Taft Law School

Electronic Classroom – Baby Bar Mini-series

05/28/19 6:00 ‑ 7:00 PM

>> INSTRUCTOR: Good evening, everyone, and welcome to tonight's baby bar mini series. We'll be starting in approximately two minutes. Thank you.

We're objectively get started in about one minute.

>> INSTRUCTOR: Good evening, everybody, and welcome to tonight's baby bar mini series. Our primary focus will be on the October 2019 baby bar, that's the most current baby bar that's come down. I do wanna point out that these sessions are recorded so for your convenience if you want to go back and listen to a lecture, just go onto Taft's Web site, sign on to the student section, and then go to the baby bar mini series. Anything that we'll review is up there as well, such as the essay questions and model answer for your convenience.

All right. We've got four essay questions to get through. Remember, if you do have any questions, please feel free to place 'em there in that chat box and I'll be sure to help you in any way I can.

Let's start off with question No. 1. Now, remember, the one thing I always emphasize to you is to always start off with the call of the question and you're objectively see in these particular exams the calls are really odd. They're a little bit different. There's certain things they're asking. Sometimes you're, like, what are they even asking? Objectively you need to be sure you follow the call. I think they're trying to shake things up so you get frustrated under the pressure of the exam. So always pay attention to the call of the question. That's your direction. And follow it.

In this question, this happens to be a contract question. Call number 1 says what claims will Becky make and what remedies will she request? Well, what I don't like is remedies. In regards to remedies is also not a lot for you guys in your first year, objectively when you see that in the call of a question, I'm objectively have to address as many remedies as applicable. In this exam you're objectively learn that not only your damages were at issue, objectively a liquidated damage clause. So that's something that's currently new of how the baby bar's testing. So I do want you to review remedies. Seems to be more of a ripe area that we've been testing because they know that's one of your weaknesses. That is something I highly recommend.

Call 2 says what defenses, if any, will Western Sky raise in response to Becky's lawsuit? Remember, I told you defenses can mean true defenses as you and I know them. So since we know this is contracts, you know, I'm thinking statute of frauds, or maybe parol evidence, or modification or mistake. Objectively actually, defenses, I also told you could be what? Counterarguments or you could see them as excuses for performance. We'll go over that as we get to that call. And then Call 3 which is, like, really? What will the likely outcome of the case? Discuss. I didn't like that call so all I had to do was two sentences to reiterate what we said up above. So that's a very odd call for the examiners.

All right. It says: Becky is a highly employable and well‑known bourbon distiller who has worked at a number of distilleries. One year ago she was offered and accepted a job of Chief Distiller at Western Sky Distillery (Western Sky) at $200,000 annually for five years provided that her employment is terminated early, she will receive $400,000 per year in damages for the remaining term of her contract.

That's a lot that they pulled out there. So we though she's well known. She's also offered and accepted so that's kind of like your mutual assent. Haven't broken it apart where we really know the definite certain terms. And you know the consideration's the $200,000 being her annual salary. Objectively you also see that if they terminate her earlier than the five year term that they're objectively be paying her $400,000 in damages per year for the remaining term. That's what we also call liquidated damage clause. Remember, with a liquidated damage clause what you're going to learn is it can't be punitive in nature, which I will go over.

Becky and Western Sky signed a complete employment contract with those terms. So they gave it to you; right?

However, two things had just happened. First, the growing popularity of distilleries over the past ten years have led to a worldwide shortage of oak barrels which are required to age and produce bourbon. The shortage will, in fact, persist for at least several years or more until such time as the barrel manufacturers will have increased production. Western Sky will now cease production of bourbon and it has fired Becky for that reason. Western Sky does not deny the existence and validity of its contract with Becky.

This paragraph is basically telling you there is a reason why they had to get rid of her basically they can't produce the bourbon anymore. And that's because the availability of the oak barrels aren't there. So you should be thinking of improbability, impracticability, frustration, or purpose. Remember I told you ‑‑ which I think most of you probably did see ‑‑ is in regards to improbability; right? Impracticability, frustration, or purpose. They like each other so those three generally do come up in a cluster so you do wanna pull that out.

Can everybody else hear me?

Now, it says next: Second, Becky has been offered a full‑time job as a host of the television show about bourbon producers at a salary of $100,000.

So you see her salary's what? Decreasing. She's gone from a salary of 200 to 100., and it's for four years.

Although the salary is less than he was paid at Western Sky, she isn't able to find another job as a bourbon distiller because of the oak barrel shortage. She has a duty to what? Mitigate her damages. So if this is all she can find, right, she's mitigating so that goes to the issue in regards to mitigation.

So the first call, what claims will Becky make, and what remedies? So we're focusing on just Becky. The first thing she is going to have to show that there is a contract. You'll see in this exam I can get to it relatively quick in regards to here's mutual assent and then consideration. So based upon the facts she was offered and she did accept to be their chief distiller for Western Sky for $200,000 for a period of five years and of course both parties did agree so we can argue that there's mutual assent. And of course in regards to consideration she's giving up her services for the $200,000 per year in exchange for providing them services in which Western Sky's giving up the $200,000. So there's a benefit detriment on both sides. So you do have a valid contract. And you can see they kind of gave it to you. So you don't wanna spend a lot of time there; right? So whenever the examiners give you issues, get in and get out. That means you need to spend it somewhere else that they're really testing.

Now, this is the issue that most people didn't pick up ‑‑ which I don't know why. It's stated in the facts. You actually have in this exam what's called an express condition. Because her argument is here wait, you expressly stated I get the $400,000 if you terminate me early. So of course remember an express condition's explicitly stated in the terms of the contract; right? The agreement expressly stated if her employment was terminated, she's objectively receive the $400,000 a year. So she wants to enforce that provision.

What's the problem with that provision? One argument ‑‑ again, which is hard for students to see ‑‑ would be like an unconscionability. This is a very rare issue. It doesn't come up a lot, objectively here it was on this exam. And the unconscionability basically's when you enter into a contract and there's an unfair bargaining power that results obviously in some type of unjust and we shouldn't enforce the agreement because it's unconscionable.

