be charged with, and what defenses, if any, might they reasonably assert? Discuss.

## Answer A to Question 4

1. What crimes, if any, might Albert reasonably be charged with, and what defenses, if any, might he reasonably assert?

Burglary:

Common law burglary is the breaking and entering of the dwelling house of another at night with the intent to commit a felony therein. Modernly, it is the breaking and entering of the protected structure with the intent to commit a crime.

Breaking: A breaking does not have to be an actual physical breaking. Here, the back door of Victor's house was closed but unlocked. Albert had to physically open the door, which is considered a breaking to satisfy the breaking element for Burglary.

Entering: Carl entered the house of Victoria, which is her protected structure.

Intent to commit a crime: Here, we do not know why Albert broke into the house and what intent he had prior to entering the house. If one assumes that since he was carrying a knife and made his way to Victoria's room then he was there to commit a crime against Victoria. It does not say that Albert stopped to remove property, but he entered and went to Victoria's bedroom. Therefore, if Albert intended to enter the house to harm Victoria prior to his entering the home the intent element for Burglary would be satisfied.

**If Albert entered the house intending to harm Victoria, then we have a Burglary for which Albert can be charged.**

Assault:

The defendant is putting the victim in an immediate fear or oppression of a harmful or offensive touching. Here, upon Albert entering Victoria's home, he walked into her bedroom, pulled a knife from his pocket and threatened to harm Victoria if she screamed. A person who sees an [un]invited intruder standing in their bedroom holding a knife threatening to harm her if she screamed would be in fear of an immediate harm or offensive touching. Albert can be charged with assault.

**Albert can be charged with assault as he threatened her with a knife, which would put Victoria in apprehension of a touching.**

Defenses:

Voluntary Intoxication: Albert is going to raise the defense that he was voluntarily intoxicated and was unable to form any intent to commit a crime or harm a person. The facts state that he pulled out a partially full bottle of whiskey from his pockets. It does not say how much or little whiskey had been consumed or if Albert was acting in any way intoxicated. Given the fact that he was able to enter the home, head straight to Victoria's room without alerting Ben or Carl, [it is likely] that Albert did not manifest an intoxication level.

**While Albert will raise the voluntary intoxication defense it will not succeed.**

2. What crimes, if any, might Ben and Carl reasonably be charged with, and what defenses, if any, might they reasonably assert?

## **Ben**

Solicitation:

Solicitation is where one party asks another party to commit a criminal act. Here, Ben looks at Carl and says, "Let's get him!" This is a solicitation for a crime.

Merger: Solicitation merges into the crime of conspiracy.

Conspiracy: A conspiracy is an agreement between two people to commit a criminal act.

Agreement: The agreement between the two individuals can be express or implied. Here, Ben looked at Carl and said "Let's get him" and they both chased after Albert. There is a valid agreement between Ben and Carl.

Act in Furtherance: There needs to be an act in furtherance of the agreement in order for there to be a conspiracy. Here, Ben and Carl both started chasing Albert and chased him out of the house and out into the street. Their actions proved they were going to get Albert.

Criminal Act: What criminal acts exactly are Ben and Carl trying to commit? They are chasing a person who was in their home without permission, holding a knife to their roommate, threatening her. Did they know what they would do when they caught him? From the facts it appears they were trying to defend their roommate and property and did not intend to commit a criminal act.

## **There is no conspiracy**

Larceny: Trespassory Taking and Carrying away [of] the personal property of another with the intent to permanently deprive.

Here, Ben and Carl jumped into their neighbor's car which had the keys in the ignition and sped off after Albert. They trespassed, took and carried away the personal property of another with the driving away of the neighbor's car.

Intent to permanently deprive: Did Ben have the intent to permanently deprive the neighbor of the car? Given the fact he was chasing after a person who had just broken into their house and threatened their roommate with a knife, and there are no facts to indicate that any intent was made other than the car was readily accessible to aid Ben in chasing after Albert. Given there is no intent shown that Ben intended to permanently deprive the neighbor of the car, a larceny charge will not be proved.

**As the intent to permanently deprive is missing from this crime, Ben will not be charged with larceny.**

Assault - supra

Albert has an immediate apprehension of fear of a harmful or offensive touching by Ben. Albert knew that Ben was out to get him and knew that he would be harmed if they caught him.

Battery: Harmful or offensive touching of another.

Here, Ben took the car he was driving and drove the car into the side of Albert's car until Albert's driver side [door] would not open. A harmful or offensive touching can be an extension of your person and the car is an extension of Albert and when Ben hit Albert's car, it can be viewed as a battery.

False Imprisonment: False imprisonment is where the defendant confines the victim to a bounded area where there are no means of escape.

Here, after Ben drove the car into the wall to block the driver's side escape and used Ben's car to block the passenger side escape, Albert had no way to leave his car and was in fact bound to an area with no means of escape.

Since Ben had no means of escape, he would be confined to a space against his will.

**Assault, Battery and False Imprisonment can all be proved by the facts.**

Defenses:

Defense of Third Party: Ben will have an excellent defense that he was defending his roommate and as such shall not be liable for any of the charges.

