

# CRUCIBLE BAR EXAM MULTISTATE BAR

## *Comprehensive Study Outline*

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February 2026 Edition

*Civil Procedure • Constitutional Law • Contracts • Criminal Law & Procedure • Evidence • Real  
Property • Torts*

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# CIVIL PROCEDURE

*Federal Rules of Civil Procedure and Title 28 U.S.C. govern jurisdiction, pleading, discovery, trial, and post-trial motions. Due process requires notice and opportunity to be heard.*

## I. Jurisdiction and Venue

### **Rule: Subject-Matter Jurisdiction**

Federal courts have original jurisdiction over cases arising under federal law (federal question, 28 U.S.C. §1331) or with complete diversity of citizenship and amount in controversy exceeding \$75,000 (28 U.S.C. §1332). Federal Question Elements: (1) Claim created by federal law; (2) federal issue substantial and appears on face of well-pleaded complaint. Diversity Elements: (1) No plaintiff shares citizenship with any defendant (complete diversity); (2) good-faith claim exceeding \$75,000.

### **Rule: Supplemental Jurisdiction (28 U.S.C. §1367)**

Court may hear state claims arising from same common nucleus of operative fact as the anchor claim. Discretionary decline if state issues predominate or raise novel issues. Elements: (1) Same transaction or occurrence; (2) no destruction of diversity for plaintiff-added claims.

### **Rule: Personal Jurisdiction**

Court must have constitutional power over the defendant via minimum contacts with the forum state and fundamental fairness (International Shoe). General PJ: Defendant "at home" in forum (individual: domicile; corporation: state of incorporation or principal place of business). Specific PJ: (1) Purposeful availment of forum benefits; (2) claim arises from or relates to contacts; (3) reasonableness (burden on defendant, forum state interest, plaintiff convenience, judicial efficiency).

### **Rule: Personal Jurisdiction — General vs. Specific Jurisdiction**

General (all-purpose) jurisdiction exists where a defendant is "at home": for individuals, their state of domicile; for corporations, the state of incorporation and principal place of business (Daimler AG v. Bauman). Only in an exceptional case will general jurisdiction extend to another forum. Specific (case-linked) jurisdiction requires: (1) the defendant purposefully directed activities at the forum state or purposefully availed itself of the privileges of conducting activities there; (2) the claim arises out of or relates to those forum contacts; and (3) exercise of jurisdiction is reasonable (Burger King v. Rudzewicz). Stream of Commerce: placing goods into the stream of commerce with awareness they may reach the forum may suffice for specific jurisdiction (O'Connor plurality in Asahi) or may require additional conduct directed at the forum (Brennan concurrence). Calder Effects Test: intentional torts aimed at a plaintiff known to be in the forum state can establish specific jurisdiction when the effects are felt in the forum (Calder v. Jones).

### **Rule: Long-Arm Statutes**

State law must authorize service; often mirrors due process limits or enumerates specific acts such as transacting business, committing a tort, or owning property in the state.

### **Rule: Service of Process and Notice (FRCP 4)**

Summons and complaint must be served within 90 days of filing. Methods include personal delivery, substituted service (dwelling plus mail), or waiver. Mullane due process standard: notice reasonably calculated under the circumstances to inform the party. Waiver extends answer time to 60 days.

### **Rule: Venue (28 U.S.C. §1391)**



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Proper in district where (1) a substantial part of events or omissions occurred, (2) property is located, or (3) any defendant is subject to personal jurisdiction (fallback if no other district fits).

**Rule: Transfer and Forum Non Conveniens**

Transfer for convenience to a district where the case could have been brought (§1404). Dismissal for forum non conveniens if a foreign, more convenient forum exists. Factors: private interest in access to evidence and witnesses; public interest in efficiency and local resolution.

**Rule: Removal Jurisdiction (28 U.S.C. §1441)**

A defendant may remove a case from state to federal court if the case could have been originally filed in federal court (federal question or diversity jurisdiction). Requirements: (1) all defendants must consent to removal; (2) notice of removal must be filed within 30 days of service; (3) in diversity cases, removal is barred if any defendant is a citizen of the forum state (forum defendant rule). Removal is to the federal district court embracing the state court where the action is pending.

**Rule: Right to Jury Trial and Order of Trial**

Under the Seventh Amendment and FRCP 38-39, parties have a right to jury trial for legal claims but not equitable claims. When both legal and equitable claims involve common factual issues, courts must try legal issues to the jury first to preserve the jury trial right. Jury demand must be filed within 14 days of the last pleading addressing the issue; failure to timely demand constitutes waiver.

## II. Law Applied by Federal Courts

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**Rule: Erie Doctrine**

In diversity cases, federal courts apply state substantive law and federal procedural law. Substantive if outcome-determinative or if a contrary rule would encourage forum shopping. A Federal Rule of Civil Procedure applies if it is valid under the Rules Enabling Act and does not abridge substantive rights.

**Rule: Federal Common Law**

Applies in narrow gaps such as federal officer actions, interstate disputes, and federal government contract interpretation. Rare and interstitial.

## III. Pretrial Procedures

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**Rule: Preliminary Injunctions and TROs (FRCP 65)**

TRO may issue ex parte for irreparable harm (up to 14 days). Preliminary injunction requires notice to the adverse party. Elements: (1) Likelihood of success on the merits; (2) irreparable harm absent relief; (3) balance of equities favors movant; (4) public interest served.

**Rule: Pleadings and Amendments (FRCP 8, 15)**

Complaint requires a short and plain statement showing plausibility (Twombly/Iqbal). Answer admits or denies allegations and raises affirmative defenses. Plausibility: factual allegations beyond conclusory statements supporting a reasonable inference of liability. Amendments freely given before trial; relation back permitted if same conduct, transaction, or occurrence.

**Rule: Counterclaims and Crossclaims (FRCP 13)**

Compulsory counterclaims arise from the same transaction or occurrence as the opposing party's claim and must be raised in the answer or are waived. Permissive counterclaims d



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not arise from the same transaction and may be raised separately. Crossclaims against co-parties are permissive and must arise from the same transaction or occurrence. Compulsory counterclaims fall within supplemental jurisdiction; permissive counterclaims require independent jurisdictional basis.

**Rule: Relation Back of Amendments for Parties (FRCP 15(c))**

An amendment adding or changing a party relates back to the original filing date if: (1) the amendment arises from the same conduct, transaction, or occurrence; (2) the new party received notice within the period for service of process (90 days); (3) the new party knew or should have known the action would have been brought against them but for a mistake concerning identity. Relation back avoids statute of limitations bars on the newly added party.

**Rule: Rule 11 Certification**

Every filing certifies it is warranted by existing law or a nonfrivolous argument for extension, supported by evidence after reasonable inquiry, and filed for a proper purpose. Sanctions available after a 21-day safe harbor for withdrawal.

**Rule: Voluntary and Involuntary Dismissal (FRCP 41)**

The plaintiff may voluntarily dismiss without prejudice by filing a notice before the opposing party serves an answer or motion for summary judgment (Rule 41(a)(1)). After that point, voluntary dismissal requires a court order on terms the court considers proper (Rule 41(a)(2)). A second voluntary dismissal of the same claim operates as an adjudication on the merits (the “two-dismissal rule”). Involuntary dismissal (Rule 41(b)): if the plaintiff fails to prosecute or comply with rules or court orders, the court may dismiss the action, and unless the order states otherwise, dismissal operates as an adjudication on the merits (except for lack of jurisdiction, improper venue, or failure to join under Rule 19).

**Rule: Motions to Dismiss (FRCP 12(b))**

A defendant may move to dismiss for: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; (7) failure to join a required party under Rule 19. Defenses (2)–(5) are waived if not raised in the first responsive pleading or pre-answer motion. Defense (1) and (6) may be raised at any time. A 12(b)(6) motion tests the legal sufficiency of the complaint under the Twombly/Iqbal plausibility standard.

**Rule: Joinder (FRCP 19-23)**

Permissive joinder (Rule 20): common question of law or fact. Required joinder (Rule 19): necessary if relief incomplete without the party; indispensable if proceeding without them would be prejudicial. Class Actions (Rule 23): (1) Numerosity; (2) commonality; (3) typicality; (4) adequacy of representation; plus type-specific requirements (e.g., Rule 23(b)(3) predominance and superiority for damages classes).

**Rule: Interpleader (FRCP 22 and 28 U.S.C. §1335)**

Interpleader allows a stakeholder holding a fund or property claimed by two or more claimants to join all claimants in a single action to avoid multiple inconsistent obligations. Rule 22 (rule interpleader) uses ordinary jurisdiction and venue rules. Statutory interpleader (28 U.S.C. §1335) requires only minimal diversity (any two claimants of diverse citizenship), a \$500 amount in controversy, and permits nationwide service of process. The stakeholder need not be disinterested and may claim an interest in the fund. The stakeholder deposits the fund or posts a bond with the court.

**Rule: Class Action Types (FRCP 23(b))**

Beyond the threshold requirements (numerosity, commonality, typicality, adequacy), a class must fit one type: (b)(1) — risk of inconsistent adjudications or adjudications that would impair other class members’ interests; (b)(2) — injunctive or declaratory relief



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appropriate for the class as a whole (often civil rights cases); (b)(3) — common questions of law or fact predominate over individual issues and a class action is superior to other methods (damages classes). (b)(3) classes require individual notice to identifiable members and the right to opt out.

**Rule: Third-Party Practice (FRCP 14)**

A defending party may implead a nonparty who is or may be liable for all or part of the claim against the defender. The third-party claim must be derivative—based on the third party’s liability to the defendant, not an independent claim.

**Rule: Intervention (FRCP 24)**

Intervention of right (Rule 24(a)): a nonparty may intervene when (1) the application is timely, (2) the applicant has an interest in the subject matter, (3) disposition may impair that interest, and (4) existing parties do not adequately represent the interest. Permissive intervention (Rule 24(b)): allowed when the applicant’s claim or defense shares a common question of law or fact with the main action, at the court’s discretion.

**Rule: Discovery (FRCP 26-37)**

Scope: relevant and proportional to the needs of the case, not privileged. Initial disclosures required (witnesses, documents, damages). Proportionality factors: importance of issues, amount in controversy, access to information, burden versus benefit. Limits: interrogatories  $\leq 25$ ; depositions  $\leq 10$ . No discovery until Rule 26(f) conference. Sanctions for noncompliance and spoliation.

**Rule: Work Product Doctrine (FRCP 26(b)(3))**

Materials prepared in anticipation of litigation by or for a party or representative are protected from discovery. Fact work product (documents, tangible things) receives qualified protection and may be discovered only upon showing substantial need and inability to obtain the equivalent without undue hardship. Opinion work product (mental impressions, conclusions, opinions, legal theories of an attorney) receives near-absolute protection and is virtually never discoverable. The doctrine applies even after litigation concludes.

**Rule: Discovery Sanctions (FRCP 37) and Spoliation**

Rule 37(b) authorizes sanctions for failure to comply with a discovery order, including: (1) deeming matters established; (2) prohibiting the disobedient party from supporting or opposing claims; (3) striking pleadings; (4) staying proceedings; (5) dismissal or default judgment; and (6) contempt. The choice of sanction is within the court’s discretion, guided by proportionality to the violation’s severity. No rigid exhaustion of lesser sanctions is required before imposing severe ones in cases of willful bad faith. Rule 37(e) governs failure to preserve electronically stored information (ESI): if ESI that should have been preserved is lost because a party failed to take reasonable steps, the court may order measures no greater than necessary to cure the prejudice; only upon finding intent to deprive may the court impose adverse inference instructions, dismissal, or default.

**Rule: Summary Judgment (FRCP 56)**

Granted if no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Material: fact affects outcome. Genuine: reasonable jury could find for the nonmovant. Evidence viewed in the light most favorable to the nonmovant. Available after adequate time for discovery.

## IV. Trial, Motions, Verdicts, and Judgments

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**Rule: Judgment as a Matter of Law (FRCP 50)**



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Granted when no reasonable jury could find for the nonmoving party on the evidence presented. Renewed JMOL (Rule 50(b)) must be preceded by a Rule 50(a) motion at the close of evidence.

**Rule: Post-Trial Motions (FRCP 59, 60)**

New trial (Rule 59): verdict against the great weight of evidence, errors of law, or newly discovered evidence. Relief from judgment (Rule 60): mistake, fraud, newly discovered evidence, or other extraordinary circumstances. One-year limit for certain grounds.

**Rule: Remittitur and Additur (Rule 59)**

Remittitur: When a jury awards excessive damages, the court may condition denial of a new trial on the plaintiff's acceptance of a reduced amount. The plaintiff chooses between the reduced amount and a new trial. Remittitur is permitted in federal courts and is consistent with the Seventh Amendment because the plaintiff voluntarily accepts the reduction. Additur: When a jury awards inadequate damages, the court conditions denial of a new trial on the defendant's acceptance of an increased amount. Additur is NOT permitted in federal courts — the Supreme Court held in *Dimick v. Schiedt* that additur violates the Seventh Amendment because it imposes a damages figure no jury has authorized. Bar Tip: Remittitur (reducing excessive verdicts) = permitted in federal court. Additur (increasing inadequate verdicts) = prohibited in federal court.

**Rule: Default Judgment (FRCP 55)**

When a party fails to plead or otherwise defend, the clerk must enter a default (Rule 55(a)). A default judgment may then be entered by the clerk (if the claim is for a sum certain against a non-minor, non-incompetent defendant) or by the court (in all other cases) (Rule 55(b)). The court may set aside a default or default judgment for good cause (Rule 55(c)) or under Rule 60(b) (excusable neglect, meritorious defense, absence of prejudice to the plaintiff). A default judgment cannot exceed the amount demanded in the complaint. Due process requires that the defendant receive proper notice before a default judgment is entered.

## V. Appellate Review

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**Rule: Final Judgment Rule and Interlocutory Appeals**

Appeals generally lie only from final judgments disposing of all claims (28 U.S.C. §1291). Exceptions: interlocutory appeals under §1292(a) for injunctions, certified questions under §1292(b), and the collateral order doctrine for orders conclusively determining an important issue completely separate from the merits.

**Rule: Standards of Appellate Review**

De novo: pure questions of law, statutory interpretation, summary judgment, JMOL. Clearly erroneous (FRCP 52(a)): findings of fact in bench trials—reversed only if the reviewing court has a definite and firm conviction that a mistake was made, with due regard to the trial court's credibility assessments. Abuse of discretion: evidentiary rulings, discovery sanctions, new trial motions. Substantial evidence: jury fact findings. Harmless error: judgment not reversed for error that did not affect a substantial right or the outcome.

**Rule: Issue Preclusion and Choice of Preclusion Law**

Federal courts apply federal common law on issue preclusion when giving effect to federal judgments. Nonmutual offensive issue preclusion is permitted when: (1) the party against whom preclusion is asserted had a full and fair opportunity to litigate in the first action, and (2) application would not be unfair. For state-court judgments in federal court, the preclusion law of the rendering state applies.

**Rule: Res Judicata (Claim Preclusion)**



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A final judgment on the merits bars relitigation of any claim that was or could have been raised in the prior action between the same parties or their privies. Elements: (1) a valid, final judgment on the merits in the first action; (2) the same cause of action (same transaction or occurrence under the transactional test); (3) the same parties or those in privity. Claim preclusion bars not only claims actually litigated but also claims that could have been brought arising from the same transaction.

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# CONSTITUTIONAL LAW

*Scrutiny tiers form the core analytical framework. Federalism limits state power; individual rights constrain both state and federal government action through the Fourteenth and Fifth Amendments.*

## I. Nature of Judicial Review

### **Rule: Justiciability Doctrines**

Article III requires a case or controversy; no advisory opinions. Standing: (1) Concrete, particularized injury (actual or imminent); (2) causation (fairly traceable to defendant's conduct); (3) redressability (likely remedied by a favorable decision).

### **Rule: Standing – Article III Requirements (Lujan v. Defenders of Wildlife)**

Standing requires: (1) Injury in fact — a concrete, particularized, actual or imminent invasion of a legally protected interest (not conjectural or hypothetical); (2) Causation — the injury must be fairly traceable to the challenged conduct (not the result of independent action by a third party); (3) Redressability — it must be likely, not merely speculative, that a favorable decision will redress the injury. Additional standing rules: Taxpayer standing is generally denied except under *Flast v. Cohen* (Establishment Clause challenges to congressional spending). Third-party standing is disfavored but permitted when: the claimant has suffered injury, has a close relationship with the third party, and the third party faces a hindrance to asserting their own rights. Organizational standing requires either injury to the organization itself or members with individual standing (*Hunt v. Washington State Apple Advertising Commission*). *Spokeo v. Robins*: a bare statutory violation without concrete harm is insufficient.

### **Rule: Ripeness and Mootness**

Ripeness requires an immediate threat of harm; a claim is not ripe if contingent on future events. Mootness occurs when no live controversy remains. Exceptions to mootness: capable of repetition yet evading review, voluntary cessation by the defendant.

### **Rule: Political Questions**

Nonjusticiable if (1) textually committed to a coordinate political branch; (2) no judicially manageable standards exist; or (3) resolution requires a policy determination outside judicial competence.