So the argument here is that her salary's $200,000 for five years; right? If she's terminated early, they're required to pay her $400,000, double her salary? So they're objectively argue to double her compensation based upon the termination is unfair. It's an undue bargaining power here; right? And then you can come up with the argument she's highly employable, well known, right? Bring up as many facts as you can support it. Objectively what's another good argument you could bring up here? Who's the one that put in the contract? It looks like Western Sky was the one that actually offered her the job with this provision in it for the $400,000. So since they're fully aware and placed that in their terms of their own contract, is it really unfair? Should they really have refused to enforce that provision since they're the one that is put that in the employment contract? And again, maybe they did to entice her to make sure she would come because, again, we wanna assure you that you will have a job for four years.

This is an argument you do need to make. Unconscionability's worth some good points here, and you want to argue to both sides, both points.

Then of course your breach. She's objectively argue they fired her. And of course they're not objectively pay her the $400,000 so she's objectively argue they're the actual breaching party, and then the call, remember, said remedies. So that opens up your remedies checklist. What's that mean? We're in contracts so your main checklist in contracts would be, like, your damages, so you have general, special; right? We don't have punitives, remember, in contracts. You have your nominal, you have you are restitution, you have your specific performance, you have your liquidated. So you want to break these apart and see how many of these I can go through, well, the first one would be general damages. Remember, general damages for breach of contract, expectation of the terms of the contract, which what was she expecting based upon the terms of the contract? The $200,000. Don't wanna put the $400,000 because that's a liquidated damage clause. Now, of course, they're objectively counter in regards to their argument Western Sky is objectively say wait a minute here. She's being offered a job for $100,000. If she get that is and then of course we're paying more $200,000 she's receiving more compensation than what she deserves. So what's the argument? She has a duty to mitigate or you can argue it's avoidable consequences doctrine. Either one of these would be accepted. So basically as a plaintiff you have a duty to mitigate your damages.

Here, she's looking for a job and the only thing she was offered was this television show for $100,000; right? So there's $100,000 less than the expectation of the terms of the contract. So they're objectively argue that she should have to take the show; right? In regards to reduce the amount of damage that is we owe her, Becky's objectively argue she can't find an alternative job. There's nothing because everyone's trying ‑‑ in the same boat as to the oak barrels. So where's she actually objectively go? They're objectively argue the damages should be reduced at least by $100,000 because she's objectively have a television show that pays her $100,000 per year. So therefore the damages should mitigate and I should only have to pay the $100,000. Again, this is where she comes back to say you should have to pay the provision pursuant to the terms of the contract which the $400,000 based upon express terms. And this is what's called liquidated damages. Liquidated damages is probably something you're not very familiar with. What you need to understand, with liquidated damages is a fixed amount of the contract. The problem with it is the law says it can't be punitive, meaning you can't do it to punish, and damages have to be what we call unascertainable. We don't know what the damage is. So it's objectively be something like if I close the road for three days, people can't get to and from work. What's the damage? I don't know. So what would I pay the county if I had to close the road to do something? So that would be an argument that it would be not very unascertainable as to what the actual damage would be. In this case, we know what her salary is. So the fact that they have this provision in here we're objectively argue is an unfair liquidated damage clause because it's punitive in nature, and her damage is for each year she doesn't work. That's $200,000. Her damages aren't hard to ascertain. So this is an argument based upon the provisions in the contract that the termination ‑‑ early termination clause shouldn't be upheld because it's punitive in nature. Plus, in regards to her damages, they're not difficult to estimate as to what they actually would, so therefore liquidated damages should not be awarded. That takes care of call number 1.

Call number 2, this is what threw people off: What defenses? And you really did have to think about it. And what is Western Sky gonna say? Objectively shouldn't have to pay? We know we're in breach of contract? So really what this is ‑‑ and they've done this another time on the baby bar ‑‑ is actually is where they're gonna bring up objectively, you need to work, Becky, before I have to pay you, and you're not working. You terminated me. But why? Objectively that's where your impossibility objectively impracticability come into play. So this is an argument that Western Sky's gonna make, objectively they're excused from their own performance ‑‑ so that's their defense. We're excused from performance because why? It's impossible. Why? Remember, with impossibility it has to be objectively impossible then no one can perform. Now, this is the key: What's their performance supposed to be? Paying Becky. So they're gonna argue that based upon the distilleries growing all over the place that there's a shortage of the oak barrels so therefore they have to quit the production of bourbon. So based on the shortage, they're gonna say it's objectively impossible to produce any more. But it's not objectively impossible to pay Becky; right? Becky's gonna argue that hey, you produce alcohol. Why isn't there somewhere else in your factory, here, in your distillery, that I can be working at. But begin, but come back and say we only hired you because you're well known based upon your image. That's why we felt you had value in regards to our bourbon. Argue both sides. Doesn't matter how you actually conclude, but you want to is it a viable defense? Is it it impossible? And I really feel you could go either way in this case. It's not objectively impossible to pay her, but if I'm objectively making the money, I'm not gonna have the ability objectively pay we're all in the same boat. We can't get the oak barrels. Barrel when you objectively, frustration, purpose has what? A relationship. So you have to show an unforeseen event. In this case, it's a worldwide shortage of the oak barrel sos that's an unforeseen event. But the key objectively is it must be contemplated between the parties. So even though that there is a shortage, which we can argue is unforeseeable, Becky was hired based upon her wellness as to being well known in the industry and stuff like that, but was it contemplated between the parties as to, look, if I don't have the barrels to produce bourbon, I don't need you? So was that really communicated? And a good answer is no, it wasn't. So the purpose that it was not contemplated for at the formation stage of the contract so you can't argue it was destroyed, so therefore frustration of purpose is not a valid defense.

The other issue I told you is commercial you. This is where a contract's entered into between the parties and performance basically becomes commercially impossible based upon an event or activity that does occur, and of course it adversely affect the other party. So they're gonna argue bassed on the shortage of the oak barrels it made it impossible to age and produce the actual bourbon, the shortage gonna last for gonna years. Since there's no other way to aim the bourbon, they're gonna say it's commercially impossible. What are we supposed to do? The contract between the parties, they're gonna argue that gonna for Becky to produce the quality of bourbon that they want T it's not available anymore so therefore it's commercially it's. Argue and give your conclusion, and that's the arguments we have for defenses for Western Sky.