Defense of Property: Albert had entered Ben's property also, and he can claim that he was using reasonable force to protect his property.

**Crime Prevention: The defense that will work best is that Ben was trying to stop a fleeing felon who posed a risk of danger to the public. Ben had just found Albert in his home, [in] his female roommate's bedroom, where he was threatening her with a knife. Ben was not sure what this person would do or who would be the next person to be injured and by chasing after him he wanted to stop him from fleeing so that the police could take him into custody and protect the public.**

**Carl:**

Conspiracy: Supra

Pinkerton: The Pinkerton Rule states that a coconspirator will be liable for all foreseeable crimes that happen as a result of the conspiracy crime. Here, It is foreseeable that when you are chasing someone, you will have an assault, battery and false imprisonment, when you state "Let's get him". However, we determined there was no conspiracy.

Accomplice: Carl was present with Ben during these acts and can be seen as an accomplice to the crimes of Assault, Battery, False Imprisonment.

Larceny: Supra

Defenses: Supra

Carl would defend on the fleeing felon defense and would proceed to not be charged with the crimes as he was trying to protect the public from a fleeing felon who posed a risk to the public.

## Answer B to Question 4

### STATE V. ALBERT

#### BURGLARY

At common law, burglary was the breaking and entering of the dwelling of another during the night with the intent to commit a felony therein. Modernly, the requirements of breaking and night hours are usually omitted, and the structure entered can be any structure. A theft may be intended rather than a felony per se.

Breaking and entering: Even though the front door was unlocked, Albert opened it., Creating the opening of entry constitutes breaking. Further, Albert "entered the house."

Dwelling of another: This was Victoria's and her roommates' house, so it is the dwelling of another and satisfies a common law or modern version of burglary.

Night: The facts state this happened "one night," satisfying either common law or modern burglary.

Intent to commit a felony: The facts do not give us Albert's intent. Circumstantial evidence of entering Victoria's bedroom at night, the only female of the house, with alcohol and a knife could suggest an intent to commit rape. Alternatively, Albert assaulted her as will be discussed below. However, we cannot assume that he entered with this intent.

**It is not fully clear that Albert had the specific intent necessary for burglary, but a strong case on circumstantial evidence can be made.**

## ASSAULT

Criminal assault is an attempted causing of harmful or offensive contact or the placing of another in apprehension of imminent harmful or offensive contact, coupled with present ability. Albert threatened to harm Victoria and showed her a knife. This was a threat of imminent harm because he would be harming her in that instant if she screamed. Albert may assert that his threat was conditional -- "if she screamed." However, he cannot excuse his conduct by a conditional threat. He should be found guilty of assault.

## ATTEMPTED RAPE

Rape is sexual intercourse by a man without consent with a woman not one's wife, at common law. Modernly, the wife is not excluded as a possible victim and either gender may be a victim or defendant.

An Attempt occurs when a defendant takes acts that, if successful, would have resulted in the commission of a certain target crime. It requires proof of 1) an intent to commit the target crime; and 2) a substantial step that shows unequivocal intent to commit the target crime. Here, as discussed above, Albert's intent can only be inferred from the circumstances. If intent is established, his breaking and entering with a weapon in hand coupled with his threat provides the necessary substantial step. Albert will argue that he did not come close to a result as he took no actions initiating intercourse, but modern courts do not require close proximity to the act. Pending establishment of intent, he could well be found guilty of attempted rape.

## CRIMINAL TRESPASS

This is entry upon clearly marked property of another. Albert did enter the house of other people, so he could be charged with criminal trespass. He has no apparent defense other than intoxication, discussed below.

### DEFENSE OF VOLUNTARY INTOXICATION

At common law, such a defense only applied to negate specific intent crimes. Modernly, it may be a defense if it negates the mens rea. Since Albert has a partially consumed bottle of whiskey, it can be inferred that he drank the other half and is intoxicated. However, the facts don't show if this is so. If he was intoxicated, this could negate the intent to commit a felony necessary for burglary, negate the intent to place in apprehension of assault, and negate the specific intent to rape necessary for attempted rape. It would not be a defense for criminal trespass, which is a general intent crime that requires only the intent to commit the entry.

### **STATE V. BEN**

#### SOLICITATION

Defined as inciting or encouraging one to commit a crime. Ben said to Carl, "Let's get him!" which may be seen as an invitation to commit an assault or battery or both on Albert. It requires intent to commit target crime, an intent to solicit, and an actual request. Ben did want to "get" Albert and did request help from Carl intentionally. If convicted of solicitation, this would merge with conspiracy and the crime itself.

#### CONSPIRACY TO ASSAULT/BATTERY

A conspiracy is an agreement between two or more persons to commit an unlawful act or a lawful act by unlawful means. It requires 1) intent to agree; 2) intent to commit the target crime; and 3) an agreement to commit the crime. Some jurisdictions also require an overt act, not necessarily unlawful, by any one of the conspirators, at least where the crime is not serious.

As above, Ben intended to agree with Carl to "get" Albert with the purpose of "getting" Albert. Carl responded with actions by accompanying Ben. The overt act was the giving chase. Thus, a conspiracy was formed to commit battery and/or assault on Albert.