### **Rule: Sovereign Immunity (Eleventh Amendment)**

Bars private suits against states in federal court. Exceptions: (1) State waiver or consent; (2) congressional abrogation under Fourteenth Amendment §5 (legislation must be congruent and proportional to the injury); (3) prospective injunctive relief against state officials (*Ex parte Young*).

### **Rule: Void for Vagueness**

A law violates due process if it fails to give persons of ordinary intelligence fair notice of what is prohibited or if it encourages arbitrary and discriminatory enforcement. Laws restricting First Amendment freedoms are held to a stricter vagueness standard.

## II. Separation of Powers

### **Rule: Congressional Powers**

Enumerated in Article I: commerce, taxing and spending, war, foreign affairs, Thirteenth through Fifteenth Amendment enforcement. Commerce Power: Congress may regulate (1) channels of interstate commerce; (2) instrumentalities and persons or things in interstate



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commerce; (3) activities with a substantial economic effect on interstate commerce. Aggregation principle (*Wickard v. Filburn*): individual activity may be trivial, but Congress may regulate if the class of activity in the aggregate substantially affects commerce.

**Rule: Commerce Clause — Three Categories (Lopez Framework)**

Congress may regulate under the Commerce Clause: (1) the channels of interstate commerce (highways, waterways, internet); (2) the instrumentalities of interstate commerce and persons or things in interstate commerce (trucks, planes, goods); and (3) activities that have a substantial effect on interstate commerce (*United States v. Lopez*). For category (3), if the activity regulated is economic/commercial in nature, the court will aggregate individual instances to assess impact. If the activity is non-economic (e.g., gun possession near schools, gender-motivated violence), aggregation is generally not permitted, and the nexus to commerce must be direct (*United States v. Morrison*). A jurisdictional element (requiring proof of an interstate commerce connection in each case) strengthens constitutionality.

**Rule: Necessary and Proper Clause**

Congress may enact any law that is a rational means to execute an enumerated power. Not an independent source of power; must be attached to an enumerated power.

**Rule: Spending Power — Conditional Federal Spending (*South Dakota v. Dole*)**

Congress may condition federal funds to encourage state compliance with federal policy. Conditions must satisfy: (1) spending must serve the general welfare; (2) conditions must be unambiguous so states can make knowing choices; (3) conditions must be related to the federal interest in the particular program; and (4) conditions must not violate other constitutional provisions. The coercion limitation (*NFIB v. Sebelius*): Congress may not use conditions so coercive as to compel rather than encourage state action. Threatening loss of all existing Medicaid funding unless a state accepts a major expansion crosses from inducement to coercion. Bar Tip: Distinguish conditional spending (permitted if not coercive) from commandeering (always prohibited under the Tenth Amendment).

**Rule: Section 5 Enforcement Power (Fourteenth Amendment) — Congruence and Proportionality**

Congress may enforce the Fourteenth Amendment through “appropriate legislation” under Section 5. However, Congress may not expand the substantive scope of constitutional rights — it may only enact remedial or preventive legislation. Under *City of Boerne v. Flores*, Section 5 legislation must be congruent and proportional to the constitutional violation being remedied: (1) there must be a documented pattern of constitutional violations by states; and (2) the legislative remedy must be proportional to the scope of those violations. Legislation imposing requirements far exceeding the constitutional floor exceeds Section 5 power. Bar Tip: Section 5 is the primary basis for Congress to abrogate state sovereign immunity under the Eleventh Amendment.

**Rule: Exceptions and Regulations Clause**

Article III, §2 grants Congress power to make exceptions to and regulations of the Supreme Court’s appellate jurisdiction. Congress may strip appellate jurisdiction over certain categories of cases but may not violate other constitutional provisions in doing so.

**Rule: Presidential Powers**

Article II vests executive power. Commander-in-chief authority; treaty and foreign affairs power (treaties require two-thirds Senate consent); appointment and removal. Appointment Clause: President nominates principal officers with Senate advice and consent. Congress may vest appointment of inferior officers in the President, courts, or heads of departments.

**Rule: Executive Privilege**



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The President has a constitutionally based privilege to protect confidential communications with advisors. The privilege is qualified, not absolute (*United States v. Nixon*): it must yield when outweighed by the demonstrated need for evidence in a criminal proceeding. In *Nixon*, the Court held that the need for evidence in a criminal trial overcame the generalized assertion of presidential confidentiality. The privilege covers communications made in the performance of presidential duties and is strongest for national security and military secrets. Congress may overcome the privilege through a sufficient showing of legislative need.

**Rule: Interbranch Limits**

Nondelegation: Congress must provide an intelligible principle when delegating authority. Presentment: all legislation requires bicameralism and presidential signature or veto override (*INS v. Chadha*: legislative vetoes violate presentment). Speech or Debate Clause: Members of Congress have absolute immunity for legislative acts performed in the regular course of legislative business. Executive immunity: absolute for official acts.

### III. Relation of Nation and States

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**Rule: Intergovernmental Immunities**

Federal government is immune from state taxation and regulation. States are immune from federal commandeering (Tenth Amendment): Congress cannot compel states to enact legislation or administer federal regulatory programs. State taxation of federal instrumentalities is prohibited if it discriminates against the federal government or directly burdens federal operations.

**Rule: Dormant Commerce Clause**

Bars state laws that discriminate against or unduly burden interstate commerce even absent federal legislation. Discriminatory laws: strict scrutiny—law must serve an important local purpose with no less discriminatory alternative. Nondiscriminatory laws: Pike balancing—legitimate local purpose weighed against burden on interstate commerce. Market participant exception: states may favor in-state interests when acting as market participants rather than regulators.

**Rule: Privileges and Immunities Clause (Article IV, §2)**

Prohibits states from discriminating against out-of-state citizens with respect to fundamental rights, including the right to pursue a livelihood, own property, and access the courts. Unlike the Dormant Commerce Clause, it protects only natural persons (not corporations) and has no market participant exception. A state may justify discrimination only if: (1) there is a substantial reason for the difference in treatment, and (2) the discrimination bears a substantial relationship to that reason with no less restrictive alternatives available.

**Rule: Preemption (Supremacy Clause)**

Federal law is supreme. Express preemption: federal statute explicitly displaces state law. Field preemption: federal regulation so pervasive it occupies the field. Conflict preemption: impossibility (compliance with both impossible) or obstacle (state law frustrates federal objectives). Treaty Power: a valid treaty under Article II is supreme law and can preempt state law, even if Congress could not otherwise legislate on the subject under its enumerated powers.

### IV. Individual Rights

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#### A. State Action and Due Process

**Rule: State Action Requirement**



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Constitutional rights apply only to government action. A private actor may be subject to constitutional constraints if performing an exclusive public function or if there is significant government entanglement or encouragement.

**Rule: Procedural Due Process**

The Fifth and Fourteenth Amendments prohibit deprivation of life, liberty, or property without due process. A protected property interest requires a legitimate claim of entitlement (e.g., public employment with "for cause" protection). The *Mathews v. Eldridge* test determines what process is due: (1) the private interest affected; (2) the risk of erroneous deprivation and probable value of additional safeguards; (3) the government's interest. While due process generally requires a hearing before deprivation, exceptions exist when important government interests support immediate action, facts are undisputed, and adequate post-deprivation remedies are available.

**Rule: Substantive Due Process**

Limits arbitrary government action. Fundamental rights trigger strict scrutiny: the law must be necessary to serve a compelling government interest. Non-fundamental interests receive rational basis review: the law need only be rationally related to a legitimate government interest.

## B. Fundamental Rights

**Rule: Right to Parent**

Parents have a fundamental right to raise their children free from undue government interference (*Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Troxel v. Granville*). Government interference with parental decisions regarding custody, care, and upbringing triggers strict scrutiny.

**Rule: Right to Marry**

Marriage is a fundamental right protected by substantive due process (*Loving v. Virginia*, *Zablocki v. Redhail*). Laws that significantly interfere with the decision to marry trigger strict scrutiny and must be narrowly tailored to serve a compelling government interest.

**Rule: Right to Travel**

The fundamental right to travel includes the right to migrate between states and be treated as a welcome new resident. Durational residency requirements that create different classes of residents based on how long they have lived in a state trigger strict scrutiny (*Saenz v. Roe*, applying the Privileges or Immunities Clause of the Fourteenth Amendment).

## C. Equal Protection

**Rule: Equal Protection Framework (Fourteenth Amendment)**

Laws that classify must meet the applicable scrutiny level. Strict scrutiny: suspect classifications (race, national origin, alienage) or fundamental rights—must be narrowly tailored to a compelling interest. Intermediate scrutiny: quasi-suspect classifications (gender, illegitimacy)—must be substantially related to an important interest. Rational basis: all other classifications (age, wealth, disability)—need only be rationally related to a legitimate interest.

**Rule: Alienage Classifications**

State alienage classifications generally receive strict scrutiny. Exception: the political function exception applies rational basis review to state restrictions on aliens participating in self-governance (e.g., requirements that police officers, public school teachers, or probation officers be citizens).

**Rule: Education Funding and Wealth-Based Classifications**



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Wealth is not a suspect class, and education is not a fundamental right under the federal Constitution (*San Antonio v. Rodriguez*). Wealth-based disparities in school funding receive only rational basis review.

## D. First Amendment

### **Rule: Public Forum Doctrine**

Traditional public forums (streets, sidewalks, parks): content-based restrictions receive strict scrutiny; content-neutral time, place, and manner restrictions must be narrowly tailored to serve a significant government interest and leave open ample alternative channels. Designated public forums: same analysis once opened. Nonpublic forums: restrictions need only be reasonable and viewpoint-neutral.

### **Rule: Content-Based vs. Content-Neutral Speech Regulations**

Content-based restrictions on speech (targeting the message or viewpoint) trigger strict scrutiny: the government must show the law is necessary to achieve a compelling interest and is narrowly tailored. Content-neutral regulations (time, place, and manner restrictions) receive intermediate scrutiny: the regulation must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. Viewpoint-based restrictions are a subset of content-based restrictions and are virtually always unconstitutional.

### **Rule: Unprotected Speech Categories**

Certain categories of speech receive no First Amendment protection: (1) Obscenity (Miller test): appeals to the prurient interest by community standards, depicts sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value. (2) Fighting words: words directed at a specific individual likely to provoke an immediate violent reaction. (3) True threats: statements communicating a serious intent to commit unlawful violence. (4) Child pornography: visual depictions of minors engaged in sexual conduct. (5) Incitement: speech directed to producing imminent lawless action and likely to produce such action (*Brandenburg*).

### **Rule: Freedom of Association and Advocacy of Illegal Conduct**

Under *Brandenburg v. Ohio*, the government cannot punish advocacy of illegal action unless it is directed to inciting imminent lawless action and is likely to produce such action. Mere membership in an organization that advocates illegal action cannot be criminalized. The government must prove: (1) specific intent to further the organization's illegal aims, and (2) active participation in illegal activities.

### **Rule: Establishment Clause**

The government cannot provide preferential aid to religious institutions. Selling property to a church at below-market value, especially when authorized by statute for one particular church, violates the Establishment Clause by providing a financial benefit that advances religion. Modern analysis focuses on whether government action has the purpose or effect of endorsing or disapproving of religion.

### **Rule: Free Exercise Clause**

The Free Exercise Clause prohibits government from substantially burdening religious practice. Neutral, generally applicable laws that incidentally burden religion receive rational basis review (*Employment Division v. Smith*). Laws that target religious conduct or are not generally applicable trigger strict scrutiny. Exceptions: RFRA (federal) and state RFRA require strict scrutiny even for neutral laws that substantially burden religion. Hybrid rights claims (free exercise combined with another constitutional right) may also receive heightened scrutiny.

### **Rule: Lemon Test for Establishment Clause**



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Under *Lemon v. Kurtzman*, government action violates the Establishment Clause unless it: (1) has a secular legislative purpose; (2) has a principal or primary effect that neither advances nor inhibits religion; (3) does not foster excessive government entanglement with religion. Note: The Supreme Court in *Kennedy v. Bremerton* (2022) shifted toward a historical practices and understandings test, but the *Lemon* framework remains widely tested. The endorsement test asks whether a reasonable observer would perceive government endorsement of religion.

## E. Takings, Bill of Attainder, and Miscellaneous

### **Rule: Takings Clause (Fifth Amendment)**

Government taking of private property for public use requires just compensation. Public use is broadly defined to include public purpose. Per se taking: permanent physical occupation or total destruction of economic value. Regulatory taking: analyzed under Penn Central factors (economic impact, investment-backed expectations, character of government action). Exactions must have an essential nexus and rough proportionality to the impact of the proposed development (*Nollan/Dolan*).

### **Rule: Bill of Attainder**

Article I, §9 and §10 prohibit legislative acts that inflict punishment on specific individuals or identifiable groups without a judicial trial. A law is a bill of attainder if it (1) specifies affected persons, (2) inflicts punishment, and (3) does so without judicial process.

### **Rule: Ex Post Facto Clause (Article I, §§9-10)**

The Ex Post Facto Clause prohibits both Congress and the states from enacting laws that: (1) criminalize conduct that was lawful when committed; (2) increase the punishment for a crime after it was committed; (3) reduce the evidence required to convict below what was required at the time of the offense; or (4) eliminate a defense that was available at the time of the offense (*Calder v. Bull*). The Clause applies only to criminal and penal laws, not to civil regulations, even if the civil law has a retroactive punitive effect unless the legislative intent was punitive.

### **Rule: Contracts Clause (Article I, §10)**

The Contracts Clause prohibits states from passing any law “impairing the Obligation of Contracts.” It applies only to state legislation (not federal), and only to existing contracts (not to regulation of future contracts). The modern test (*Energy Reserves Group v. Kansas Power*): (1) Does the law substantially impair a contractual relationship? (2) If so, does the state have a significant and legitimate public purpose? (3) Is the impairment reasonable and narrowly tailored to the public purpose? Heightened scrutiny applies when a state impairs its own contracts (*United States Trust Co. v. New Jersey*). The Clause does not apply to federal government impairment of contracts — federal power over contracts is governed by due process.



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# CONTRACTS

*Common law governs most contracts; UCC Article 2 modifies rules for the sale of goods. Key themes: formation, defenses, performance, breach, and remedies.*

## I. Formation

### **Rule: Mutual Assent: Offer and Acceptance**

A contract requires offer (manifestation of willingness to enter a bargain with definite terms) plus acceptance (unqualified assent). Offer elements: (1) definite terms (parties, quantity, price, subject matter); (2) communicated to offeree; (3) revocable unless option contract or UCC firm offer (§2-205: merchant's signed written assurance, irrevocable up to three months). Common law mirror-image rule: acceptance must match offer exactly. UCC §2-207: a definite expression of acceptance with additional or different terms can still form a contract. Between merchants, additional terms become part of the contract unless the offer expressly limits acceptance, the terms materially alter the contract, or the offeror objects within a reasonable time.

### **Rule: Mailbox Rule (Acceptance Effective on Dispatch)**

An acceptance is effective when dispatched (placed out of the offeree's control), not when received. Exceptions: (1) Option contracts — acceptance effective only on receipt; (2) Rejection sent first — if offeree sends rejection then acceptance, whichever arrives first controls; (3) Offer specifies otherwise — offeror is master of the offer and may require receipt. Revocations are effective on receipt, not dispatch. If offeree dispatches acceptance then sends an overtaking rejection that arrives first, a contract is formed on dispatch of acceptance. Bar Tip: The mailbox rule applies only to acceptances; all other communications (offers, rejections, revocations, counteroffers) are effective on receipt.

### **Rule: Unilateral Contracts and Irrevocability Upon Beginning Performance**

A unilateral contract is one in which the offeror requests acceptance solely by performance (not a promise). Once the offeree begins performance, the offer becomes irrevocable for a reasonable time to allow completion, though the offeree is not obligated to finish. Mere preparation does not constitute beginning performance. Under the Restatement (Second), beginning performance creates an option contract. If the offeree completes performance, the offeror is bound; if the offeree stops, the offeror's duty is discharged.

### **Rule: Battle of the Forms — Additional Terms (UCC §2-207(2))**

When an acceptance contains additional or different terms: between non-merchants, additional terms are mere proposals requiring assent. Between merchants, additional terms automatically become part of the contract unless: (1) the offer expressly limits acceptance to its terms; (2) the additional terms materially alter the contract (e.g., disclaimers, arbitration clauses); or (3) the offeror objects within a reasonable time. Different terms: majority view applies the knockout rule (conflicting terms drop out and UCC gap-fillers apply).

### **Rule: Consideration**

A bargained-for exchange of a promise or act inducing a legal detriment or benefit. Elements: (1) Bargain (not past consideration, gifts, or moral obligation alone); (2) legal value (not illusory promises or preexisting duty). Preexisting duty rule: performing or promising what one is already bound to do is not valid consideration for a new promise.

### **Rule: Obligations Without Consideration**

Promissory estoppel: a promise that the promisor should reasonably expect to induce reliance, that does induce actual reliance, and where injustice can be avoided only by



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enforcement. Restitution: recovery for the reasonable value of a benefit conferred to prevent unjust enrichment.