So as you can see in this exam, it's different. It's not true defenses, it's really excuses to performance of their condition, isn't it? Right? So it's a rather odd duck. And then Call 3, what will be the likely outcome of the case? It's like what? You kind of already told me by going through everything. So you're gonna reiterate as you discuss as to whether or not Becky will be successful in recovering her salary and if so, how much will that be? And again, since we've thrown out the 400,000‑dollar provision as a liquidated damages clause improper because it's punitive, right, we should show that she can mitigate her damages that she should be able to recover $100,000 annually for the term period that she's out of work for the remaining how many years are left on her contract.

So that's the first question. Question one in regards to contract. You can see there's some odd issues here that, again, in your practice you haven't seen such as unconscionability, liquidated damages. So they're getting a little bit more clever in what they're testing to test your knowledge, so something you just wanna be prepared for, right, and don't obviously let it upset you when you're under the pressure of the exam and just deal with it. It is something you should obviously be able to deal with. And plug it back in to your checklist. So I have a good idea of how I can see avoidable consequences, how I can see in regards to liquidated damage clause. Again, I don't like it, but it's something that they did test so I need to be aware. And, again, that's why we go through essay questions and get a good understanding how the concepts are tested so we don't mess up. Okay.

I know that was a lot in that question. Is there any questions on this?

Some good issues there; right?

All right. Let's go to question number 2. Crim law. The key thing, again, is to watch your calls. I think they're trying to, again, mess with you so you miss issues. Call 1 says with what crimes, if any, can Andrew and Belle be reasonably charged? Discuss.

Number two says do Andrew and Belle have any defenses? Ever.

They've separated it out for you. Remember, defenses can be true defenses as we know them or counterarguments.

Maybe. But you always will find there's one or two that are difficult in exam.

In regards to crimes, two or more in the call. Andrew and Belle. Two separate parties. So really you have a 1A and a 1B. You've got to separate them out. I want you to pay attention to that. It's very rare you can lump two people or three people together. There's got to be something different. Otherwise why'd they give you a separate person? So I want you to be aware of that, and you've got to be very careful about putting things together, which you're gonna see in the other question later too.

All right. Let's go through the facts.

All right. Andrew's facing battery charges against his ex‑girlfriend, Belle. He asked his present girlfriend, Claire to help him testify that the battery never happened.

So he's asking his present girlfriend; right? What's that? That's a form of solicitation, isn't it?

Andrew and Claire agree that they will call Belle and ask her to meet them at his place of work. So when they're agreeing, what are they trying do? Convince her not to testify so they're interfering with prosecution in criminal case. So that's your conspiracy.

Claire will be waiting in the parking lot to confront Belle and ask her not to testify against Andrew. Andrew makes the call X Belle agrees to meet Andrew in the parking lot of his work. Claire's waiting in her car in the parking lot when Belle arrives Claire gets out of her car and confronts Belle. So I'm seeing confrontation, thinking maybe it's escalate so that can be on the verge of assault; right? She yells at her to withdraw her complaint against Andrew. Andrew comes out of the building and tells Claire to get Belle. So what does that mean, get Belle? Belle has a knife on her. She brought it with her for protection. Now, remember, Andrew's facing battery charges against his ex‑girlfriend so maybe she did bring the knife for protection, like, self‑defense, so that's a defense you should be thinking of which is call number 2; right?

When Belle sees Claire coming over to her, she brandishes the knife. Angry words are exchanged, and each one threatens the other. Claire goes back to her car, gets a baseball bat out of her backseat, and goes after Belle. Bevel stabs Claire with her knife, causing serious bodily injury. The police are called, Andrew and Belle are arrested, and Claire's transported to the hospital where she later dies from her wounds.

Now, look how this flipped on you. You had an drew asking his girlfriend Claire to do this, now you have defendants being Andrew and Belle. It's like what? You really gotta break this apart. So the first lawsuit basically's going to be the State versus Andrew. Focus on his conduct. What I would recommend is take it right down in chronological order. First thing I see is that he basically asked his present girlfriend. So I'm gonna bring up solicitation. Is he enticing, inducing with the specific intent? Sure. He doesn't want those battery charges facing them, so he's asking his girlfriend to convince her not to testify so he's inducing Claire to interfere with a criminal prosecution. So that would be a form of solicitation.

Is there a conspiracy? Sure. Because when Andrew asked his girlfriend and she agreed, there's an agreement between the two of them ‑‑ two or more ‑‑ and the unlawful act's the interference with the prosecution. So I do have conspiracy.

What happened next? Well, when Belle arrives in the parking lot, Claire gets out and confronts her, and there's words exchanged. So at this point, could you argue that that's assault? Well, then she pulls out a knife. The other one goes back and gets a baseball bat. So based upon these threats, we can show that they actually had the intent. Who had the intent? Both parties, really. Belle as well as Claire based upon Claire's action of getting the baseball bat. So the fact they exchanged angry words and threats and we got the baseball bat, that's placing eminent fear, isn't it? So we can argue here clear has committed the assault. But wait, we're under what? State versus Andrew. So why are we talking ‑‑ what are we talking about in regards to what Claire did? Because we're going to impute it onto him based on the Pinkerton's Rule. And of course in my case I think there's two ways you could have written this. You could put Pinkerton's Rule define discuss infra because I did it later. Or you can bring it up here, cursory. But I really feel it's gonna be an argument of his as a defense that I didn't do it. I'm not the one that hurt anybody and swung a bat or anything like that. All right. So I really feel the call the way they set it up kind of hurt people. Because what other defense would you really have for Andrew other than I didn't do it? They're imputing it onto him based upon the Pinkerton's Rule.