## ASSAULT

Defined above. Ben placed Albert in apprehension of imminent harm by chasing him on foot and by car. An assault occurred, though Ben has defenses below.

## BATTERY

Criminal battery is the application of unlawful force with intent, recklessness, or negligence. Ben drove his car into Albert's car and pinned him to the wall. He seems to have acted with intent since he said he wanted to "get him" and had been chasing him. Ben will argue that nobody was harmed, but this is still an offensive force. Ben will argue that he never made contact with Albert's body, but the force can be applied via objects connected to the victim and/or defendant. Ben controlled his car, which touched Albert's car, which impacted Albert. A battery occurred, though Ben has defenses below.

## LARCENY

Larceny is the trespassory taking and carrying away of the personal property of another with the intent to deprive the owner permanently.

Trespassory taking. Ben had no permission to take the car that he jumped into while pursuing Albert. This is a trespassory taking.

Carrying Away. Driving off with the property is a carrying away, and Ben "drove away."

Personal Property of Another. A car is personal property and it belonged to a "neighbor."

Intent to Deprive Permanently. Ben may argue he intended to return the car. However, acting in a manner that makes it little likely that the owner will receive his property is tantamount to intent to deprive permanently. Chasing a criminal -- he "sped away" -- qualifies as such a manner.

**Ben fulfills all the criteria of larceny, though he may have defenses below.**

**DEFENSES**

Defense of Others. One is entitled to use reasonable force necessary to defend others from unlawful force. Most courts now give the benefit of a reasonable mistake. Here, Victoria was privileged to use force to defend herself from a knife-wielding trespasser. This gave Ben privilege to defend her as well. All he did was give chase in response to deadly force, so he did not exceed the permissible scope. This defense should shield him from the assault charge. It may also shield him from the battery charge although he may have exceeded the scope in using the car as a deadly force even after the initial aggressor was in retreat since he rammed his car into Albert after Albert was running away. Acquittal of Assault and/or battery would entail acquittal of solicitation and/or conspiracy for those charges as well.

Arrest of Felon. One is entitled to use reasonable force to effect the capture of a person who has committed a felony or breach of the peace in one's presence. Here, Albert is at least guilty of trespass and assault if not attempted rape. Ben was privileged to assault him when he chased him from the house. However, deadly force is only permitted if the fleeing suspect is a clear threat to the defendant or to others. It is not clear that Albert posed any threat during the car chase, so the deadly force of ramming a car into another car may have exceeded the scope in the charge of battery. Ben may also try to raise this defense against the larceny, though the victim of this force was the neighbor instead of the suspect. This defense should not work for larceny.

Prevention of Crime. One is entitled to use reasonable force in prevention of crime. Ben was preventing a battery or rape from being perpetrated on Victoria. His initial assault of Albert is privileged, though he will lose this defense in the battery charge since Albert was no longer in danger of committing any crime at that point.

## STATE V. CARL

### CONSPIRACY TO ASSAULT/BATTERY

A conspiracy is an agreement between two or more persons to commit an unlawful act or a lawful act by unlawful means. It requires 1) intent to agree; 2) intent to commit the target crime; and 3) an agreement to commit the crime. Some jurisdictions also require an overt act, not necessarily unlawful, by any one of the conspirators, at least where the crime is not serious.

Carl responded to Ben's call to "get him" with actions by accompanying Ben. The overt act was the giving chase. Thus, a conspiracy was formed to commit battery and/or assault on Albert.

### ASSAULT

Assault defined above.

Carl placed Albert in apprehension of imminent harm by chasing him on foot and by car. An assault occurred, though Carl has defenses below.

### BATTERY (ACCOMPLICE)

An accomplice is one who aids or abets another in the commission of a crime and thereby incurs liability for that crime as well. It requires 1) an intent to assist; 2) an intent to commit the target crime; and 3) acts that assist the principal. Under the MPC, even attempted assistance incurs accomplice liability.

As above, Ben committed a battery on Albert when he rammed his car into him. Carl provided assistance by lending moral support since Ben knew Carl would help him in any subsequent confrontation as he had helped him up to this point. Thus, Carl is an accomplice to battery, though he has defenses below.

## LARCENY

As analyzed for Ben, Carl will be charged with larceny though with possible defenses below. He may argue he was not the driver, and therefore not the taker, but he should be seen as constructively taking or as an accomplice.

## DEFENSES

Defense of Others. One is entitled to use reasonable force necessary to defend others from unlawful force. Most courts now give the benefit of a reasonable mistake. Here, Victoria was privileged to use force to defend herself from a knife-wielding trespasser. This gave Carl privilege to defend her as well. All he did was give chase in response to deadly force, so he did not exceed the permissible scope. This defense should shield him from the assault charge. It may also shield him from the battery charge although he may have exceeded the scope in using the car as a deadly force even after the initial aggressor was in retreat since he rammed his car into Albert after Albert was running away. Acquittal of Assault and/or battery would entail acquittal of solicitation and/or conspiracy for those charges as well.

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