**Rule: Modification**

Common law: new consideration required. UCC §2-209: no consideration needed if modification is made in good faith. Both: modifications may be subject to the Statute of Frauds if the modified contract falls within it.

**Rule: Intent to Be Bound and Preliminary Negotiations**

When parties expressly agree that no contract exists until a final writing is signed, preliminary negotiations create no binding obligations. Letters of intent and agreements in principle are not contracts absent a clear intent to be bound. However, parties may face liability for bad-faith negotiations under promissory estoppel in some jurisdictions.

**Rule: Implied-in-Fact Contracts and Quasi-Contract**

An implied-in-fact contract arises from the parties' conduct rather than express words, where circumstances indicate mutual agreement. A quasi-contract (implied-in-law) is not a true contract but a legal fiction to prevent unjust enrichment; recovery is measured by the reasonable value of the benefit conferred.

## II. Defenses to Enforceability

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**Rule: Incapacity**

Contracts by minors or mentally incompetent persons are voidable at the incapacitated party's election. Ratifiable upon reaching capacity. A party lacks capacity if unable to understand the nature and consequences of the transaction.

**Rule: Duress and Undue Influence**

Voidable if (1) improper threat or overwhelming influence; (2) no reasonable alternative. Economic duress: wrongful threat that leaves no reasonable alternative but to agree to an unfavorable modification.

**Rule: Mistake**

Mutual mistake: rescission available if both parties share an erroneous assumption about a material, basic fact and the risk is not allocated. Unilateral mistake: no relief unless the other party knew or should have known of the mistake, or enforcement would be unconscionable.

**Rule: Fraud and Misrepresentation**

Voidable if (1) false assertion of material fact; (2) scienter (knowledge of falsity or reckless disregard); (3) intent to induce reliance; (4) justifiable reliance; (5) damages.

**Rule: Mutual Mistake of Meaning / Ambiguity (Peerless Doctrine)**

Distinct from mutual mistake of fact. When parties attach materially different meanings to a key contract term (latent ambiguity): (1) if neither party knows or has reason to know of the ambiguity, no contract is formed (the Peerless rule); (2) if one party knows or has reason to know of the other's meaning, the innocent party's meaning controls; (3) if both parties know of the ambiguity, no contract is formed. This is a formation issue, not an excuse or discharge defense.

**Rule: Fraudulent Concealment and Duty to Disclose**

A party has a duty to disclose material facts when: (1) asked a direct question; (2) a partial disclosure creates a false impression; (3) one party has superior knowledge of material facts not reasonably discoverable by the other; or (4) a previous statement becomes misleading due to changed circumstances. Active concealment constitutes fraud.



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Generally, silence alone is not misrepresentation, but a fiduciary relationship or statutory requirement may impose a duty to disclose.

**Rule: Illegality and Unconscionability**

Void if the contract has an illegal purpose. Unconscionability requires both (1) procedural unfairness (surprise, unequal bargaining power) and (2) substantive oppression (unreasonably one-sided terms).

**Rule: Illegality: Regulatory vs. Revenue-Raising Licensing**

Contracts that violate regulatory licensing requirements (designed to protect the public from unqualified practitioners) are void and unenforceable. Contracts that violate revenue-raising licensing requirements (merely raising government funds) are generally enforceable despite the violation.

**Rule: Statute of Frauds**

A writing signed by the party to be charged is required for: Marriage (promises in consideration of marriage), Year-plus (contracts not performable within one year), Land (interests in real property), Executor (promises to pay decedent's debts), Goods over \$500 (UCC §2-201), and Surety (guaranty promises). Exceptions: part performance (land); merchant's confirmation (UCC §2-201(2)); specially manufactured goods; judicial admission.

**Rule: Statute of Frauds — One-Year Rule (Detailed Analysis)**

A contract that cannot be performed within one year from the date of making requires a writing. The test is possibility, not probability: if the contract is capable of being fully performed within one year, even if unlikely, the statute of frauds does not apply. A contract for an indefinite duration (e.g., employment for "as long as you want") does not fall within the one-year provision because it could theoretically be completed within a year. A lifetime contract is outside the statute because a person could die within a year, fully performing the contract. The one-year period is measured from the date of contract formation, not from the date performance begins. Bar Tip: The one-year rule is narrowly applied — only contracts that by their terms make performance within one year impossible fall within the statute.

### III. Contract Content and Meaning

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**Rule: Parol Evidence Rule**

An integrated writing bars evidence of prior or contemporaneous agreements that contradict or vary its terms. Fully integrated: bars all extrinsic terms. Partially integrated: bars contradictory terms but allows consistent additional terms. Exceptions: ambiguity, fraud, duress, mistake, condition precedent to formation, subsequent modifications.

**Rule: Interpretation and Hierarchy of Terms**

Contracts are interpreted according to objective meaning. UCC §1-303 hierarchy: express terms prevail over course of performance, which prevails over course of dealing, which prevails over trade usage. Course of performance (how the parties actually performed under the current contract) controls interpretation even when it contradicts trade custom.

**Rule: Satisfaction Clauses**

Contracts conditioned on one party's personal satisfaction: subjective standard applies to matters of taste, comfort, or aesthetics—the party must be genuinely dissatisfied in good faith. Objective "reasonable person" standard applies to matters of mechanical fitness, utility, or marketability.

### IV. Performance, Breach, and Discharge

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**Rule: Conditions**

An event that must occur before a duty of performance arises. Express conditions (stated in the contract) must be strictly satisfied. Constructive conditions (implied by law) require only substantial performance.

**Rule: Breach****Rule: Divisible (Severable) Contracts**

A contract is divisible if performance by each party can be divided into corresponding pairs of part performances, with each pair treated as the agreed exchange for the other. Even after a material breach, a party may recover for divisible portions already fully performed. A contract is divisible if: (1) performance can be divided into matching pairs; (2) each pair is roughly the agreed equivalent. Employment contracts paid periodically and installment delivery contracts are common examples.

**Rule: At-Will Employment Presumption**

Absent a definite duration or contrary agreement, employment is presumed to be at-will and terminable by either party at any time without liability. A promise of "permanent employment" is generally construed as at-will, not lifetime employment. Exceptions: (1) implied contract based on employer handbooks or policies; (2) public policy exceptions (termination for refusing illegal acts or exercising legal rights); (3) implied covenant of good faith and fair dealing (recognized in some jurisdictions).

Material breach: substantial nonperformance excusing the other party's duty. Factors: (1) extent of deprivation of expected benefit; (2) adequacy of compensation; (3) likelihood of cure; (4) good faith. Minor breach: damages recoverable but does not excuse the other party's performance.

**Rule: Waiver and Excuse of Conditions**

A party may waive a condition by words or conduct indicating willingness to perform despite non-occurrence. Once waived, a condition may be reinstated by reasonable notice if the other party has not detrimentally relied. Excuse of condition: prevention, hindrance, anticipatory repudiation, or impossibility.

**Rule: Anticipatory Repudiation**

An unequivocal refusal to perform before the time for performance allows the aggrieved party to: (1) treat the contract as breached and sue immediately; (2) suspend its own performance; (3) await performance for a commercially reasonable time (UCC). Repudiation of one contract generally does not affect separate independent contracts unless they are interdependent or the repudiation provides reasonable grounds for insecurity under UCC §2-609.

**Rule: Anticipatory Repudiation – Retraction**

A repudiating party may retract the repudiation and reinstate the contract unless the non-breaching party has: (1) materially changed position in reliance on the repudiation (e.g., entered a substitute contract); (2) commenced an action for breach; or (3) indicated that the repudiation is accepted as final. Under UCC §2-611, retraction may be by any method clearly indicating intent to perform, but must include adequate assurance if demanded. Retraction reinstates all contract rights but does not excuse delay already caused.

**Rule: Right to Adequate Assurance of Performance (UCC §2-609)**

When reasonable grounds for insecurity arise regarding either party's performance, the insecure party may: (1) demand in writing adequate assurance of due performance; and (2) suspend any performance for which return has not been received, if commercially reasonable. Failure to provide adequate assurance within a reasonable time (not exceeding 30 days) constitutes a repudiation of the contract. Between merchants, the



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reasonableness of grounds for insecurity and adequacy of assurance are determined by commercial standards.

**Rule: Good Faith and Fair Dealing**

Implied in every contract. UCC imposes an obligation of good faith in performance and enforcement (honesty in fact; for merchants, also commercial reasonableness).

**Rule: Perfect Tender Rule (UCC §2-601)**

Rule: If the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may: Reject the whole; or Accept the whole; or Accept any commercial unit(s) and reject the rest. Key Point: "Perfect tender" required — even minor nonconformity allows rejection (stricter than common-law substantial performance). Bar Tip: Contrast with common-law substantial performance doctrine — UCC favors buyer flexibility in single-delivery sales of goods.

**Rule: Installment Contracts — Substantial Impairment Standard (UCC §2-612)**

An installment contract requires or authorizes delivery in separate lots, each separately accepted. The buyer may reject a nonconforming installment only if the nonconformity substantially impairs the value of that installment and cannot be cured. The buyer may cancel the entire contract only if the nonconformity in one or more installments substantially impairs the value of the whole contract. This is a higher threshold than the perfect tender rule — it mirrors common-law substantial performance. A failure to seasonably object to a nonconforming installment reinstates the contract as to that installment. Key distinction: single-delivery contracts use perfect tender (any defect allows rejection); installment contracts use substantial impairment (only material defects justify rejection).

**Rule: Output and Requirements Contracts (UCC §2-306)**

Rule: A term measuring quantity by the output of the seller or the requirements of the buyer means the actual output or requirements as may occur in good faith.

No quantity unreasonably disproportionate to any stated estimate (or, absent estimate, to normal/prior comparable output or requirements) may be tendered or demanded.

Definitions: Output contract — Buyer agrees to purchase all (or substantially all) of seller's production/output of specified goods. Requirements contract — Seller agrees to supply all (or substantially all) of buyer's needs/requirements for specified goods.

Key Safeguards:

Both parties bound by good faith (UCC § 1-304 / § 2-103) — no bad-faith demands to reduce quantity to zero or inflate unreasonably. Exclusive dealing contracts (§ 2-306(2)) impose obligation of best efforts to supply (seller) or promote (buyer). Bar Tip: Addresses indefiniteness/illusory promise concerns — good faith + disproportionate limit make enforceable (unlike common law).

**Rule: Express Warranty (UCC §2-313)**

An express warranty is created when the seller: (1) makes an affirmation of fact or promise relating to the goods that becomes part of the basis of the bargain; (2) provides a description of the goods; or (3) provides a sample or model. No specific intent to warrant is required, and no formal words ("warrant," "guarantee") are necessary. Statements of opinion or commendation (puffing) do not create express warranties. An express warranty cannot be disclaimed if the disclaimer is inconsistent with the warranty — the warranty controls (UCC §2-316(1)). Bar Tip: Any specific factual claim about the goods in marketing materials, negotiations, or the contract itself can create an express warranty.

**Rule: Implied Warranties of Merchantability and Fitness (UCC §§2-314, 2-315)**



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Implied Warranty of Merchantability (§ 2-314): Arises in every contract for sale if seller is a merchant with respect to goods of that kind (unless excluded/modified per § 2-316).

Goods must be at least: Pass without objection in the trade under contract description; (For fungible goods) fair average quality within description; Fit for the ordinary purposes for which such goods are used; Adequately contained, packaged, and labeled; Conform to promises/affirmations on label/container. Other implied warranties may arise from course of dealing or usage of trade.

Implied Warranty of Fitness for a Particular Purpose (§ 2-315): Arises where: 1. Seller has reason to know any particular purpose for which goods are required; and 2. Buyer is relying on seller's skill or judgment to select/furnish suitable goods. Implied warranty that goods shall be fit for such particular purpose (unless excluded/modified per § 2-316).

Key Distinctions: Merchantability → ordinary/ordinary use; requires merchant seller. Fitness → particular/specific use; requires seller knowledge + buyer reliance (seller need not be merchant).

Bar Tip: Both can be disclaimed (§ 2-316), but merchantability disclaimer must mention "merchantability" (conspicuous writing for fitness); "as is" or "with all faults" excludes both if conspicuous.

**Rule: Warranty Privity — Vertical and Horizontal**

Vertical privity concerns whether a buyer can sue an upstream seller (manufacturer, wholesaler) with whom the buyer has no direct contract. Most jurisdictions allow direct suits against manufacturers, effectively eliminating the vertical privity requirement for breach of warranty. Horizontal privity concerns which persons beyond the immediate buyer can sue. UCC §2-318 offers three alternatives: Alternative A (majority) extends warranty protection to household members, guests, or natural persons reasonably expected to use or be affected by the goods and who suffer personal injury. Alternatives B and C progressively expand the class of protected persons and types of injury (including property damage and economic loss).

**Rule: Risk of Loss (UCC §§2-509, 2-510)**

In shipment contracts (F.O.B. seller's place): risk passes to buyer when goods are duly delivered to the carrier. In destination contracts (F.O.B. buyer's place): risk passes when goods are tendered at the destination. Non-carrier cases: if seller is a merchant, risk passes when buyer takes physical possession; if seller is not a merchant, risk passes on tender of delivery. If goods are nonconforming, risk of loss remains on the seller until cure or acceptance.

Implied warranty of merchantability (§2-314): in every sale by a merchant, goods are impliedly warranted to be fit for ordinary purposes, adequately packaged and labeled, and conforming to any promises on the label. Implied warranty of fitness for particular purpose (§2-315): when the seller knows the buyer's particular purpose and the buyer relies on the seller's expertise, the goods are warranted fit for that purpose. Disclaimers: merchantability disclaimers must mention "merchantability" and be conspicuous; fitness disclaimers must be in writing and conspicuous.

A contract measuring quantity by the output of the seller or the requirements of the buyer is not illusory if made in good faith. The quantity tendered or demanded must not be unreasonably disproportionate to any stated estimate, or in the absence of a stated estimate, to any normal or otherwise comparable prior output or requirements. Good faith



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means honesty in fact and, for merchants, observance of reasonable commercial standards.

In contracts for the sale of goods, if the goods or tender of delivery fail to conform to the contract in any respect, the buyer may: (1) reject the whole; (2) accept the whole; or (3) accept any commercial unit and reject the rest. Exceptions: (1) the seller has the right to cure if the time for performance has not expired or the seller had reasonable grounds to believe the tender would be acceptable; (2) installment contracts are governed by the substantial impairment standard under §2-612.

**Rule: Impossibility, Impracticability, and Frustration of Purpose**

Impossibility: performance objectively impossible due to destruction of subject matter, death or incapacity, or supervening illegality. Impracticability: performance possible but commercially unreasonable due to unforeseen circumstances. Frustration of purpose: the principal purpose is substantially frustrated by an event not caused by the party seeking discharge.

**Rule: Accord and Satisfaction**

An accord is an agreement to accept substitute performance; satisfaction is the actual performance. Requirements: (1) an honest dispute over the amount owed; (2) tender of performance clearly communicated as "full satisfaction"; (3) acceptance by the creditor. If no genuine dispute exists and the debtor knows the full amount owed, acceptance of a lesser amount does not discharge the debt.

## V. Remedies

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**Rule: Expectation Damages**

Put the nonbreaching party in the position they would have occupied had the contract been performed. Measured by the benefit of the bargain: lost value plus incidental and consequential damages, minus costs avoided. For construction contracts: cost of completion or diminution in value, depending on economic waste.

**Rule: Construction Contract Damages Formulas**

When the owner breaches after the builder has partially performed: the builder recovers costs already incurred plus anticipated profit on the remaining work, minus any costs saved by not completing. When the builder breaches: the owner recovers the cost of completion by another contractor, or if that would involve economic waste, the diminution in value. When the owner breaches before performance begins: the builder recovers lost profits (contract price minus total projected costs).

**Rule: Consequential Damages (Hadley v. Baxendale)**

Recoverable only if foreseeable at the time of contracting—either arising naturally from the breach or reasonably within the parties' contemplation because of special circumstances communicated to the breaching party.

**Rule: Reliance and Restitution Damages**

Reliance: expenditures made in reliance on the contract. Restitution: value of benefit conferred on the breaching party. A breaching party may recover restitution for the value of benefits conferred in excess of the nonbreaching party's damages.

**Rule: Mitigation of Damages**

All parties must take reasonable steps to mitigate losses after breach. Damages that could have been avoided through reasonable effort are not recoverable. In employment cases, the discharged employee must accept comparable employment but need not accept work of a different or inferior kind.

**Rule: Specific Performance and Injunctive Relief**



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Specific performance is an equitable remedy ordering the breaching party to perform. Available when: (1) the subject matter is unique or legal damages are inadequate; (2) the contract terms are sufficiently definite to enforce; and (3) equitable defenses (unclean hands, laches, unconscionability) do not bar relief. Land is presumed unique — specific performance is the standard remedy for breach of a land sale contract. For goods, specific performance is available when goods are unique or in “other proper circumstances” (UCC §2-716), such as requirements contracts with no available substitute. Personal services contracts cannot be specifically enforced (involuntary servitude), but injunctions may prevent the breaching party from working for a competitor if the services are unique or extraordinary.