Now, the facts told you that Claire is transported to the hospital and she dies. This is where I felt it was a little harder for students. So we're trying to impute that murder onto Andrew. He's not the one that stabbed her; Belle did. This actually triggers what you know as a red line view or the special felony murder rule. When you have an innocent party doing the killing, can we impute it on to the co‑felon? Remember, Belle didn't do anything. She was meeting the boyfriend and all of a sudden it was almost like a stabbing; right? So based upon this view, can we impute the conduct onto Andrew? Well, they're threatening each other ‑‑ baseball bat, knife ‑‑ right? Basically killing did result; right? So under common law, will he be found guilty? You can argue absolutely. Versus modern law the killing has to be done with his own hand. Under common law jurisdiction he can be guilty of murder, which I'm gonna go through the more the full murder approach under Claire ‑‑ excuse me, under Belle for Claire under that lawsuit, but at this point I'm gonna just bring out how we're imputing it onto him which would be the special felony murder rule. I didn't really prove up the murder; I'm gonna do it later when I go after State versus Belle. In this case, how aim imputing it onto Andrew? It's under the special felony murder rule or what we call the red line view. Everybody understand that with the call when I Call 1 A?

As to 1B, State versus Belle, first thing I'll start her off with is the assault. Basically Andrew called her, she agreed to meet him, she did go there, Claire was waiting at her car. Claire gets out with ‑‑ yells at her do you withdraw your complaint? Belle sees Claire coming towards her with a baseball bat and she brandishes a knife. So the brandishing of the knife, her angry words exchanging between each other we can argue creates an eminent fear of a harmful or offensive touching. So I do have my assault. She brandished and stabbed Claire with a knife. So I do have a battery. Then you can point out how battery will merge into the murder itself because the call says crimes so I'm going to grab as many as I can and then point out if we have a murder rule, et cetera. And then go through my discussion of murder.

Now, remember, with murder ‑‑ you're gonna see this ‑‑ if you can argue multiple ways to show malice, I want you to do it. Now, again, she's being confronted ‑‑ she being Belle ‑‑ about dropping the battery charges against her ex‑boyfriend, Andrew. There's threats exchanged between Claire and Belle. And what happens? Belle stabs Claire. Did she have the intent to cause great bodily harm? I would say absolutely. She wanted to inflict injuries upon her; she was fearful; right? Based upon her conduct, would you argue that's wanton and reckless conduct? Sure. Should you even argue she had the intent to kill? So there's multiple ways to show that malice. I do want you to bring it up. So even if there's an excuse ‑‑ later a defense ‑‑ you still wanna prove up the underlining case before you get there, meaning before you get to any applicable defense. So in this case, I would be arguing intent to kill. Intent to cause great bodily harm. Wanton reckless conduct.

Your actual and proximate cause but for stabbing her, she wouldn't have died. Foreseeable if you stab somebody they could die from the knife wound; right? So far she's the causation. Is it first‑degree? Now, remember, with first‑degree you need specific intent with premeditation deliberation. Remember, premeditation deliberation can be a matter of moments. Doesn't have to be long planned out. So the fact that Belle's carrying the knife, and Claire's coming at her with a baseball bat and she stabs her, did she actually act with specific intent and premeditation arthritics to kill her? I say no, but I think you can argue. If it's not first‑degree, it can be second‑degree.

Now, at this point if you're going through your approach you need to go through defenses don't you? But the call of the question put it in Call 2. Well, I don't like that. Because especially if you find there's a defense and it fails, we can mitigate to voluntary manslaughter. So what you're gonna have to do ‑‑ that's why we outline ‑‑ do a strong, good outline that this point tell the reader if the Court finds the defense fails or works, what have you, right, and tell the reader it's gonna be discussed infra.

Now, in this case I do feel we could argue self‑defense and we could argue crime prevention. Based on my outline, I feel basically if these defenses fail they will allow Belle to mitigate to voluntary manslaughter. But I see two issues with voluntary manslaughter. This is a way the baby bar's currently been testing. The first issue here is in regards to was she adequately provoked? Again, you need adequate provocation, you need insufficient time to cool, and a loss of mental equilibrium. When Belle arrives to meet Andrew, what happens? Well, Claire, his girlfriend's ‑‑ sitting in her car and starts yelling at him and withdraw and confronts her; right? Of course she has knife, and then of course Claire goes back and gets a baseball bat like she's gonna beat her up. So of course is this adequate provocation based upon the words being exchanged, the anger of the heat of the moment. Words alone are not enough. Do we have enough in regards to the activity? Further, it was spontaneous. So we definitely don't have time to cool off. So you will argue in regards to whether or not we will mitigate to voluntary manslaughter.

Further, the second issue is that remember with an imperfect defense, you can mitigate. So after you go through your adequate provocation, sufficient time to cool, loss of mental equilibrium and depending how you conclude, you're gonna come back and say in addition if the court doesn't find she's adequately provoked because of the words and not enough action, that an imperfect defense as discussed infra can mitigate the murder to involuntary manslaughter. That make sense? So you have two issues within the voluntary manslaughter and I want to make sure you understand that, because that is something they currently test.

So I have the verbiage, exchanged against each other, as well as an imperfect defense.

Any questions on Call 1? All right. Let's do call number 2 in regards to do Andrew or Belle have any defenses? What does Andrew have? The only thing he has is I didn't do it, and that's where you're gonna triggering Pinkerton's Rule. So he's gonna argue I'm not the one that stabbed Claire. I'm not the one that caused her death, Belle did it. And then bring up your facts based upon the conspiracy what is this? A natural probable result of what they conspired to do? And argue. So a natural probable foreseeable result. And since he convinced Claire to help me basically to get her to withdraw the charge, right, battery charge, could he foresee that things could escalate or a death could result? Then make your actual argument.

Then of course in regards to Belle she's gonna argue number one self‑defense. Remember, one can use reasonable force to defend one's self when they're being threatened. And it can arise to a level of deadly force if my life was being threatened. And she was fearful. Claire came up and threatened her and she goes and gets a baseball bat. So based upon the knife, right, she's gonna argue she took it along for protection because Andrew, my ex‑boyfriend, had battered me. He's up for charges on battery so of course I took it for protection. I'm fearful. Am I using reasonable force to protect myself? You're balancing a baseball bat versus a knife. Some people would say that's unreasonable force. I'm not so sure. A baseball bat really could hurt you. So under the circumstances with what's going on with the parties, argue both sides. I really feel it's a gray area so you could go both ways. All right? But you need to argue both sides.

You're correct. The Pinkerton's Rule I agree with you is really written in Call 1 except for then what defense do you have for Andrew? That's what made this weird. So what're you gonna say in Call 2 for Andrew? Define, discuss, supra? Uh‑uh. Can't do that. If you ever do that and don't answer the call, that's gonna hurt you. So they're really messing you here. That's why infra and came back to it. His argument is really what? I didn't do it and that's what triggers the Pinkerton's Rule. Okay?

The other issue when you see self‑defense, remember, defenses I taught you look for two or more. Get as many as you can. I could argue crime prevention. Remember, can she use reasonable force when a felony's being committed in her presence? Of course or if there's a death or serious bodily harm? She's gonna argue again when Claire's coming after her with a baseball bat that based upon her belief and her fear that she had a right to use deadly force to prevent an attack. Make your argument as to whether or not that would be a valid defense.

So if you did in regards to Pinkerton's Rule, remember, Pinkerton's Rule is natural probable result foreseeability. So if you brought it up in Call 1 your full discussion's gonna be under Call 2. Okay. So yes, so they're playing with you on the calls. Otherwise what would I put in Call 2? Okay. Any questions on question number 2? Did everybody see the special felony murder rule? I thought it was very clever in what they did in this exam.

All right. Let's look at question number 3. This is the tort question. This, again, you need to separate your lawsuits. So, again, they're making sure you understand. So it says what claims and defenses, if any, do neighbor, BlastCo, and Pet Farm have against each other? I didn't like this call because who did anything? Well, BlastCo's the one that's blasting. Neighbor's car, right, the jeep there ran into Pet Farm. What did Pet Farm do? I didn't like that in the call because they said "against each other." It was a very terrible call. And it says of course what damages. You see damages. Two or more. Claims two or more, defenses two or more, damages two or more. Remember, true defenses can be what? Counterarguments. So sometimes there's no way to find an actual defense especially against Pet Farm. What do they do? They own this little rabbit ranch and did nothing.

I agree with you. You could think about nuisance. But you'll see with nuisance it's got to be continuing. That's a good issue. So whenever you see strict liability on the land, private nuisance is partner, usually. You look for it. But it's got to be something that's continuing. Since basically they did this blast to do this tunnel, they're not telling me it's repetitious. If so, then I have it. Like a quarry that keeps blasting, it's repetitious. Otherwise I'm not going to talk about the issue of nuisance, but that is something to always think about when you see strict liability. Look for the private nuisance. I guess it wasn't hurt you if you had time to bring it in there if you weren't quite sure. But generally it's repetition. So if it's an isolated one‑time thing, not a nuisance. So people generally write that a lot like someone's barbecuing and the smoke gets in your eyes. Nuisance. It's a one‑time thing. If they told you I barbecue every weekend, then maybe I have an argument for nuisance. So look for that repetition of that issue. But you are correct when you see strict liability on the land, look for the private nuisance. They have a tendency to go together.

We understand our call. Let's go through the facts.

Neighbor has owned property in Mountain Town since 1965. BlastCo is a blasting company situated in Mountain Town and has been in operation since 1970. In 1980, Pet Farm moved its bunny farm into Mountain Town and began to breed bunnies for sale as pets. Pet Farm is situated just outside of the city limits, in the rural portion of Mountain Town. The property next to Pet Farm is a residential property owned by Neighbor.

So it looks like what they're really doing here is kind of setting up the stage, aren't they? Telling you who was there first so if you're thinking maybe come into the nuisance ‑‑ which I didn't really see nuisance being at issue which is why I think they're giving you the dates.

In 2015, Neighbor purchased a classic 1957 Jeep Willys automobile to restore as a hobby. By 2017, the jeep was almost finished, waiting for installation of brakes and wood paneling on the doors. It was perched at the top of Neighbor’s steep driveway with its front wheels improperly secured by blocks. Once completed, the jeep would be worth $50,000.

They just gave you the damages; right?

It says on March 3, 2017, BlastCo was blasting a new train tunnel about 3 miles from the properties owned by Pet Farm and Neighbor.

So it say they're 3 miles away. So the one thing I look for when I look at that, doesn't say it's neighboring. So I'm thinking your dance. I'm looking at you might be remote. I'm looking to foreseeability. If they separate you with some distance, that's what I should be going to and I'm thinking maybe Anderson or Cardozo's going to come up the pipe, definitely proximate cause.

It says here, While blasting, an unusual jolt occurred, which caused Neighbor’s jeep to jump off its blocks and roll down the driveway. Neighbor was not home at the time. Neighbor’s jeep careened across the street and entered Pet Farm’s property by busting through a thin wooden fence. While on Pet Farm property, Neighbor’s jeep ran over and killed 22 Holland Lop rabbits owned by Pet Farm, worth about $100 each. The jeep eventually came to rest at the bottom of a ravine, damaged beyond repair. When Neighbor returned home, he saw the gaping hole in the fence and immediately called his lawyer.

Let's set up in regards to your actual claims. So it says here ‑‑ I'll take neighbor first. Neighbor's going to go after BlastCo. I'm going after strict liability. Why? Because of the blasting. Remember, when one engages in abnormally dangerous activity, they're gonna be strictly liable. But remember, we look to the utility versus the risk, the gravity of the harm, is it common for the area? Manner of usage, stuff like that.

Now, again, they're in proximate causation since 1970 and they've got to blast ‑‑ highly dangerous ‑‑ but can they eliminate any risk in regards to the actual blasting? Not really, so it's an abnormally dangerous activity. They need to do this in order to make trains for ‑‑ tunnels for drains for transportation, don't they? So it is a common method used to create tunnels. What's the risk? It's 3 miles away from you, so in regards to hurting neighbor or Pet Farm, the risk is relatively low. So the utility of the risk of the harm is outweighed in regards to the risk of neighboring property.

The blasting is necessary, right, in regards to value to the actual community itself. And of course the blasting didn't involve a high degree of ribbing of harm because they're 3 miles away. But, again, blasting is what? Abnormally dangerous in and of itself. There's a potential danger that is obviously attached in regards to your actual blasting, so they're gonna be strictly liable.