**Rule: Liquidated Damages — Enforceability Test**

A liquidated damages clause is enforceable if: (1) the amount is a reasonable forecast of the harm caused by breach, assessed at the time of contract formation; and (2) actual damages are difficult to prove or calculate at the time of formation. Under UCC §2-718(1), liquidated damages must be reasonable in light of the anticipated or actual loss and the difficulties of proof. A clause failing both tests is an unenforceable penalty and is void. Courts generally use a formation-time analysis — the fact that actual damages turn out to be significantly less than the stipulated amount does not invalidate the clause if the estimate was reasonable when made. A clause that is unreasonably large compared to any foreseeable loss is void as a penalty. Bar Tip: Remittitur (reducing an excessive verdict) is distinct from liquidated damages — remittitur is a judicial remedy, not a contractual provision.

**Rule: UCC Seller’s Remedies: Lost Profits (§2-708(2))**

When resale damages under §2-706 are inadequate to put the seller in as good a position as full performance (typical for lost-volume sellers who can supply unlimited goods), the seller may recover lost profit: the contract price minus variable costs saved by not performing, plus incidental damages.

**Rule: UCC Buyer’s Remedies — Cover, Market Price, and Accepted Goods (§§2-711 through 2-714)**

When the seller breaches, the buyer may: (1) Cover (§2-712): purchase substitute goods in good faith and without unreasonable delay, then recover the difference between the cover price and the contract price, plus incidental and consequential damages. Cover need not be perfect but must be commercially reasonable. (2) Market price differential (§2-713): if the buyer does not cover, recover the difference between the market price at the time the buyer learned of the breach (measured at the place of tender) and the contract price, plus incidental and consequential damages. (3) Accepted nonconforming goods (§2-714): recover the difference between the value of the goods as accepted and the value they would have had if conforming, plus consequential and incidental damages. The buyer must give reasonable notice of breach after discovery or be barred from any remedy (§2-607(3) (a)). Bar Tip: Cover is the buyer’s analog to the seller’s resale remedy under §2-706.

## VI. Third-Party Rights

**Rule: Third-Party Beneficiaries**

An intended beneficiary (one the parties intended to benefit) may enforce the contract once rights vest (through assent, reliance, or suit). An incidental beneficiary has no enforceable rights. The beneficiary’s rights are independent and can exceed the underlying obligation between the original parties. The promisor may assert defenses arising from the contract with the promisee. Intended beneficiaries, like all plaintiffs, must mitigate damages.

**Rule: Third-Party Beneficiary — Vesting of Rights (Detailed)**



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An intended beneficiary's rights vest (become immune from modification or rescission by the original parties) when the beneficiary: (1) materially changes position in justifiable reliance on the promise; (2) brings suit to enforce the promise; or (3) manifests assent to the promise at the request of either party. Before vesting, the original contracting parties may freely modify or rescind the contract and eliminate the beneficiary's rights by mutual agreement. After vesting, the beneficiary has an independent cause of action and the original parties cannot alter the beneficiary's rights without consent. A contract clause reserving the right to modify prevents vesting regardless of reliance.

**Rule: Assignment and Delegation**

Assignment transfers rights; delegation transfers duties. Most contract rights are assignable unless the assignment materially changes the obligor's risk or duty. Anti-assignment clauses restrict the right to assign but generally do not render the assignment void unless the clause explicitly states so. Delegation does not relieve the delegator of liability unless there is a novation.

**Rule: Delegation – Non-Delegable Duties and Novation**

Duties may not be delegated when: (1) the contract prohibits delegation (anti-delegation clauses are strictly enforced, unlike anti-assignment clauses which are construed as covenants); (2) the obligee has a substantial interest in personal performance by the original obligor (services involving special skill, trust, or reputation); or (3) delegation would materially change the obligee's expectancy. The delegator remains liable after delegation — delegation alone never releases the original obligor. A novation is a three-party agreement that substitutes a new obligor for the original, completely releasing the original obligor from liability. A novation requires the express consent of all three parties: the original obligor, the new obligor, and the obligee. Without the obligee's consent to release, the arrangement is a delegation (original party remains liable), not a novation.

**Rule: Promissory Estoppel in Subcontractor Bids**

When a subcontractor makes a bid that the general contractor foreseeably relies upon in submitting its own bid, the subcontractor's bid may be irrevocable under promissory estoppel even absent consideration, if injustice can be avoided only by enforcement.

**Rule: Promise to Pay a Debt Barred by the Statute of Limitations**

A new promise to pay a debt that has been barred by the statute of limitations is enforceable without new consideration. The moral obligation arising from the original debt serves as a substitute for consideration. Many jurisdictions require the new promise to be in writing. A partial payment on a time-barred debt may also restart the limitations period in some jurisdictions.



# CRIMINAL LAW & PROCEDURE

*A crime requires an actus reus (voluntary act or culpable omission) and mens rea (guilty mind), absent strict liability. Constitutional protections constrain police conduct, prosecution, and sentencing.*

## I. Homicide

### **Rule: Murder: Malice Aforethought**

The unlawful killing of another with malice aforethought. Malice encompasses: (1) intent to kill; (2) intent to cause serious bodily harm; (3) depraved-heart murder (extreme recklessness manifesting a wanton disregard for human life); (4) felony murder. First-degree murder: premeditated (actual reflection) and deliberate (cool mind) killing, or felony murder during an enumerated dangerous felony. Second-degree murder: intentional killing without premeditation, or depraved-heart killing.

### **Rule: Voluntary Manslaughter**

An intentional killing committed in the heat of passion caused by adequate provocation. Elements: (1) provocation that would arouse sudden, intense passion in a reasonable person; (2) actual passion; (3) no sufficient cooling time; (4) causal connection between provocation and killing. Common law recognizes finding a spouse in adultery as adequate provocation.

### **Rule: Involuntary Manslaughter**

An unlawful killing without malice. Elements: (1) criminal negligence or recklessness; or (2) a killing during commission of an unlawful act not amounting to a felony (misdemeanor manslaughter, limited to mala in se offenses).

### **Rule: Felony Murder**

A defendant is liable for any death occurring during the commission or attempted commission of an inherently dangerous felony (burglary, arson, rape, robbery, kidnapping). Elements: (1) underlying felony must be independent of the killing (merger doctrine: assault that causes death cannot serve as the predicate felony); (2) death must be a foreseeable and proximate result; (3) killing must occur during the felony or immediate flight.

### **Rule: Felony Murder — Agency Theory vs. Proximate Cause**

Jurisdictions split on liability when a non-felon (bystander, police officer, victim) kills someone during a felony. Agency theory (majority): felony murder applies only to killings committed by the defendant or a co-felon acting as the defendant's agent. If a police officer or victim kills a co-felon or bystander, the surviving felons are not liable for felony murder because the killer was not their agent. Proximate cause theory (minority): felony murder applies to any death that is a foreseeable and proximate result of the felony, regardless of who does the killing. Under this theory, if a store clerk kills a co-felon during a robbery, the surviving robber is liable. Bar Tip: Under agency theory, look at who pulled the trigger; under proximate cause theory, look at whether the death was foreseeable.

## II. Other Crimes

### **Rule: Larceny**

Trespassory taking and carrying away of another's personal property with intent to permanently deprive. Elements: (1) taking without consent; (2) asportation (slight movement suffices); (3) specific intent to permanently deprive at the time of taking. A



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later-formed intent to keep property initially taken innocently does not satisfy the intent element.

**Rule: Larceny by Trick vs. False Pretenses**

Larceny by trick: the victim intends to transfer only custody or possession, induced by fraud. False pretenses: the victim intends to transfer title or ownership, induced by a false representation of a material fact. The distinction turns on whether the victim intended to part with possession only (larceny by trick) or ownership (false pretenses).

**Rule: Embezzlement**

Fraudulent conversion of property by one who is already in lawful possession. Elements: (1) the defendant had lawful possession of another's property (distinguishing it from larceny, which requires a trespassory taking); (2) the defendant converted the property to his or her own use; and (3) the defendant acted with fraudulent intent. Key distinction from larceny: if the defendant acquires possession lawfully (as an employee, trustee, or agent) and later converts, it is embezzlement. If the defendant takes possession unlawfully from the start, it is larceny. Intent to return the property is not a defense if the defendant intended to use it in a manner inconsistent with the owner's rights.

**Rule: Robbery**

Larceny accomplished by force or threat of immediate force against the victim's person. The force must be used to effectuate the taking or retention of property. If force is used only after the taking is complete solely to facilitate escape, the crime is larceny plus assault, not robbery. Elements: (1) force sufficient to overcome resistance or induce fear; (2) from victim's person or presence; (3) intent to steal.

**Rule: Kidnapping — Asportation and Confinement**

Unlawful confinement of a person involving either movement (asportation) or concealment in a secret place. Common law required asportation — the victim must be moved a substantial distance. Modern statutes vary: some require only slight movement, others require the movement to be more than incidental to another crime (e.g., moving a robbery victim to another room may not suffice, but forcing the victim into a car does). The MPC approach requires substantial isolation or movement that increases risk of harm. False imprisonment is the lesser-included offense: unlawful confinement without the asportation element.

**Rule: Burglary**

Common law: breaking and entering the dwelling of another at nighttime with intent to commit a felony inside. Modern statutes often eliminate the requirements of breaking, nighttime, and dwelling—any unauthorized entry into a structure with felonious intent suffices. A good-faith claim of right to take specific property negates the intent to commit larceny, thereby negating burglary.

**Rule: Assault and Battery**

Criminal assault: (1) intentional creation of reasonable apprehension of imminent harmful contact; or (2) an attempted battery. Criminal battery: unlawful application of force to another's person. Aggravated assault: assault with a deadly weapon or with intent to commit a felony.

**Rule: Rape**

Nonconsensual sexual intercourse accomplished by force, threat of force, or incapacity of the victim. Statutory rape is a strict-liability offense in many jurisdictions—mistake of age is no defense.

### III. Inchoate Crimes and Parties



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**Rule: Attempt**

Specific intent to commit the target crime plus a substantial step beyond mere preparation that strongly corroborates criminal intent. Factual impossibility is not a defense; legal impossibility may be. Abandonment is a defense only if voluntary and complete before completion of the offense.

**Rule: Conspiracy**

Agreement between two or more persons to commit an unlawful act plus an overt act in furtherance (majority rule). Elements: (1) agreement (express or implied); (2) specific intent that the target crime be committed; (3) overt act. Bilateral conspiracy: requires at least two guilty minds. Withdrawal from conspiracy does not erase conspiracy liability already incurred but can prevent liability for subsequent crimes by co-conspirators if the withdrawing party affirmatively acts to thwart the conspiracy (e.g., notifying authorities, disabling prior assistance).

**Rule: Conspiracy – Wharton’s Rule**

Where a substantive crime by definition requires the participation of two persons (e.g., adultery, dueling, bigamy), there can be no conspiracy conviction if only the minimum number of participants are involved. If a third party participates beyond the minimum required, Wharton’s Rule does not apply and conspiracy charges are proper. The modern trend (and MPC approach) treats Wharton’s Rule as a judicial presumption that can be overcome by clear legislative intent to allow separate conspiracy charges.

**Rule: Conspiracy – Pinkerton Liability (Vicarious Co-Conspirator Liability)**

Under *Pinkerton v. United States*, each conspirator is liable for the substantive crimes committed by co-conspirators in furtherance of the conspiracy, provided the crimes were reasonably foreseeable. The defendant need not have participated in, known about, or agreed to the specific crime — liability attaches if the crime was a natural and probable consequence of the conspiracy. Withdrawal can terminate future Pinkerton liability but does not excuse liability for the conspiracy itself or for substantive crimes already committed. To withdraw, the defendant must affirmatively act to defeat or disavow the conspiracy’s purpose (e.g., inform co-conspirators or report to authorities). Mere cessation of activity is insufficient.

**Rule: Merger of Lesser-Included Offenses**

A defendant cannot be convicted of both a greater offense and its lesser-included offense arising from the same conduct; the lesser-included offense merges into the greater. A lesser-included offense is one whose elements are entirely contained within the elements of the greater offense. Example: assault merges into murder if both arise from the same act. The Blockburger test determines whether offenses are the "same offense" for double jeopardy: each offense must require proof of an element that the other does not.

**Rule: Speedy Trial Right (Sixth Amendment)**

The Sixth Amendment guarantees the right to a speedy trial. Courts apply the *Barker v. Wingo* balancing test: (1) length of the delay (threshold trigger, usually 1 year); (2) reason for the delay (government negligence weighs against prosecution); (3) whether the defendant asserted the right; (4) prejudice to the defendant (oppressive pretrial incarceration, anxiety, impairment of defense). The sole remedy for a violation is dismissal with prejudice. The right attaches upon arrest or formal charge.

**Rule: Entrapment Defense**

Entrapment occurs when a government agent induces a person to commit a crime they were not predisposed to commit. Subjective test (federal/majority): focuses on the defendant’s predisposition — if predisposed, entrapment fails regardless of government conduct. Objective test (minority/MPC): focuses solely on whether the government’s conduct would have induced a law-abiding person to commit the offense. The defendant



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bears the burden of production; the prosecution bears the burden of proving predisposition beyond a reasonable doubt.

**Rule: Solicitation**

Enticing, advising, or commanding another to commit a crime with the intent that the crime be committed. Solicitation merges into the completed crime. When the solicited person agrees, conspiracy is formed; when the target crime is completed, solicitation merges into the substantive offense.

**Rule: Accomplice Liability**

An accomplice is liable for the crime if they (1) with the intent to promote or facilitate the commission of the crime, (2) aid, abet, encourage, or counsel the principal. The accomplice must intend that the crime be committed (*mens rea*) and must provide actual assistance or encouragement (*actus reus*). An accomplice is liable for the crimes committed by the principal and for any other crimes that are a natural and probable consequence of the criminal enterprise. Providing tools with knowledge they may be used is insufficient without intent to further the crime. An accomplice may withdraw by wholly depriving assistance and giving timely notice before the crime is committed.

**Rule: Accomplice Liability vs. Accessory After the Fact**

An accomplice assists before or during the crime. An accessory after the fact helps the principal after the crime is complete (e.g., harboring, concealing). Mere receipt of stolen property with knowledge it was stolen is receiving stolen property, not accomplice liability.

## IV. General Principles

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**Rule: Actus Reus**

A voluntary act or a culpable omission where a legal duty exists. Duty arises from: (1) statute; (2) special relationship; (3) contract; (4) voluntary assumption of care; (5) creation of peril.

**Rule: Mens Rea**

MPC hierarchy: purpose (conscious desire), knowledge (awareness), recklessness (conscious disregard of substantial and unjustifiable risk), negligence (should be aware of risk). Common law: specific intent (purpose plus ulterior motive), general intent (awareness), and strict liability (no mental state required).

**Rule: Transferred Intent**

When a defendant intends to commit a crime against one person but accidentally harms a different person, the intent transfers from the intended victim to the actual victim. The defendant is guilty of the same crime as if the intended victim had been harmed. Transferred intent applies to: murder, battery, arson, and other specific-intent crimes. The defendant may be liable both for the completed crime against the actual victim (via transferred intent) and for attempt against the intended victim. Transferred intent does not apply across different types of crimes — intent to commit one type of crime does not transfer to a different type of crime (e.g., intent to commit battery does not transfer to support a larceny conviction).

**Rule: Mistake**

Mistake of fact: negates specific intent if genuine; negates general intent only if reasonable. Mistake of law: generally not a defense except when the defendant reasonably relies on an official interpretation or statement of the law.

**Rule: Causation**



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Actual cause: but-for the defendant's act, the result would not have occurred (or substantial factor test for concurrent causes). Proximate cause: the result must be a foreseeable consequence of the defendant's conduct.

**Rule: Self-Defense**

A person may use reasonable, proportionate force to repel an imminent threat. Deadly force is justified only to prevent death or serious bodily harm. Once the threat ends (the aggressor is incapacitated or retreats), the right to use force terminates. Duty to retreat: in retreat jurisdictions, deadly force may not be used if safe retreat is available, except in one's home (castle doctrine). Imperfect self-defense (honest but unreasonable belief of threat) may reduce murder to voluntary manslaughter.

**Rule: Self-Defense — Initial Aggressor Rule**

A person who is the initial aggressor — who provokes or initiates the confrontation — generally cannot claim self-defense. Exceptions: (1) Withdrawal: the initial aggressor can regain the right to self-defense by clearly communicating withdrawal from the fight and the other party continues to use force. (2) Escalation: if the victim of a non-deadly attack responds with deadly force, the initial aggressor (who used only non-deadly force) may use deadly force in self-defense because the victim's disproportionate response creates a new threat. Bar Tip: A defendant who starts a fistfight cannot claim self-defense unless the other person escalates to deadly force or the defendant clearly withdraws.