Now go through your causation. But for the blasting creating an unusual jolt, the jeep would not have been shaken off the block, rolled down the hill into Pet Farm's property, killing 22 rabbits. And is this foreseeable? This is where I think they're playing with you. The blasting caused an unusual jolt. It's unusual. They're gonna argue it's not foreseeable, plus we've got the neighbor here who's got his jeep up on the racks improper, so it's an intervening act. However, whenever you do blasting, jolts, vibrations are relatively foreseeable. And the negligence of the third party's always foreseeable. It does not cut off liability, so therefore BlastCo is the proximate cause in regards to the damage to the jeep, and then go through your general damages which would be the cost in regards to the jeep itself. What'd they tell you? It's not reparable. So it would be the cost. Would that be ‑‑ they told you it'd be worth $50,000. So could he get actual cost of what he expended on the jeep? Plus if he could sell it in regards to its value $50,000. So I did an issue in regards to general damages and special. The reason I did that instead of just doing oh, let's just talk about general damages, because of the call of the question. The call told me damages. So in regards to the damages, he's gonna get the value of what he paid for the jeep, which they didn't tell me. He might have paid $20,000. I don't know. And then general damages if they render it basically beyond repair and he could have sold it and it would be worth 50, he should reap the reward for the special damages itself.

Remember, the call said defenses. So I can argue comparative negligence or assumption of the risk. You cannot use contributory negligence for strict liability; right? Never. So with comparative, basically he had his jeep up on this block, he didn't it properly secured, the blasting ‑‑ although it was an unusual jolt ‑‑ caused it to come off its blocks and roll down the hill into the neighbor's yard, destroying the jeep. So did he contribute to his own faults; right? Did he fall below the standard of care of himself? I would argue yes. Did he really assume the risk? Remember, assumption of the risk you have to be aware of the risker and voluntarily encounter. Again, it's an unusual jolt so I don't think he was aware of it. I know there might be blasting 3 miles away but again, am I really assuming the risk that my ‑‑ the jolt might take my jeep and have it roll off the blocks and careen ‑‑ end up in the ravine? So I argue basically assumption of the risk is not about defense.

Remember, the call did say claims so I'm gonna go through negligence. Now, with negligence, if you look at it, if I argue negligence against BlastCo, they have a duty to blast in a reasonable pursuant manner, don't they? But they did tell you they're 3 miles away. So this is why I call a remote plaintiff. Right? Now, remember, if you didn't bring up assumption of the risk, the call says defenses. Even if you're gonna find it fails, if there's a fact that goes to the element, you got to bring it up. It's worth points. Don't dismiss it in your mindset. Remember, defenses. Two or more. I want you to look for two or more. Again, if I see strict liability I know comparative assumption of the risk. If I see negligence, contributory, comparative, assumption of the risk. I know these are what they're looking for, so I always put them in a cluster.

Now, in regards to contributory negligence, I would argue Cardozo issue. Why? They told you it was flee miles away. You're what we call a remote plaintiff. You're not in my zone, or are you in my zone? So I feel the facts that they told you is 3 miles away do I owe you that duty? Does that duty extend to you? Under Cardozo, you have to be within the foreseeable zone of danger. So it's that 3‑mile radius within that zone. Or you don't care, you conclude no matter what, Andrews will pull it back out. Andrews says you owe a duty to all. Then your breach. Well, jolt caused my jeep to jump off its blocks and become damaged, and then of course your actual and proximate cause as well as your general and special damages define discuss supra because you already talked about it. And then the only other defense I'd bring up, I'd supra back the other two and bring it contributory negligence. With contributory negligence you need to show, again, did you fall below the standard of care that you should be barred from recovery. Pretty harsh. Make your argument. I don't think it matters how you conclude, as long as you argue both sides. But did he fall below the standard of care himself by not securing his jeep that he knows is on a steep driveway? That would be an argument you'd make up here.

That's your first lawsuit as to Neighbor versus BlastCo.

Next lawsuit's Pet Farm versus BlastCo. Now, when you see the same issues like I'm going back through strict liability, right, there's got to be something different. So I've got to go in there looking. Well, in this case we actually have two wrongdoers so it actually triggers I can define discuss supra my strict liability. But two wrongdoers is I have neighbor wells BlastCo because both independent negligent acts resulted in my injury; right? But for the success and negligent act of BlastCo causing a jolt as well as the neighbor not properly securing his jeep, my bunnies wouldn't have been injured. Foreseeability I can steal, then of course go through my damages. Again, they told me each rabbit's worth $100. I don't know if that's what I paid for it or if it's the retail value, what have you. I would point out that I could get the $2,200. Then of course if they're worth more meaning if I can resell them I should be able to get those special damages as well. A reason, again, I'm addressing both of those, the call said damages so I know I need to talk about 'em.

Now, you could do negligence. Some people did bring it up. Basically the same discussion; right? Define discuss supra in and of itself and again the same issues in regards to Cardozo, stuff like that. So there's really no difference between the two.

Last lawsuit Pet Farm versus Neighbor. Again, just a negligence; right? He has a duty to act as a reasonable prudent neighbor. And if you're working on your jeep on a steep driveway, you have a duty to properly secure it. You breached by failure to properly securing it, which caused it to roll down. Already talked about successive tortfeasors so I can talk about that cause; right? And then go right to my proximate cause. Now, we have a proximate cause problem here, don't we? Because in this case Neighbor's gonna say BlastCo's the one that caused the jolt; right? Their conduct as an intervening act; right? However, BlastCo's blasting's indirect and independent, is it foreseeable? And it is. If you don't properly secure your things and there's an earthquake or a jolt or anything it is foreseeable that it could roll down, go off the blocks, and cause destruction. And your damages, which you can steal from your strict liability lawsuit up above. Define discuss supra. So you can see these have a lot of issues. I've got to steal from my arguments in order to get through; right? And that's your question number 3.

So I think people had a hard time with the way they did the call, neighbor, BlastCo, Pet Farm. You have to separate these out in independent lawsuits and see which each party can bring in against whom. And I don't feel BlastCo has a prayer to sue anybody. The only argument I have is really counterarguments as to Neighbor's actually the one who didn't put jeep on blocks, et cetera. Okay?

So any questions on question 3? Okay.

Question number 4. Crimes. Question number 4 had quite a few issues. You do still need to separate out your parties. So let's look at the call. With what crimes ‑‑ two or more ‑‑ should Moe, Larry, and Curley each be charged and what defenses might each one raise?

Separate your parties. So I've got Moe is one, Larry is another, and Curley is another. Three separate independent that you're gonna bring up here.

Okay.Curley, Larry and Moe were discussing plans to rob Bank. When I hear "bank" I think robbery. Moe and Larry agreed to do the robbery ‑‑ there's your conspiracy ‑‑ but Curley said that he would think about it. It looks like Curley's not agreeing. There's no conspiracy; right? Moe and Larry, however, asked Curley to at least drive them to the Bank in his car, and Curley agreed to do so.

So based upon his conduct, could you argue there's an agreement now? Right? So is it a conspiracy versus accomplice.

On the planned day, the three drove to the Bank. Curley remained outside, sitting in the car waiting for his two friends. Once inside, Larry noticed that the armed Bank guard was approaching them. Larry pulled out his gun, fired at the guard but missed, while the bullet hit and killed a customer. That's murder number 1. Moe then shot the guard dead.

Two murders. That's murder number 2. Outside, Curley decided to call the police on his cell phone and told them about the ongoing crime and drove away. That goes to the issue of withdraw.

Remember, you are responsible for common law as well as Model Penal Code. So talk about common law first because there is a distinction here. Remember, to withdraw effectively from a conspiracy at common law it needs to be effectively communicated to all co‑felons. You just drove off. You called the police. Common law's not gonna work. Modernly, did you take steps to thwart?

It says,Inside, Larry and Moe ordered Teller at gunpoint to give them a sack of money. There's your robbery. Fleeing outside, but noticing that Curley had left, Larry and Moe dragged a driver out from a nearby car ‑‑ and before you go on to the next fact, if I drag you out of a car, that's a form of movement. That's a form of kidnapping, isn't it ‑‑ and drove away with the money.

I took your car. There's a larceny. So very subtle here. Moe, Larry, and Curley were later captured by the police. Now we're looking at crimes. First one I'm gonna look at here is State versus Moe, and do your what? Conspiracy.

Curley, Moe, and Larry were discussing plans about robbing the bank, and Moe and Larry did agree so I have an agreement between Moe and Larry. It's two or more, and of course the unlawful agreement's to rob the bank, so you have conspiracy. The fact they went into the bank I'm going to argue common law burglary first. The facts state it is day they planned so it's no nighttime; right? It's open for business there's no breaking, they did enter. Of course it's a bank, not the dwelling house of another, they entered with intent to rob, but since the other element are lacking there's no common law burg so I talk about modern law. They entered with the intent to rob so it's trespatory entry to rob a bank it's a structure, and of course specific intent to commit a crime in this case would be robbery. So I do have a modern law burglary. Okay.

Now, the carjacking that's a current or modern crime. We're not responsible for it so you don't have to worry about it in regards to carjacking.

Well, what happened next? Take it in chronological order. The guard was killed so murder, malice. They noticed the bank guard was approaching them, Larry pulled out a gun and shot him dead. Shows intent to kill as well as intent to commit great bodily harm. It is wanton and reckless to shoot anybody, plus, you're in the commission of inherently dangerous felony, bank robbery. So I have four ways here that I can show the underlining malice. So you're going down for what? First degree based upon the felony murder rule; right? Then of course in regards to customer, well, did Moe shoot the customer? No. Moe's going to be charged for customer's death based upon the Pinkerton's Rule; right? So as a co‑conspirator, anything that's natural probable result and foreseeable is gonna be imputed onto you. The fact that we're trying protect ourselves so we're not captured, you're gonna argue that he's gonna be responsible for the murder of customer under Pinkerton's. Then I can go through the actual robbery.

They did order the teller at gunpoint to give them the money. That's trespatory taking of the bank's. Personal property of another. Gunpoint, we have force, fear, intimidation; right? So we do have the robbery. Kidnapping how they both fled the bank and pulled the guy out of the car, so there's an unlawful asportation or movement of another. Larceny. They did take the car and drive it away so there's trespatory taking. Car belonged to another because they pulled him out of the car as they carried him away. Personal property of another. And specific intent, they're trying get away. So I do have the larceny as well.

So there's a lot here, isn't there, that you need to get through.

So in regards to Moe, we've got a discussion here in regards to the conspiracy, the common law, modern law burglary. The issue in regards to the murder of the cards, the issue in regards to the customer, the murder; robbery, kidnapping; and larceny. There's a lot of issues and obviously you need to get through those issues.

So the first lawsuit, State versus Moe, that's a heavy‑hitter and you want to do a good job. Now, when I get to Larry, define discuss supra on the conspiracy, right, and then argue Pinkerton's because I'm imputing now onto Larry what Moe did about killing the guard; right? And is it a natural, probable, foreseeable consequence of robbing a bank? And the answer's yes.

Then I talk about the murder of the customer. See. So see what I'm doing is the actual felon that committed the crime, I'm doing it under them. The one that didn't do the actual killing, right, I'm imputing it on to them through Pinkerton's. This made it kind of hard for setup, didn't it? Okay. In regards to the murder of the customer, again, gonna argue that you intended to kill, but no, I didn't intend to kill the customer. Oops. I'm a bad shot and missed. Well, shooting anybody did you have intent to cause great bodily harm? Yeah, I'd argue. It would be wanton and reckless, plus you're in the commission of the felony so you should be guilty for commission of the murder for the killing of the customer as well.

Then when we get to ‑‑ which if you did a good job for the kidnapping and the larceny and the burglary, and brought in in regards to Moe and Larry, I can steal that and not have to go back through it. Because time. This exam is very hard to get through time‑wise, isn't it? There's a lot of meat here. In regards to the money, well, if you look at the actual facts, it says that they ordered the teller at gunpoint to give them a sack of money. So I know it's the bank's money. Then it said fleeing outside but noticing that Curley had left, Larry and Moe dragged a driver out from a nearby car and drove away with the money. So it's with the money. They've already had the money; right? So it's actual bank's money.