**Rule: Defense of Property and Use of Deadly Force**

A person may use reasonable, non-deadly force to protect property from theft, trespass, or destruction. Deadly force is never permitted solely to protect property — human life outweighs property interests. Spring guns and other mechanical devices designed to use deadly force against trespassers are prohibited because they use deadly force to protect mere property and cannot distinguish between dangerous intruders and innocent persons (Katko v. Briney). A property owner may use deadly force against an intruder only if the owner reasonably believes the intruder poses an imminent threat of death or serious bodily harm to a person (at which point the justification shifts from defense of property to self-defense or defense of others).

**Rule: Defense of Others**

A person may use reasonable force to defend a third party if the person reasonably believes the third party is in imminent danger of unlawful bodily harm and the force used is proportionate to the threat. Majority rule (modern/MPC): the defender is justified if the defender reasonably believes the third party would be entitled to use self-defense — even if the defender is mistaken about the circumstances. Minority rule (older common law): the defender "steps into the shoes" of the person defended — if the third party was actually the initial aggressor, the defender has no privilege regardless of reasonable appearances. Deadly force may be used in defense of others only when the defender reasonably believes the third party faces deadly force or serious bodily harm.

**Rule: Voluntary Intoxication**

May negate specific intent for specific-intent crimes if the defendant was so intoxicated as to be incapable of forming the required intent. Not a defense to general-intent or strict-liability crimes. Drinking to build courage ("Dutch courage") does not negate intent formed before intoxication.

**Rule: Insanity**

M'Naghten: at the time of the act, the defendant did not know the nature and quality of the act or did not know it was wrong. Irresistible impulse: the defendant could not control conduct due to mental disease. MPC: the defendant lacked substantial capacity to appreciate the criminality of conduct or conform conduct to the law.

**Rule: Duress**



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A defendant acts under duress when coerced to commit a crime by a threat of imminent death or serious bodily harm to the defendant or a close family member. Elements: (1) a threat of imminent death or serious bodily harm; (2) the threat caused the defendant to commit the crime; (3) the defendant had no reasonable opportunity to escape or resist; and (4) the defendant did not recklessly place himself in the situation. Common law: duress is never a defense to intentional murder (the defendant may not take an innocent life to save his own). MPC: duress may reduce murder to manslaughter. Duress is a defense to all other crimes, including felonies. Distinguish from necessity: duress involves a human threat; necessity involves natural circumstances.

**Rule: Necessity (Choice of Evils)**

A defendant may be justified in committing a crime if: (1) the defendant reasonably believed that the criminal act was necessary to avoid a greater harm; (2) no adequate lawful alternative existed; (3) the harm avoided was greater than the harm caused by the criminal act; and (4) the defendant did not create the emergency. Necessity is an objective defense — the court balances the harms. It is generally unavailable as a defense to intentional homicide. Distinguish from duress: necessity arises from natural forces or circumstances; duress arises from human threats.

**Rule: Strict Liability Crimes**

Due process generally requires mens rea, but strict liability is constitutional for public-welfare offenses (food safety, environmental protection, sale of alcohol to minors) when: (1) significant public danger exists; (2) penalties are relatively minor; (3) the defendant is in a position to prevent the harm. If a statute is silent on intent and serves a public-welfare purpose, courts may construe it as imposing strict liability.

**Rule: Mens Rea for Possession Offenses (Rehaif)**

Knowing possession of a firearm by a prohibited person (e.g., felon) requires the government to prove: (1) the defendant knowingly possessed a firearm or ammunition; and (2) the defendant knew of their status as a prohibited person (e.g., knew they had been convicted of a felony). Under *Rehaif v. United States* (2019), the knowledge requirement extends to the defendant's status, not just to the physical act of possession.

**Rule: Impossibility Defense**

Factual impossibility (circumstances preventing completion) is never a defense to attempt or conspiracy. Legal impossibility (what the defendant intended was not actually a crime) can be a defense. In bilateral conspiracy, if one party is merely feigning agreement, no conspiracy exists because there are not two guilty minds.

## V. Constitutional Protection of the Accused

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### A. Fourth Amendment: Search and Seizure

**Rule: Reasonable Expectation of Privacy**

A search occurs when the government violates a person's reasonable expectation of privacy (Katz test): (1) subjective expectation of privacy; (2) expectation that society recognizes as reasonable. The Fourth Amendment protects only against government searches; private searches without government direction do not implicate the Amendment. No reasonable expectation of privacy in garbage left for collection in an area accessible to the public (*California v. Greenwood*).

**Rule: Warrant Requirement and Exceptions**

Warrants require probable cause, particularity in describing the place to be searched and items to be seized, and issuance by a neutral magistrate. Exceptions: (1) Search incident to arrest (person and immediate grabbing area; for vehicles, the passenger compartment the arrestee is unsecured or there is reason to believe evidence of the arrest offense is in



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the vehicle per *Arizona v. Gant*); (2) Automobile exception (probable cause to believe vehicle contains contraband or evidence); (3) Consent (voluntary and knowing); (4) Plain view (officer lawfully present, incriminating nature immediately apparent); (5) Exigent circumstances (probable cause plus genuine emergency such as imminent destruction of evidence, where police did not create the exigency); (6) Protective sweep (reasonable suspicion of danger during arrest in a home); (7) Terry stop and frisk (reasonable suspicion of criminal activity for a stop; reasonable belief the suspect is armed and dangerous for a frisk).

**Rule: Fourth Amendment — Open Fields, Curtilage, and Consent Variants**

Open fields doctrine: areas beyond the curtilage of a home (open fields, wooded areas) are not protected by the Fourth Amendment, even if fenced or posted with “No Trespassing” signs (*Oliver v. United States*). Curtilage (the area immediately surrounding the home) is protected; courts apply the Dunn factors: proximity to the home, enclosure, use of the area, and steps taken to protect from observation. Consent: (1) Co-tenant consent (*Georgia v. Randolph*): if one co-tenant consents but a physically present co-tenant objects, the objection controls and the search is invalid. If the objecting co-tenant is absent (even if removed by police), consent of the remaining tenant is valid (*Fernandez v. California*). (2) Apparent authority (*Illinois v. Rodriguez*): police may reasonably rely on consent from a person who appears to have authority over the premises, even if that person actually lacks authority. Checkpoints (*Indianapolis v. Edmond*): suspicionless seizures at fixed checkpoints are permitted only for purposes closely related to border enforcement, sobriety, or license checks — not for general crime control. Special needs: searches in contexts beyond normal law enforcement (public schools, government workplaces, drug testing of certain employees/students) require balancing governmental interest against privacy expectation (*New Jersey v. T.L.O.*).

**Rule: Fourth Amendment — Warrant Exceptions (Detailed)**

The principal exceptions to the warrant requirement: (1) Search incident to arrest (*Chimel/Robinson*): officer may search the arrestee’s person and the area within immediate reach (“wingspan”); for vehicles, may search passenger compartment only if the arrestee is unsecured and within reaching distance, or if it is reasonable to believe evidence of the arrest offense is in the vehicle (*Arizona v. Gant*). (2) Automobile exception (*Carroll*): if officers have probable cause to believe a vehicle contains evidence of a crime, the entire vehicle and any container within it may be searched without a warrant. (3) Plain view: an officer lawfully present may seize evidence in plain view if its incriminating nature is immediately apparent. (4) Consent: voluntary consent to search eliminates the warrant requirement. (5) Exigent circumstances: hot pursuit, destruction of evidence, or danger to persons. (6) Terry stop and frisk: reasonable suspicion of criminal activity permits a brief stop; reasonable belief the suspect is armed permits a pat-down of outer clothing. (7) Inventory searches: routine inventory of impounded vehicles or arrestee’s belongings pursuant to standardized procedures.

**Rule: Exclusionary Rule**

Evidence obtained through an illegal search or seizure must be suppressed. Derivative evidence (fruit of the poisonous tree) is also inadmissible unless an exception applies: (1) inevitable discovery; (2) independent source; (3) attenuation of the taint. Good-faith exception (*United States v. Leon*): evidence is admissible if officers reasonably relied on a facially valid warrant later found defective.

**Rule: Grand Jury Proceedings — Exclusionary Rule Does Not Apply**

The exclusionary rule does not apply in grand jury proceedings. A grand jury may consider evidence obtained through an unconstitutional search or seizure (*United States v. Calandra*). This means a witness cannot refuse to answer grand jury questions on the ground that the questions are based on illegally obtained evidence. The rationale is that the exclusionary rule’s deterrent purpose does not justify the cost of impeding the grand jury’s investigative function. Other contexts where the exclusionary rule does not apply:



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parole revocation hearings, civil deportation proceedings, civil tax proceedings, and impeachment of a testifying defendant (evidence excluded from the case-in-chief may be used on cross-examination).

**Rule: Fruit of the Poisonous Tree Doctrine**

Evidence derived from an unconstitutional search, seizure, or interrogation is inadmissible as "fruit of the poisonous tree" (*Wong Sun v. United States*). Exceptions: (1) Independent source — evidence obtained from a source wholly independent of the illegality; (2) Inevitable discovery — evidence that would have been discovered lawfully through routine procedures; (3) Attenuation — the connection between the illegality and the evidence is sufficiently remote or attenuated by intervening circumstances (consider temporal proximity, intervening events, and the flagrancy of the violation).

**Rule: Consent Obtained by Deception**

Consent to enter premises is invalid if obtained through deception that undermines the voluntary nature of consent. However, police may use undercover tactics and deception about identity. The key question is whether the deception vitiated consent entirely or merely concerned the officer's identity or purpose.

**B. Fifth Amendment**

**Rule: Miranda Rights and Custodial Interrogation**

Miranda warnings are required when a suspect is subjected to custodial interrogation. Custody: a reasonable person in the suspect's position would not feel free to leave. Interrogation: words or actions police should know are reasonably likely to elicit an incriminating response. Warnings: (1) right to remain silent; (2) statements may be used against the suspect; (3) right to an attorney; (4) right to appointed counsel if indigent. Invocation must be unambiguous. After invocation of the right to counsel, police must cease interrogation until counsel is provided (*Edwards rule*). A significant break in custody (approximately two weeks) may allow resumed questioning about an unrelated crime with fresh Miranda warnings.

**Rule: Public Safety Exception to Miranda (*New York v. Quarles*)**

Statements obtained without Miranda warnings are admissible if prompted by an objectively reasonable concern for public safety. The exception applies when officers ask questions reasonably prompted by an immediate threat to safety (e.g., the location of a discarded weapon in a public area). The officer's subjective motivation is irrelevant; the test is whether a reasonable officer would conclude there was an immediate danger. The exception is narrow and applies only to the specific questions needed to address the safety concern.

**Rule: Miranda — Subsequent Interrogation After Invocation (*Shatzer 14-Day Rule*)**

Once a suspect invokes the right to counsel during custodial interrogation, police must cease questioning and cannot reinitiate interrogation until counsel has been provided (*Edwards v. Arizona*). However, if the suspect is released from custody and returns to normal life for at least 14 days, police may reinitiate contact and seek a new Miranda waiver without counsel present (*Maryland v. Shatzer*). The 14-day break-in-custody rule provides a bright-line test: the break must involve a return to the suspect's normal life (release from custody), not merely transfer between facilities. If the suspect invokes only the right to silence (not counsel), police must "scrupulously honor" that invocation but may re-approach after a significant time and fresh warnings (*Michigan v. Mosley*).

**Rule: Double Jeopardy**

The Fifth Amendment bars retrial for the same offense after jeopardy attaches. Attachment: jury sworn (jury trial); first witness sworn (bench trial); defendant accepts a plea. Blockburger test for same offense: offenses are different only if each requires proof of an element the other does not. Lesser-included offenses are the same offense.



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Exceptions: (1) Dual sovereignty doctrine (separate prosecutions by different sovereigns); (2) mistrial with manifest necessity (hung jury, unavoidable circumstances). Manifest necessity must reflect a high degree of need; the judge should consult with the parties before declaring a mistrial.

**Rule: Privilege Against Self-Incrimination**

Applies only to natural persons, not corporations or other collective entities. A civil litigant who voluntarily testifies waives the privilege regarding matters within the scope of testimony on direct examination; cross-examination on related topics does not violate the privilege.

**Rule: Burden of Proof and Affirmative Defenses**

Due process requires the prosecution to prove every element of the crime beyond a reasonable doubt. States may require defendants to prove affirmative defenses (such as self-defense or insanity) by a preponderance of the evidence, as long as the prosecution still bears the burden on all elements of the offense.

## C. Sixth Amendment

**Rule: Right to Counsel**

Attaches at the initiation of adversarial judicial proceedings (arraignment, preliminary hearing, indictment) and applies at all critical stages thereafter, including post-indictment lineups, trial, sentencing, and first appeal of right. The right is offense-specific: it applies only to the charged offense, and the government may not deliberately elicit statements about the charged offense without counsel present. Pre-indictment lineups and photo arrays do not require counsel.

**Rule: Ineffective Assistance of Counsel (Strickland)**

Requires: (1) deficient performance—attorney errors falling below an objective standard of reasonableness; and (2) prejudice—a reasonable probability that but for the errors, the outcome would have been different. Both prongs must be satisfied.

**Rule: Right to Self-Representation (Faretta)**

A defendant has the right to represent himself if the waiver of counsel is knowing, intelligent, and voluntary. The court must ensure the defendant understands the disadvantages of self-representation and that the waiver is unequivocal.

**Rule: Jury Size and Unanimity**

The Sixth Amendment requires juries of at least six members. Six-person juries must be unanimous. Larger juries may permit nonunanimous verdicts under some circumstances, though the Supreme Court has significantly narrowed this (*Ramos v. Louisiana* requiring unanimity for serious crimes).

**Rule: Right to Public Trial**

The Sixth Amendment guarantees a public trial and the right to be present at all critical stages, including jury selection (*voir dire*). Partial closure may be permitted for practical reasons if justified by an overriding interest and the defendant is not prejudiced.

## D. Eighth Amendment

**Rule: Sentencing of Juveniles**

Mandatory life without parole for juveniles violates the Eighth Amendment (*Miller v. Alabama*). For non-homicide offenses, life without parole for juveniles is categorically barred (*Graham v. Florida*). For homicide offenses, individualized sentencing considering the defendant's youth and attendant characteristics is required.

**Rule: Jury Fact-Finding for Sentence Enhancement (Apprendi)**



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Any fact (other than prior convictions) that increases the maximum sentence beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The government cannot circumvent this requirement by labeling the fact a sentencing factor.

## **E. Miscellaneous Constitutional Protections**

### **Rule: Independent State Constitutional Grounds**

State courts may interpret their own constitutions to provide greater protection than the federal Constitution. When a state-court ruling rests on adequate and independent state-law grounds, the U.S. Supreme Court lacks jurisdiction to review it.

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# EVIDENCE

*The Federal Rules of Evidence govern admissibility in federal courts. Key themes: relevance, hearsay and its exceptions, character evidence, privileges, impeachment, and the best evidence rule.*

## I. Relevance and Exclusion

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### **Rule: Relevance (FRE 401)**

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. Low threshold; the fact need only be material to a claim or defense.

### **Rule: Exclusion for Prejudice (FRE 403)**

Relevant evidence may be excluded if its probative value is substantially outweighed by: unfair prejudice, confusion of issues, misleading the jury, undue delay, waste of time, or needless cumulative evidence.

### **Rule: Subsequent Remedial Measures (FRE 407)**

Measures taken after an injury that would have made the injury less likely are not admissible to prove negligence, culpable conduct, a defect, or the need for a warning. However, they are admissible to prove feasibility of precautionary measures when controverted, or for impeachment. When the defendant claims a safer design was not feasible, evidence of subsequent changes becomes admissible on feasibility.

### **Rule: Plea Discussions and Related Statements (FRE 410)**

The following are inadmissible against the defendant in any criminal or civil proceeding: (1) withdrawn guilty pleas; (2) nolo contendere pleas; (3) statements made during plea discussions with a government attorney that do not result in a guilty plea or result in a later-withdrawn plea. Exception: statements are admissible in perjury proceedings and when another statement from the same plea discussion has been introduced and fairness requires consideration of both. Waiver of FRE 410 protection is enforceable if knowing and voluntary.

### **Rule: Offers in Compromise (FRE 408)**

Statements made and offers given during settlement negotiations are inadmissible to prove the validity or amount of a disputed claim. Does not apply if offered for another purpose, such as proving bias or obstruction.

### **Rule: Offers to Pay Medical Expenses (FRE 409)**

Offers or payments of medical expenses are inadmissible to prove liability. Unlike FRE 408, accompanying statements of fault are not protected and may be severed and admitted.

### **Rule: Insurance Coverage (FRE 411)**

Evidence of liability insurance is inadmissible to prove negligence or wrongful conduct but admissible for other purposes such as proving ownership, control, or bias.

## II. Character Evidence

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### **Rule: General Rule (FRE 404(a))**

Character evidence is inadmissible to prove action in conformity on a particular occasion. In criminal cases: (1) the accused may offer evidence of a pertinent character trait, opening the door for prosecution rebuttal; (2) the accused may offer evidence of the victim's pertinent trait (e.g., violence in self-defense cases). In civil cases, character evidence is inadmissible unless character is an essential element of the claim or defense.



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**Rule: Methods of Proving Character (FRE 405)**

When character evidence is admissible, it may be proved by reputation or opinion testimony on direct examination. Specific instances of conduct may be inquired into on cross-examination. When character is an essential element, specific instances may be proved on direct.

**Rule: Other Acts Evidence (FRE 404(b)) – MIMIC**

Evidence of prior bad acts is inadmissible to show propensity but admissible to prove: Motive, Intent, absence of Mistake or accident, Identity, or Common plan/scheme. The prosecution must provide reasonable notice in criminal cases, and FRE 403 balancing still applies.

**Rule: Habit and Routine Practice (FRE 406)**

Evidence of a person's habit or an organization's routine practice is admissible to prove conformity on a particular occasion. Habit requires regularity and near-automatic, semi-reflexive behavior (e.g., always locking a door, always using a signal before turning).

**Rule: Character Evidence in Civil Cases (FRE 404(a))**

In civil cases, character evidence is generally inadmissible to prove conduct in conformity therewith. Exception: character evidence is admissible when character is an essential element of the claim or defense (e.g., negligent entrustment, defamation where truth is asserted, child custody). When character is an essential element, it may be proved by reputation, opinion, or specific instances of conduct (FRE 405(b)).

**Rule: Prior Sexual Misconduct of Defendant (FRE 413-415)**

In sexual assault or child molestation cases, prior similar acts by the defendant are admissible for any relevant purpose, including propensity. FRE 403 balancing still applies.

**Rule: Past Sexual Conduct of Victim (FRE 412 – Rape Shield)**

In sex offense cases, the victim's sexual behavior or predisposition is generally inadmissible. Criminal exceptions: specific instances to prove an alternative source of physical evidence, or to prove consent with the accused. Civil exception: if probative value substantially outweighs prejudice. Notice required.

### III. Witnesses

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**Rule: Competency (FRE 601)**

Every person is competent to testify unless otherwise provided. In diversity cases, state law governs (e.g., dead man's statutes). A witness must understand the oath and have the ability to communicate.

**Rule: Dead Man's Statute**

Under state evidence rules (applied in federal diversity cases via FRE 601), an interested party may be barred from testifying about communications or transactions with a person who has since died, when the testimony would be adverse to the decedent's estate. The purpose is to prevent fraud where the deceased cannot rebut the testimony. Varies by jurisdiction; some states have abolished it.

**Rule: Personal Knowledge (FRE 602)**

A witness may testify only to matters within their personal knowledge. Foundation must be laid showing the witness perceived the matter.

**Rule: Lay Opinion (FRE 701)**

Lay witness opinion is admissible if: (1) rationally based on the witness's perception; (2) helpful to the trier of fact; (3) not based on scientific, technical, or specialized knowledge.



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Common examples: speed, intoxication, identity, emotional state, handwriting identification.

**Rule: Scope of Cross-Examination (FRE 611(b))**

Cross-examination is limited to: (1) the subject matter of the direct examination, and (2) matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination. When cross-examination exceeds the scope, the examining party must use non-leading questions. The scope limitation applies to topics, not specific facts — counsel may explore any facts relevant to topics covered on direct.

**Rule: Leading Questions (FRE 611(c))**

Leading questions (those suggesting the desired answer) are generally prohibited on direct examination but permitted on cross-examination. Exceptions allowing leading on direct: (1) preliminary or foundational matters; (2) witnesses with difficulty communicating (e.g., children); (3) hostile witnesses, adverse parties, or witnesses identified with an adverse party. The court has broad discretion to control the mode of questioning.

**Rule: Refreshing Recollection (FRE 612)**

A witness may use any writing or item to refresh memory while or before testifying. The adversary may inspect the item, cross-examine on it, and introduce relevant portions. The item itself is not admitted unless it qualifies as past recollection recorded (FRE 803(5)).

**Rule: Exclusion of Witnesses (FRE 615)**

At a party's request or sua sponte, the court shall exclude witnesses so they do not hear other testimony. Exceptions: parties, designated party representatives, persons essential to the presentation (e.g., case agents), and persons authorized by statute.

## IV. Expert Testimony

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**Rule: Qualifications and Reliability (FRE 702, Daubert)**

An expert qualified by knowledge, skill, experience, training, or education may testify if: (1) testimony is based on sufficient facts or data; (2) testimony is the product of reliable principles and methods (testable, peer-reviewed, known error rate, general acceptance); (3) the expert has reliably applied those methods to the facts. The judge serves as gatekeeper.

**Rule: Basis of Expert Opinion (FRE 703)**

An expert may base an opinion on facts or data reasonably relied upon by experts in the field, even if those facts are not independently admissible. Otherwise-inadmissible underlying facts may be disclosed to the jury only if the court determines their probative value in evaluating the opinion substantially outweighs their prejudicial effect.

**Rule: Ultimate Issue (FRE 704)**

Expert testimony on an ultimate issue is generally permissible. Exception: in criminal cases, an expert may not state an opinion as to whether the defendant had the mental state constituting an element of the crime (FRE 704(b)).

## V. Impeachment and Rehabilitation

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**Rule: Prior Inconsistent Statements (FRE 613)**

A prior inconsistent statement is admissible to impeach credibility. Extrinsic evidence of the statement is admissible if the witness is given an opportunity to explain or deny. If the prior statement was made under oath at a prior proceeding, it is also admissible as substantive evidence under FRE 801(d)(1)(A).



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**Rule: Bias, Interest, and Motive**

Evidence of a witness's bias, interest, or motive to lie is always admissible and is not subject to FRE 403 balancing due to its fundamental importance. Extrinsic evidence of bias is permitted; the impeacher need not accept the witness's denial.

**Rule: Prior Convictions (FRE 609)**

Admissible to impeach: (1) felonies—subject to FRE 403 balancing (for criminal defendants, probative value must outweigh prejudice); (2) crimes of dishonesty or false statement—automatically admissible regardless of the grade of the offense. Ten-year limit: older convictions admissible only if probative value substantially outweighs prejudice and advance notice is given.

**Rule: Specific Instances of Conduct (FRE 608(b))**

On cross-examination, specific instances of a witness's conduct probative of truthfulness or untruthfulness may be inquired into. Extrinsic evidence is not permitted; the cross-examiner must accept the witness's answer. A good-faith basis for the inquiry is required.

**Rule: Character for Truthfulness (FRE 608(a))**

Reputation or opinion evidence of a witness's character for truthfulness or untruthfulness is admissible, but only after the witness's character for truthfulness has been attacked. Bolstering before an attack is impermissible.

**Rule: Rehabilitation of Impeached Witnesses**

After impeachment, rehabilitation may include: (1) explanation on redirect; (2) character evidence for truthfulness under FRE 608(a); (3) prior consistent statement to rebut a charge of recent fabrication, improper influence, or motive (FRE 801(d)(1)(B))—this is also admissible as substantive evidence.

**Rule: Impeachment of Hearsay Declarants (FRE 806)**

When a hearsay statement is admitted, the declarant's credibility may be attacked and rehabilitated by any method available as if the declarant had testified.

## VI. Privileges

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**Rule: Attorney-Client Privilege**

Protects confidential communications between a client and attorney made for the purpose of obtaining legal advice. Waived if disclosed to third parties. Crime-fraud exception: no privilege when the client seeks legal assistance to further a crime or fraud. Joint-client doctrine: when two parties consult the same attorney on a matter of common interest, neither can claim the privilege against the other in subsequent litigation between them.

**Rule: Spousal Privileges**

Testimonial (spousal immunity): in criminal cases, the witness-spouse may refuse to testify adversely against the other spouse. Applies only during a valid marriage. Marital communications privilege: protects confidential communications made during the marriage in all cases; survives divorce but does not cover pre-marriage communications. Exceptions: joint crime, spousal abuse.

**Rule: Physician/Psychotherapist-Patient Privilege**

Protects confidential communications made for the purpose of diagnosis or treatment. Exceptions: court-ordered examinations, dangerous-patient situations, and some criminal proceedings. In federal court, recognized under FRE 501; state law governs in diversity cases.

**Rule: Religious Beliefs (FRE 610)**

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Evidence of a witness's religious beliefs or opinions is not admissible to show that the witness's credibility is impaired or enhanced.

## VII. Hearsay

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### **Rule: Definition (FRE 801(c))**

Hearsay is an out-of-court statement (oral, written, or nonverbal conduct intended as an assertion) offered to prove the truth of the matter asserted. Not hearsay if offered for a non-truth purpose: effect on listener, verbal act (legally operative words), circumstantial evidence of the declarant's state of mind.

### **Rule: Prior Statements by Witness (FRE 801(d)(1))**

Non-hearsay: (1) prior inconsistent statement made under oath at a prior proceeding; (2) prior consistent statement rebutting a charge of fabrication, improper influence, or motive; (3) prior identification of a person. The declarant must testify and be subject to cross-examination.

### **Rule: Statements of a Party-Opponent (FRE 801(d)(2))**

Non-hearsay: the opposing party's own statement, an adoptive admission (party heard the statement and manifested belief in its truth), an authorized statement, an agent or employee statement within the scope of the relationship made during the relationship, or a co-conspirator statement made in furtherance of the conspiracy.

### **Rule: Multiple Hearsay (FRE 805)**

Hearsay within hearsay is admissible only if each layer falls within an exception or exclusion.

## **Hearsay Exceptions — Declarant Availability Immaterial (FRE 803)**

### **Rule: Present Sense Impression (803(1))**

A statement describing or explaining an event or condition made while or immediately after the declarant perceived it.

### **Rule: Excited Utterance (803(2))**

A statement relating to a startling event made while the declarant was under the stress of excitement caused by the event. The statement need not be contemporaneous if the declarant remains in an excited state.

### **Rule: Then-Existing State of Mind (803(3))**

A statement of the declarant's then-existing mental, emotional, or physical condition. Admissible to prove the condition itself or the declarant's future conduct. Not admissible to prove memory or belief about a past event (exception: statements relating to the execution or terms of a will).

### **Rule: Statements for Medical Diagnosis or Treatment (803(4))**

Statements describing medical history, past or present symptoms, pain, sensations, or their inception or cause, if reasonably pertinent to diagnosis or treatment. Applies regardless of whether the statement is made to a physician—statements to any person (e.g., ambulance driver, family member) qualify if made for the purpose of obtaining medical care. Statements identifying an assailant are admissible if pertinent to treatment.

### **Rule: Past Recollection Recorded (803(5))**

A record concerning a matter the witness once knew but now cannot recall sufficiently to testify, made or adopted when the memory was fresh and accurately reflecting the witness's knowledge. Read into evidence but not received as an exhibit unless offered by the adverse party.



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**Rule: Business Records (803(6))**

A record of an act, event, condition, or opinion kept in the regular course of business, made at or near the time by someone with knowledge, if it was the regular practice to make such a record. Foundation by a qualified custodian or certification under FRE 902(11). Excludes records prepared primarily for litigation.

**Rule: Public Records (803(8))**

Records of a public office setting forth: (1) the office's activities; (2) matters observed pursuant to a duty to report (excluding law enforcement observations against a criminal defendant); (3) factual findings from a legally authorized investigation (in civil cases or against the government in criminal cases). Trustworthiness factors: source of information, timeliness, nature of investigation.

**Rule: Absence of Public Record (FRE 803(10))**

Testimony or a certification from the custodian of public records that a diligent search failed to disclose a particular record or entry is admissible to prove that a matter did not occur or a condition did not exist, if a public office regularly kept records for such matters. Used to prove the non-occurrence or non-existence of a fact that would normally be recorded. In criminal cases, the prosecution must provide written notice and opportunity to contest before offering the certification.

**Rule: Learned Treatises (803(18))**

Statements in published treatises, periodicals, or pamphlets established as reliable authority (by testimony or judicial notice). Read into evidence on direct or cross of an expert but not received as an exhibit.

**Hearsay Exceptions – Declarant Unavailable (FRE 804)****Rule: Unavailability Defined (804(a))**

A declarant is unavailable if: (1) exempt by privilege; (2) refuses to testify despite a court order; (3) testifies to lack of memory; (4) is dead or suffering from physical or mental illness; (5) is absent and the proponent has been unable to procure attendance by process or reasonable means. **P-R-L-D-A** (Privilege, Refusal, Lack of memory, Death/infirmary, Absence + diligence). Forfeiture by wrongdoing prevents abuse of these exceptions by wrongdoing. Proponent killed the witness → forfeiture → no exception

**Rule: Former Testimony (804(b)(1))**

Testimony given at a prior hearing or deposition, if the party against whom it is offered (or a predecessor in interest in civil cases) had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

**Rule: Statement Against Interest (804(b)(3))**

A statement so contrary to the declarant's pecuniary, proprietary, or penal interest that a reasonable person would not have made it unless they believed it was true. Corroborating circumstances are required if the statement is offered to exculpate an accused. Distinguish from party-opponent admissions (FRE 801(d)(2)), which require neither unavailability nor a statement against interest.

**Rule: Dying Declaration (FRE 804(b)(2))**

A statement made by a declarant who believes their death is imminent, concerning the cause or circumstances of their believed impending death. Requirements: (1) the declarant must be unavailable (though not necessarily dead at trial); (2) the declarant must have believed death was imminent at the time of the statement; (3) the statement must concern the cause or circumstances of the declarant's believed impending death. Admissible only



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in homicide prosecutions and civil cases. The declarant's actual death is not required, only unavailability.

**Rule: Residual Exception (FRE 807)**

A statement with equivalent circumstantial guarantees of trustworthiness, offered as evidence of a material fact, more probative than other reasonably obtainable evidence. Notice to the adverse party is required.

## VIII. Authentication and Best Evidence

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**Rule: Authentication (FRE 901)**

The proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Methods include testimony of a witness with knowledge, distinctive characteristics, chain of custody, and the reply doctrine (a letter purporting to respond to an earlier communication is authenticated by its content). Gaps in the chain of custody go to weight, not admissibility, unless so significant as to raise substantial doubts about authenticity.

**Rule: Self-Authentication (FRE 902)**

No extrinsic evidence of authenticity needed for: certified copies of public records, acknowledged documents, official publications, newspapers, trade inscriptions, and certified business records.

**Rule: Best Evidence Rule (FRE 1002-1006)**

To prove the content of a writing, recording, or photograph, the original is required. Duplicates are admissible unless authenticity is genuinely questioned or it would be unfair. Excuses for non-production: original lost or destroyed not in bad faith, unobtainable, or content is collateral. Summaries (FRE 1006) of voluminous records are admissible if originals are available for inspection.

**Rule: Completeness Rule (FRE 106)**

When a party introduces part of a writing or recorded statement, the adverse party may require the introduction of any other part—or any other writing or statement—that in fairness ought to be considered contemporaneously.

## IX. Proceedings, Judicial Notice, and Presumptions

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**Rule: Judicial Notice (FRE 201)**

The court may take judicial notice of a fact not subject to reasonable dispute that is either generally known within the jurisdiction or capable of accurate determination from reliable sources. In civil cases, the jury must accept the noticed fact as conclusive. In criminal cases, the jury may but is not required to accept it.

**Rule: Presumptions (FRE 301)**

In civil cases, a presumption shifts the burden of production to the opponent. Once the opponent introduces evidence rebutting the presumed fact, the presumption is satisfied ("bursting bubble" approach). The burden of persuasion remains with the original proponent.

**Rule: Confrontation Clause (Sixth Amendment)**

In criminal cases, testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine (*Crawford v. Washington*).



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Testimonial statements include those made with the primary purpose of creating evidence for prosecution (e.g., formal police interrogations, affidavits, forensic lab reports prepared for trial). Non-testimonial statements are governed by ordinary hearsay rules.

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# REAL PROPERTY

*Covers ownership interests, landlord-tenant law, land transactions, and security interests. The MBE tests approximately one-fifth of questions on each of the five main categories.*

## I. Ownership of Real Property

### A. Present Estates and Future Interests

#### **Rule: Fee Simple**

Fee simple absolute: complete ownership of infinite duration, freely alienable. Fee simple determinable: automatically terminates upon occurrence of a stated event ("so long as," "while," "during"); grantor retains a possibility of reverter. Fee simple subject to condition subsequent: does not automatically terminate; grantor retains a right of entry that must be affirmatively exercised ("but if," "provided that," "on condition that"). Fee simple subject to executory limitation: shifts to a third party upon the occurrence of a stated event.

#### **Rule: Life Estates**

Measured by the life of the tenant or another (pur autre vie). Life tenant may use the property but must not commit waste: voluntary (affirmative acts damaging property), permissive (failure to maintain), or ameliorative (changes increasing value—generally allowed if no objection). Remainders or reversions follow a life estate.

#### **Rule: Future Interests**

Reversions: retained by the grantor when conveying a lesser estate. Remainders: created in a third party to take effect at the natural termination of the preceding estate. Vested remainder: no condition precedent and ascertained taker. Contingent remainder: subject to an unresolved condition or unascertained taker. Executory interests: divest a preceding estate upon a condition (shifting: from transferee; springing: from grantor). Subject to the Rule Against Perpetuities.