All right. Now we're to Curley. What's the big issue here in regards to Curley? Well, was there a conspiracy? Right? He did discuss plans about robbing the bank but said I'm gonna think about it, get back to you. He'll argue there's no agreement. But when he agreed to drive them to the bank, could you argue that's an agreement? Could you argue that even though it's not expressed based upon his conduct otherwise why'd he drive them to the bank? That's an argument you could make. You do wanna argue both sides. And you see there's three defendants here. There's got to be something different amongst them. What should be looked at in regards to Moe, he did the killing, right, in regards to the guard; then we had the killing of Larry in regards to the customer; and now we have Curley in regards to whether or not there's an actual agreement. So there is differences between these parties so we'll break that apart.

So in regards to res gestae, I'm not sure how you got there. In regards to the killing, the killings took place while they were in the bank. Once they fled, if the killing happened after they fled the bank, I would bring up the res gestae. But I don't have that here so I'm not sure how you're bringing it in within the res gestae.

In regards to Curley, the big issue here obviously was there an agreement? And then of course was there an effect i withdrawal? And students did ask about this. With withdrawal, remember, go through your common law in the common law says well, number one, first of all, once you conspire, what? You never get out of the conspiracy. Always gonna be charged with the conspiracy. The effect of the withdrawal is does that cut off further liability in furtherance thereof? The actor here is he's gonna argue that one, I didn't agree, but if you do find an agreement was formed, once I was there at the bank, I call it had police and fled. So is that an effective withdrawal? Remember, it needs to be communicated under common law to all co‑felons. He didn't communicate to anybody he just drove away. Modern law you're looking at did he take steps to thwart the crime? He did call the police. So the argument here is if I did call the police, should my withdrawal be effective? Well, what happened prior to? Well, you've already broken into the bank and committed the burglary. You've already killed two people in the actual bank. In regards to then he was outside decided to call the police before you dragged a guy out of a car. So should we basically let him withdraw in regards to those two murders that transpired before his effective withdrawal? So they're playing with you trying see what you come up with, so you need to argue. So based upon the guard and the customer being killed, did he thwart the crime? Well, they succeeded and they got the money and they're running out. Didn't see any thwart here.

Again, do I really care how you conclude? No. As long as you let the examiners know you see there's a problem here. I see the facts are playing with me. Gotta argue both sides. So we can agree to see it differently, but you have to argue both sides. The fact that he tried to withdraw is it gonna be effective? Everything you kind of agreed to do has already been done; right? So you should be responsible for, again, the murder of the guard, the murder of the customer. Because your withdrawal wasn't timely. Make your argument.

As long as you argue both sides; right? That's obviously your point value.

So what made ‑‑ I feel this question hard for people was your setup. You had Moe, Larry, and Curley, you're gonna have to isolate them all. Remember that. If you lumped them together, I'm sure you had a mess because you had Moe doing one killing, Larry doing another, and Curley just kind of sitting on the sidelines while we get imputed to him through the Pinkerton's Rule.

As you can see in going through this, what's one rule in crim law that I love? Conspiracy and Pinkerton's Rule. I told you, it's most likely gonna be there so it's something that you want to get to know and understand how it comes up. Okay.

Is there any questions on question number 4?

So I feel with the most current exam that they've done, the calls are getting a little bit more odd, shall I say. They tested a couple more odd ducks in regards to issues such as the unconscionability and contracts. These are just things you need to plug back into your checklist and be aware of.

What I would recommend is go through your checklist and make sure you understand everything in your checklist you know how it comes up. And if I don't, what will I do? Go get an example. Go get an essay or MBE on it and look at it and make sure you understand it. That's important.

Yes. Absolutely. So do you see the more you are ‑‑ start playing with it and understand how they test, it clicks. It comes to fruition. Versus if I've never seen it before, we all learn by our mistakes versus our successes. So that's something I want you to look at. Again, just start plugging it in. You can see, again, the calls are a little bit trickier in regards to your setup so I want you to pay attention to that.

Contract question? You could say that. It had a lot of what I call more of an analytical, that you had to take a step back and look at it more analytically versus a racehorse. That's why it's important, took into consideration to determine whether it's a think 'em example. Those of you who took Flemings used the word think 'em versus a racehorse. That will dictate your point value. That's what I always told you, took into consideration to determine general call versus specific call. Where's your point value? General call, issue spotting, analysis. Specific call, it's all analysis. So yeah, I need to know that, and I need to know what I'm going in to look for.

Remember, I told you with specific call, you know what element, elements, and/or defenses. Go look and see what's at issue. If you don't, I guarantee I've got you. It's something that you need to pay attention to and look at what's important.

All right. Hopefully you felt these were doable. Again, we learn by 'em. Yes. Only way we can. But I would recommend of course we just did the October 2018. Work your way backwards because they do change their testing format. Your obviously need to be aware. So even the one previously tested special felony murder rule. It's one they seem to be hitting right now, so it's an area that I would get to know. It's very well written. It's not blaring out there where we can see it so it's something you want to be aware of.

Well, I guess ‑‑ they don't see it as tricking students. I do, because they know how your mind thinks of how we don't break things apart or sometimes even our terminology like a uniformed policer officer. Oh, he's undercover. No, he's uniformed, but they know based on the pressure and how we read things, we misinterpret. So I think they use those to their advantage versus ours, shall I say.

All right. Any other questions on these exams? Well, if you didn't take a chance actually to outline them, I would recommend for you to do that. That is important. And again, the more you start practicing and understanding how the issues come up and how you're gonna spit it back out to the reader, that's important. And obviously if I don't understand how it's tested, I'm in trouble. I need to understand how the concept's tested. Okay.

Next week we're going to go back over some multi states. You've got to be working on your multi states and getting those scores up because that can cost you the exam. If you pass the essays but not the MBEs, we're not gonna pass. So I want you to start working on those daily. Start working on the why. Why did I pick A when it's B? Start looking at the actual facts and breaking it apart. Okay. If you have questions, please feel free to shoot me an e‑mail, jolly@taftu.edu. Be more than happen you in any way I can. All right.

I wish you guys all a good night.

[END TIME: 7:01PM]