#### **Rule: Class Gifts and Rules of Construction**

#### **Rule: Rule in Shelley's Case and Doctrine of Worthier Title**

Rule in Shelley's Case: if a conveyance creates a life estate in A with a remainder to A's heirs, the remainder merges with the life estate to give A a fee simple absolute. Abolished in most jurisdictions but still tested as a historical doctrine. Doctrine of Worthier Title: a remainder to the grantor's own heirs is treated as a reversion in the grantor rather than a remainder in the heirs. The inter vivos branch operates as a rule of construction (rebuttable); the testamentary branch is largely abolished.

Class gifts open when the first member qualifies and close under the rule of convenience when any member is entitled to immediate possession. Rule Against Perpetuities: a future interest is void unless it must vest, if at all, within 21 years of a life in being at creation. Cy pres: courts may reform charitable trusts if the original purpose becomes impossible.

### B. Cotenancy

#### **Rule: Types**

Tenancy in common: default form; undivided interests, no survivorship, freely alienable. Joint tenancy: undivided interests with right of survivorship; requires four unities (time, title, interest, possession); created by express language ("as joint tenants with right of survivorship").

#### **Rule: Rights, Obligations, and Severance**



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Each cotenant is entitled to possess the whole. Accountable for profits from exclusive use. Ouster triggers an accounting. Contribution required for necessary repairs, taxes, and mortgage payments. Partition: judicial division in kind (preferred) or sale and division of proceeds. Severance of joint tenancy (converts to tenancy in common): any act breaking a unity, such as a conveyance; a will does not sever.

## C. Landlord-Tenant Law

### **Rule: Types of Tenancies**

Term of years: fixed period, terminates automatically. Periodic tenancy: continues until notice (notice period equals the rental period, up to six months). Tenancy at will: no fixed duration, terminable at any time. Tenancy at sufferance: holdover tenant; landlord may evict or hold to a new term.

### **Rule: Possession, Rent, and Transfers**

Landlord must deliver possession (majority: actual possession). Tenant pays rent; breach may excuse rent. Assignment: full transfer of the remaining term; assignee is in privity of estate with the landlord. Sublease: transfer of less than the full remaining term; sublessee is not in privity with the landlord. Consent clauses: if the lease is silent on assignments, they are freely permitted; if consent is required, it may not be unreasonably withheld.

### **Rule: Termination**

Surrender: mutual agreement to end the lease early. Abandonment: tenant vacates without justification; landlord may accept surrender, relet on tenant's behalf, or (in a minority of jurisdictions) leave the premises vacant and sue for rent. Eviction: actual eviction (landlord physically excludes tenant) or constructive eviction (landlord's breach renders premises substantially unsuitable).

### **Rule: Implied Warranty of Habitability (Residential Leases)**

The landlord impliedly warrants that residential premises are fit for human habitation and comply with applicable housing codes. This warranty is non-waivable. The tenant must give the landlord notice and a reasonable opportunity to repair before exercising remedies. Remedies include: withholding rent or paying reduced rent reflecting the diminished rental value, repairing and deducting costs from rent, terminating the lease, or suing for damages. The warranty covers conditions such as lack of heat, plumbing, or essential services, and serious building code violations.

## II. Rights in Land

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### **Rule: Deed Delivery**

A deed is effective only upon delivery with the present intent to make an irrevocable transfer. Physical handover is evidence of delivery but is not required; retention of the deed by the grantor raises a presumption of non-delivery. Conditional delivery to a third party (escrow) is permissible.

## B. Restrictive Covenants

### **Rule: Real Covenants Running with the Land**

A real covenant is a promise concerning the use of land that runs with the land at law, allowing successors to enforce or be bound. For the burden to run: (1) intent that the covenant bind successors; (2) the covenant touches and concerns the land (affects use, value, or enjoyment); (3) horizontal privity between original parties (mutual interest in the same land, such as grantor-grantee); (4) vertical privity between the original covenantor and successor (successor holds the entire estate); (5) the successor has notice (actual, constructive, or inquiry). For the benefit to run, all elements except horizontal privity are required.



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**Rule: Equitable Servitudes**

An equitable servitude is a covenant enforced in equity by injunction. Requirements for the burden to run: (1) intent to bind successors; (2) touch and concern the land; (3) notice to the successor (actual, constructive, or inquiry). Neither horizontal nor vertical privity is required for equitable servitudes, making them easier to enforce than real covenants. A common scheme or general plan for a subdivision may impose implied reciprocal servitudes on all lots, even those whose deeds lack express restrictions, if the purchaser had notice.

**Rule: Termination of Covenants and Servitudes**

Covenants and equitable servitudes may be terminated by: (1) release by all benefited parties; (2) merger of the benefited and burdened estates; (3) abandonment (conduct by the benefited party indicating intent to relinquish); (4) changed conditions (the neighborhood has changed so substantially that enforcement is inequitable); (5) condemnation of the burdened property; (6) estoppel (benefited party acted inconsistently and the burdened party relied to their detriment). Mere non-enforcement alone does not constitute abandonment without additional evidence of intent.

**C. Easements, Profits, and Licenses****Rule: Easement: Nature and Types**

An easement is a nonpossessory right to use another's land. Appurtenant easement: benefits the holder in the use of a specific parcel (the dominant tenement) and burdens the servient tenement; passes automatically with the dominant estate. Easement in gross: benefits the holder personally, not in connection with land ownership; commercial easements in gross are transferable, but personal easements in gross generally are not. Affirmative easements allow entry and use; negative easements restrict the servient owner's use (limited at common law to light, air, support, and stream flow).

**Rule: Creation of Easements**

Express: created by grant or reservation in a writing that satisfies the Statute of Frauds. Implied from prior use (quasi-easement): arises when (1) a single parcel is divided, (2) prior to division an apparent and continuous use existed, and (3) the use is reasonably necessary for enjoyment of the dominant parcel. Implied by necessity: arises when (1) a common owner divides property and (2) one parcel is left without access to a public road; strict necessity is required, and the easement lasts only as long as the necessity exists. Prescriptive easement: acquired by use that is (1) open and notorious, (2) adverse and hostile (without permission), (3) continuous for the statutory period, and (4) under claim of right. Unlike adverse possession, exclusivity is not required for prescriptive easements.

**Rule: Scope, Transfer, and Termination of Easements**

Scope is limited to the original intended use; the holder may not unreasonably increase the burden on the servient estate. An appurtenant easement passes automatically with the dominant estate and cannot be separated from it. Termination methods: (1) release (written instrument); (2) merger (dominant and servient estates come under common ownership); (3) abandonment (nonuse plus affirmative acts manifesting intent to abandon; mere nonuse alone is insufficient); (4) estoppel (servient owner reasonably relies on the easement holder's conduct); (5) prescription (servient owner blocks use for the statutory period); (6) condemnation; (7) expiration of the stated term; (8) necessity ending (for easements implied by necessity).

**Rule: Profits and Licenses**

A profit a prendre grants the right to enter another's land and remove a natural resource (timber, minerals, game). Profits follow easement rules for creation, scope, and termination. A license is a revocable privilege to enter land, not an interest in land. Licenses are freely revocable unless coupled with an interest or the licensee has expended



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substantial funds in reliance (estoppel may bar revocation). A failed attempt to create an easement (e.g., oral grant) may operate as a license.

## D. Fixtures

### Rule: Fixtures

A fixture is personal property that has been so affixed to real property that it becomes part of the realty. Factors for determining fixture status: (1) the annexor's objective intent to make a permanent improvement (most important factor); (2) the degree of attachment or adaptation to the realty; (3) whether removal would cause substantial damage to the property. Trade fixtures installed by a commercial tenant for business purposes may be removed before the lease expires, even if they would otherwise qualify as fixtures. A buyer of real property acquires all fixtures unless the contract provides otherwise. As between a mortgagee and a subsequent purchaser of a fixture, the mortgage generally has priority if recorded first.

## E. Zoning

### Rule: Zoning Powers and Nonconforming Uses

#### Rule: Private Nuisance

An unreasonable, substantial interference with another's use and enjoyment of their land. The interference must be intentional (defendant knows or should know of the interference) or result from negligent, reckless, or abnormally dangerous conduct. Courts balance the gravity of harm (extent, character, social value of use, suitability to locale) against the utility of the defendant's conduct. Remedies include damages and injunctive relief. "Coming to the nuisance" (plaintiff moved near the nuisance) is a factor but not an absolute defense.

Zoning is an exercise of the state's police power to regulate land use for health, safety, and welfare. Zoning ordinances must bear a rational relationship to a legitimate government purpose. A nonconforming use is a lawful use that existed before a zoning change and may continue (grandfathered), but generally cannot be expanded or substantially changed. Some jurisdictions allow amortization periods requiring the nonconforming use to cease after a reasonable time.

#### Rule: Variances and Special Exceptions

A variance permits a deviation from zoning requirements when strict application would cause unnecessary hardship. Requirements: (1) unique hardship related to the property, not self-created; (2) the variance will not be detrimental to surrounding properties or the public interest; (3) the variance is consistent with the general purpose of the zoning plan. A special exception (or conditional use permit) allows a use specifically contemplated by the zoning ordinance in a particular zone, subject to conditions and approval by the zoning board.

## III. Real Estate Contracts

### Rule: Statute of Frauds and Part Performance

A contract for the sale of an interest in land must be in writing signed by the party to be charged, identifying the parties, the property, and the price or terms. Part performance may take a contract outside the Statute of Frauds when the buyer has done two or more of the following in reliance on the oral agreement: (1) taken possession of the property; (2) made valuable improvements; (3) paid all or part of the purchase price. Equitable estoppel may also apply when the party asserting the statute would be unjustly enriched.

#### Rule: Marketable Title



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Every land sale contract contains an implied warranty that the seller will deliver marketable title at closing. Marketable title is title free from reasonable doubt, meaning no encumbrances, liens, restrictive covenants, or defects that would expose the buyer to litigation. The seller has until closing to cure defects. A buyer who discovers a title defect before closing may not immediately rescind but must give the seller a reasonable opportunity to cure. An existing zoning violation (but not a mere zoning restriction) renders title unmarketable.

**Rule: Equitable Conversion and Risk of Loss**

Under the doctrine of equitable conversion, once an enforceable contract for the sale of land is executed, the buyer is treated as the equitable owner and the seller holds legal title in trust. Risk of loss: in the majority of jurisdictions (following the Uniform Vendor and Purchaser Risk Act), the risk of loss from casualty remains on the seller until legal title passes or the buyer takes possession. Under the minority common law rule, the risk shifts to the buyer at the time of contracting. If the property is destroyed, the buyer may rescind or enforce the contract with an abatement in price.

**Rule: Time for Performance and Remedies for Breach**

If the contract does not specify that time is of the essence, courts allow a reasonable time for performance beyond the stated closing date. If the contract expressly states time is of the essence, failure to close by the specified date is a material breach. Remedies: (1) damages (difference between contract price and market value); (2) specific performance (available to both buyer and seller because land is considered unique); (3) rescission and restitution. The seller may retain the buyer's deposit as liquidated damages if the clause is reasonable and not a penalty.

**Rule: Options and Rights of First Refusal**

An option contract gives the holder an irrevocable right to purchase property at a set price within a specified period; it requires consideration to be enforceable. A right of first refusal (preemptive right) gives the holder the right to match any offer the owner receives from a third party before the owner may sell to that third party. Both options and rights of first refusal are subject to the Rule Against Perpetuities if held by a third party (not the current holder of a possessory estate).

**Rule: Implied Warranty of Fitness (New Construction)**

A builder-vendor of a new home impliedly warrants that the home is built in a workmanlike manner and is suitable for habitation. This warranty protects against latent defects. In some jurisdictions, the warranty extends to subsequent purchasers who suffer from the defect within a reasonable time. The warranty cannot be disclaimed in most jurisdictions. It applies only to new construction, not to sales of existing homes by non-builder sellers.

**Rule: Merger Doctrine**

Under the doctrine of merger, the terms of the real estate contract merge into the deed at closing. After closing, the buyer's rights are governed by the deed, not the contract. Exceptions: (1) terms collateral to the conveyance (e.g., a promise to repair a roof) survive merger; (2) the parties may include a survival clause in the contract preserving specified contract obligations; (3) fraud claims survive merger.

**Rule: Real Estate Brokerage**

A broker earns a commission when a ready, willing, and able buyer is produced on the seller's terms, or the seller accepts the buyer's offer. An exclusive listing agreement typically requires a writing. Under an exclusive right to sell, the broker earns a commission regardless of who procures the buyer. Under an exclusive agency, the broker earns a commission unless the seller personally procures the buyer. The broker owes fiduciary duties to the client, including loyalty, disclosure, confidentiality, and reasonable care.



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## IV. Mortgages and Security Devices

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### A. Types of Security Devices

#### **Rule: Mortgages and Deeds of Trust**

A mortgage is a security interest in real property given to secure a debt. It requires a valid underlying obligation (promissory note) and a written instrument identifying the property. A deed of trust involves three parties: borrower (trustor), lender (beneficiary), and a neutral trustee who holds legal title as security. In lien-theory states (majority), the mortgagee holds only a lien, and the mortgagor retains possession. In title-theory states, the mortgagee holds legal title until the debt is paid. Intermediate-theory states treat the mortgage as a lien until default, when title passes to the mortgagee.

#### **Rule: Purchase Money Mortgages**

A purchase money mortgage (PMM) secures a loan used to acquire the property. It may be given to the seller (vendor PMM) or to a third-party lender whose funds are used for the purchase. A PMM has special priority: it takes priority over all other liens and claims that attach to the property through the buyer, even those recorded earlier, because the PMM is deemed to attach simultaneously with the buyer's acquisition of title.

#### **Rule: Installment Land Contracts**

In an installment land contract (contract for deed), the buyer makes periodic payments and receives legal title only after full payment. The seller retains legal title as security. On default, the traditional remedy was forfeiture of all payments made, but modern courts increasingly apply mortgage-like protections: requiring judicial foreclosure, granting an equity of redemption, or limiting forfeiture to a reasonable amount. The buyer holds equitable title during the contract.

### B. Rights and Obligations

#### **Rule: Rights Before Foreclosure and Waste**

The mortgagor generally retains the right to possess, use, and collect rents from the property. The mortgagor must not commit waste that impairs the mortgagee's security interest. Waste by the mortgagor (such as failure to maintain the property, failure to pay taxes or insurance, or physical destruction) gives the mortgagee the right to accelerate the debt and foreclose. In title-theory states, the mortgagee may take possession at any time; in lien-theory states, only after default.

#### **Rule: Equity of Redemption**

The equity of redemption is the mortgagor's right to pay the full debt and reclaim the property at any time before a valid foreclosure sale. This right cannot be waived or clogged at the time of the mortgage (anti-clogging doctrine). Any provision in a mortgage that attempts to cut off the mortgagor's right to redeem is void as clogging the equity of redemption. Statutory redemption, available in some states, allows the mortgagor to redeem even after the foreclosure sale for a limited period (typically 3-12 months) by paying the sale price plus costs.

#### **Rule: Transfer by Mortgagor: Assumption vs. Subject To**

A buyer who assumes the mortgage becomes personally liable on the debt alongside the original mortgagor (who remains secondarily liable as a surety unless released by novation). A buyer who takes subject to the mortgage assumes no personal liability; if the buyer defaults, the mortgagee may foreclose, but the buyer is not liable for any deficiency. The original mortgagor remains primarily liable when the buyer takes subject to the mortgage.

#### **Rule: Due-on-Sale Clauses**



A due-on-sale clause accelerates the full mortgage balance upon transfer of the property. Under the Garn-St. Germain Act, due-on-sale clauses are generally enforceable, preempting contrary state law. Exceptions: certain transfers do not trigger due-on-sale clauses, including transfers to a spouse or child, transfers resulting from divorce or death, and transfers into a living trust where the borrower remains a beneficiary.

**Rule: Transfer by Mortgagee and Holder in Due Course**

The mortgagee may assign the mortgage and note. The note and mortgage travel together; an assignment of the note carries the mortgage. A holder in due course (HDC) of a negotiable promissory note takes free of personal defenses (failure of consideration, fraud in the inducement, waiver, estoppel) but remains subject to real defenses (forgery, fraud in the factum, incapacity, illegality, discharge in bankruptcy). To qualify as an HDC: the instrument must be negotiable, taken for value, in good faith, and without notice of defenses.

## C. Foreclosure

**Rule: Foreclosure Process**

Judicial foreclosure involves a court-supervised sale after notice to all parties with an interest in the property. Power-of-sale foreclosure (non-judicial) is available in deed-of-trust states and requires strict compliance with statutory notice and sale procedures. Acceleration clauses allow the mortgagee to demand the full balance upon default; waiver may occur if the lender habitually accepts late payments. All junior lienholders must be joined as necessary parties; failure to join preserves their liens on the property.

**Rule: Priority and Recording**

Mortgage priority is generally determined by the order of recording. A purchase money mortgage has superpriority over prior claims arising through the buyer. A future advance mortgage secures both present and future loans; obligatory advances maintain priority even with notice of an intervening lien, while optional advances lose priority if the lender has actual notice of an intervening lien. Subordination agreements may alter priority.

**Rule: Deficiency and Surplus**

If the foreclosure sale proceeds are less than the outstanding debt, the mortgagee may obtain a deficiency judgment against the mortgagor for the difference (unless anti-deficiency statutes apply). If the proceeds exceed the debt, the surplus is distributed to junior lienholders in order of priority, with any remaining balance going to the mortgagor. Some jurisdictions limit deficiency judgments to the difference between the debt and the property's fair market value rather than the sale price.

## V. Titles

### A. Adverse Possession

**Rule: Adverse Possession**

Title to real property may be acquired by adverse possession when the possessor's use is: (1) actual and exclusive (physical occupation inconsistent with the true owner's rights); (2) open and notorious (visible enough that a reasonable owner would discover it); (3) continuous for the statutory period (uninterrupted use consistent with the type of property); (4) hostile and adverse (without the true owner's permission and under a claim of right). Tacking: successive adverse possessors in privity (voluntary transfer) may combine their periods to meet the statutory requirement. Adverse possession does not run against government-owned land. Payment of property taxes is required in some jurisdictions.

### B. Transfer by Deed



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**Rule: Types of Deeds and Covenants for Title**

General warranty deed: the grantor warrants title against all defects, including those arising before the grantor's ownership. Contains six covenants: present covenants (seisin, right to convey, against encumbrances) breached at delivery, and future covenants (quiet enjoyment, warranty, further assurances) breached only upon disturbance. Special warranty deed: the grantor warrants only against defects arising during the grantor's period of ownership. Quitclaim deed: no warranties whatsoever; conveys only whatever interest the grantor may have. Estoppel by deed: if a grantor purports to convey title by warranty deed but does not have title, and later acquires title, the after-acquired title automatically passes to the grantee.

**Rule: Deed Requirements and Delivery**

A valid deed requires: (1) a writing signed by the grantor; (2) identification of the parties; (3) words of conveyance; (4) a legally sufficient description of the property. A deed is effective only upon delivery with the present intent to make an irrevocable transfer. Physical handover is evidence of delivery but not required; retention by the grantor raises a presumption of non-delivery. Conditional delivery to a third party (escrow) is permissible: the deed is delivered to the escrow agent, and title passes automatically when the condition is satisfied, relating back to the date of the original deposit. Acceptance by the grantee is presumed when the conveyance is beneficial.

**C. Recording Acts and Title Assurance****Rule: Recording Acts****Rule: Types of Recording Acts**

Three types: (1) Pure Race — the first to record prevails, regardless of notice (rare, only a few states). (2) Pure Notice — a subsequent bona fide purchaser (BFP) without notice prevails over a prior unrecorded interest, even if the BFP has not yet recorded. (3) Race-Notice (majority) — a subsequent BFP prevails only if they (a) took without notice of the prior interest AND (b) recorded first. To qualify as a BFP: must pay value and have no actual, constructive (record), or inquiry notice of the prior interest.

Recording statutes protect bona fide purchasers (BFPs) who pay value and take without notice of prior unrecorded interests. Three types: (1) Race: first to record wins regardless of notice. (2) Notice: a subsequent BFP without notice prevails over a prior unrecorded interest, even if the BFP does not record first. (3) Race-notice (most common): a subsequent BFP without notice who records first prevails. Notice includes actual knowledge, constructive notice (from the recording chain), and inquiry notice (facts that would prompt a reasonable person to investigate, such as possession by someone other than the seller).

**Rule: Chain of Title and Wild Deeds**

A deed recorded outside the chain of title (a wild deed) does not provide constructive notice. A wild deed results when a prior deed in the chain was never recorded, creating a gap. The shelter rule protects a transferee who takes from a BFP, giving the transferee the same rights as the BFP even if the transferee had notice of the prior unrecorded interest. A quitclaim deed does not disqualify a purchaser from BFP status in most jurisdictions, but it may put the buyer on inquiry notice.

**Rule: Title Insurance**

Title insurance protects against losses from defects in title not discovered by the title search. The policy covers only defects existing at the time of issuance, not future defects. Standard exclusions include defects known to the insured but not disclosed, government regulations (zoning), and rights of parties in possession. An owner's policy protects the buyer; a lender's policy protects the mortgagee. Title insurance liability is limited to the



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policy amount. Title insurance does not guarantee marketable title but indemnifies against loss from covered defects.

## D. Transfer by Operation of Law

### **Rule: Intestate Succession and Wills**

Real property passes by intestate succession when the owner dies without a valid will, according to the state's descent and distribution statutes. A will must meet formality requirements: signed by the testator with capacity, attested by the required number of witnesses. Ademption: a specific devise fails if the testator no longer owns the property at death (identity theory, majority). Lapse: a devise fails if the beneficiary predeceases the testator, unless an anti-lapse statute preserves the gift for the beneficiary's descendants. Exoneration: under common law, a specific devisee was entitled to have the mortgage on devised property paid from the residuary estate, but most modern statutes have abolished this presumption.

## VI. Special Property Doctrines

### **Rule: Implied Warranty of Habitability**

In residential leases, the landlord impliedly warrants that the premises are fit for human habitation and comply with applicable housing codes. This warranty is non-waivable. The tenant must give the landlord notice and a reasonable opportunity to repair. Remedies for breach include: (1) withholding rent (or paying reduced rent reflecting the diminished value); (2) repair and deduct (tenant makes repairs and deducts costs from rent); (3) termination of the lease; (4) damages. The warranty applies to conditions affecting habitability such as lack of heat, plumbing, or essential services, and serious building code violations.

### **Rule: Fair Housing Act**

The Federal Fair Housing Act prohibits discrimination in the sale, rental, or financing of housing based on race, color, religion, sex, familial status, national origin, and disability. Prohibited practices include refusing to sell or rent, discriminatory terms, false representations of unavailability, and discriminatory advertising. Exemptions: (1) the Mrs. Murphy exemption (owner-occupied dwellings with four or fewer units); (2) religious organizations may limit occupancy to members; (3) senior housing (55+ communities) is exempt from familial status requirements. Race discrimination has no exemptions under the Civil Rights Act of 1866 (42 U.S.C. §1982).

### **Rule: Rule Against Perpetuities**

Common law rule: no interest is valid unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. Applies to contingent remainders, executory interests, vested remainders subject to open (class gifts), options to purchase held by third parties, and rights of first refusal. Does not apply to future interests retained by the grantor (reversions, possibilities of reverter, rights of entry). The fertile octogenarian and unborn widow problems are classic RAP traps. Modern reforms include: (1) wait-and-see (test validity at end of the perpetuities period rather than at creation); (2) Uniform Statutory Rule Against Perpetuities (90-year alternative vesting period); (3) cy pres (judicial reformation to approximate the grantor's intent).

### **Rule: Lateral and Subjacent Support**

A landowner has the right to have land supported in its natural state by adjoining land (lateral support) and by underground support (subjacent support). Strict liability applies when excavation causes neighboring land in its natural state to subside. If structures on the land contributed to the collapse, the excavator is liable only if negligent. The right to subjacent support prohibits a holder of mineral rights from removing support necessary to



sustain the surface in its natural state. Damages for loss of lateral or subjacent support include the diminution in value of the land.

**Rule: Water Rights**

Riparian rights (eastern states): owners of land abutting a watercourse have the right to make reasonable use of the water. Reasonable use is determined by balancing the needs of all riparian owners. Prior appropriation (western states): water rights are allocated based on priority of beneficial use (first in time, first in right); the right is not dependent on land ownership. Surface water: landowners may not substantially alter the natural drainage to the detriment of neighboring properties. Underground water: generally governed by reasonable use principles, though some states follow the absolute ownership rule.

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# TORTS

*Tort law compensates injured parties and deters harmful conduct. The MBE tests intentional torts, negligence (duty, breach, causation, damages), strict liability, products liability, and defenses.*

## I. Intentional Torts

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### **Rule: Battery**

Requires: (1) a volitional act by the defendant; (2) intent to cause harmful or offensive contact (or apprehension thereof—transferred intent applies); (3) harmful or offensive contact results. The plaintiff need not be aware of or apprehend the contact at the time it occurs. Contact with anything closely connected to the plaintiff's person (e.g., an object in their hand) suffices.

### **Rule: Assault**

Requires: (1) an act by the defendant creating a reasonable apprehension in the plaintiff; (2) of imminent harmful or offensive contact. The plaintiff must actually be in apprehension (subjective) and that apprehension must be reasonable (objective). Words alone are generally insufficient; there must be an accompanying act. If the plaintiff knows the threat cannot be carried out (e.g., an unloaded gun known to be unloaded), there is no assault.

### **Rule: False Imprisonment**

Requires: (1) an act or omission that confines the plaintiff; (2) to a bounded area; (3) the plaintiff is aware of the confinement or is harmed by it. Confinement must be complete—leaving a reasonable means of escape open defeats the claim. Threats of force, physical barriers, and failure to release (where there is a duty to release) all qualify.

### **Rule: Intentional Infliction of Emotional Distress (IIED)**

Requires: (1) extreme and outrageous conduct (beyond all bounds of decency tolerated in a civilized society); (2) intent to cause severe emotional distress or reckless disregard of the probability of causing it; (3) severe emotional distress actually results; (4) causation. Third-party claims may lie when the defendant knows a close family member is present and the distress is foreseeable.

### **Rule: Trespass to Land**

Requires: (1) an act; (2) intent to enter the land or cause a physical invasion (mistake is no defense—intent to trespass is not required, only intent to enter); (3) physical invasion of the plaintiff's possessory interest. Actionable without proof of actual damages (nominal damages suffice). A tenant has sufficient possessory interest to bring a trespass claim against anyone, including the landlord, for unauthorized entry.

### **Rule: Trespass to Chattels and Conversion**

Trespass to chattels: intentional interference with another's possession of personal property causing minor damage or temporary deprivation. Conversion: intentional exercise of dominion or control over another's chattel that so seriously interferes with the owner's rights as to justify requiring the defendant to pay the chattel's full value. The key distinction is the degree of interference.

## II. Defenses to Intentional Torts

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### **Rule: Consent**



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Express consent: the plaintiff agrees to the defendant's conduct. Implied consent: individuals impliedly consent to the ordinary, reasonable, and customary contacts of daily life (jostlings in crowds, taps on the shoulder). Consent obtained by fraud or duress is invalid. Consent to a medical procedure does not extend to substantially different procedures.

**Rule: Self-Defense and Defense of Others**

A person may use reasonable force to defend against an imminent threat. Deadly force is justified only to prevent death or serious bodily harm. Defense of others: a person may use reasonable force to defend another from imminent harmful or offensive contact if they reasonably believe the other person is being threatened with unlawful force. The defender steps into the shoes of the person defended (same privileges and limitations).

### III. Negligence

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#### A. Duty

**Rule: General Duty of Reasonable Care**

Every person owes a duty to exercise reasonable care under the circumstances to avoid foreseeable risks of harm to foreseeable plaintiffs.

**Rule: Negligence Per Se**

Violation of a statute establishes the standard of care (breach) as a matter of law only if: (1) the plaintiff is within the class of persons the statute was designed to protect; and (2) the harm is of the type the statute was designed to prevent. The court decides whether the standard applies; the jury decides whether it was violated. Not all statutory violations constitute negligence per se.

**Rule: Premises Liability: Slip-and-Fall**

A premises owner or occupier is liable for injuries from dangerous conditions only if they had actual or constructive notice and failed to remedy the hazard. Constructive notice requires evidence that the condition existed long enough that a reasonable owner should have discovered it, or that the condition was created by the owner or an employee in the course of business. A "self-service" operation alone does not establish constructive notice without additional evidence of the condition's duration.

**Rule: Duty to Trespassers**

No duty to undiscovered trespassers except to refrain from willful or wanton conduct. For known or anticipated trespassers, the landowner must warn of or protect against known, concealed, dangerous artificial conditions. The attractive nuisance doctrine imposes a duty to child trespassers when the landowner knows of a dangerous condition likely to attract children.

**Rule: Firefighter's Rule**

Public safety professionals (firefighters, police) cannot recover in negligence for injuries arising from the very risks their profession is designed to confront. The rule is grounded in assumption of risk—these professionals are compensated to face such dangers. Exception: injuries from risks unrelated to the specific hazard that occasioned their presence may be recoverable.

**Rule: Duty to Supervise Children**

A day-care center, school, or other custodian owes a duty of reasonable care to supervise children in its custody. The standard is what a reasonably prudent provider would do under the circumstances. If reasonable care was exercised and a child was still injured, there is no liability.



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**Rule: Negligent Infliction of Emotional Distress**

A defendant's duty in NIED claims generally extends only to the direct victim of negligence, not to third parties. Bystander recovery (Dillon/Thing): a close family member who (1) was near the scene, (2) contemporaneously perceived the injury-producing event, and (3) was closely related to the victim may recover for emotional distress. Zone-of-danger rule: only plaintiffs within the zone of physical danger may recover.

**B. Breach****Rule: Standard of Care**

The reasonable person under the circumstances. Professionals are held to the standard of a reasonably competent practitioner in the same field. Children: standard of a reasonable child of similar age, intelligence, and experience. Exception: when a child engages in an inherently dangerous adult activity (driving, operating a motorboat), the child is held to an adult standard of care.

**Rule: Industry Custom**

Evidence of industry custom is admissible and relevant on the issue of negligence, but it is not conclusive. A jury may find that an entire industry's customary practice is itself negligent (The T.J. Hooper). Compliance with custom does not automatically establish non-liability; departure from custom does not automatically establish breach.

**C. Causation****Rule: Actual Cause (Cause-in-Fact)**

But-for test: but for the defendant's negligence, the harm would not have occurred. Substantial factor test: applied when multiple causes concur; the defendant's conduct is a cause if it was a substantial factor in producing the harm.

**Rule: Proximate Cause (Legal Cause)**

The harm must be a foreseeable result of the defendant's negligence. Superseding causes: an unforeseeable intervening event that breaks the chain of causation. Criminal acts of third parties are generally considered superseding unless foreseeable under the circumstances (e.g., negligent security in a high-crime area). An intervening act that is a foreseeable consequence of the defendant's negligence is not superseding.

**Rule: Res Ipsa Loquitur**

Allows the jury to infer negligence from circumstantial evidence when: (1) the accident is of a type that ordinarily does not occur without negligence; (2) the instrumentality causing the harm was in the defendant's exclusive control; (3) the plaintiff did not contribute to the accident. Creates a permissive inference (the jury may, but is not required to, infer negligence); it is not a presumption.

**D. Damages****Rule: Compensatory Damages**

Include economic losses (medical expenses, lost wages) and non-economic losses (pain and suffering, emotional distress). The plaintiff must prove damages with reasonable certainty. The eggshell-skull rule: the defendant takes the plaintiff as found and is liable for the full extent of harm even if unforeseeable.

**Rule: Joint and Several Liability**

Under pure comparative negligence with joint and several liability, the plaintiff's recovery is reduced by their percentage of fault, but they may recover the full reduced amount from any defendant who is jointly and severally liable. Each defendant is individually responsible for the entire judgment, with a right of contribution against other tortfeasors.



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**Rule: Vicarious Liability and Respondeat Superior**

An employer is vicariously liable for torts committed by an employee acting within the scope of employment. Scope of employment: conduct of the kind the employee was hired to perform, occurring substantially within authorized time and place, and motivated at least in part by serving the employer. Frolic (substantial departure from duties) — no liability. Detour (minor deviation) — still within scope. Independent contractors: generally no vicarious liability unless the work is inherently dangerous or involves a nondelegable duty. An employer may also be directly liable for negligent hiring, supervision, or retention.

**Rule: Negligent Entrustment**

Liability attaches when a person entrusts a dangerous instrumentality (e.g., vehicle, firearm) to a person the entrustor knows or should know is incompetent, inexperienced, or reckless, and the trustee causes foreseeable harm. Elements: (1) entrustment of a dangerous instrumentality; (2) to an incompetent person; (3) the entrustor knew or should have known of the incompetence; (4) the incompetence was a proximate cause of the plaintiff's injury.

**Rule: Wrongful Death and Survival Actions**

Wrongful death: a statutory cause of action brought by specified beneficiaries (spouse, children, parents) to recover their own losses from the decedent's death caused by tortious conduct. Damages include loss of financial support, companionship, and services. Survival action: continues the decedent's own cause of action after death, allowing the estate to recover pre-death injuries (pain and suffering, medical expenses, lost wages). Both require the defendant's conduct to have been tortious toward the decedent.

## IV. Strict Liability

**Rule: Abnormally Dangerous Activities**

Strict liability applies to activities that, even with reasonable care, create a foreseeable and highly significant risk of physical harm. Restatement factors: (1) high degree of risk; (2) likelihood the harm will be great; (3) inability to eliminate risk by reasonable care; (4) extent to which the activity is not common; (5) inappropriateness of the activity to the location; (6) value to the community versus dangerousness. Assumption of risk is a valid defense; due care by the defendant is not.

**Rule: Wild Animals**

Owners of wild animals are strictly liable for injuries caused by the animal, even if tamed or defanged. Strict liability applies to injuries resulting from a dangerous propensity characteristic of the species or from the plaintiff's fearful reaction to the animal. The plaintiff need not prove the injury arose from the specific dangerous propensity—any injury from the animal's presence may suffice.

**Rule: Products Liability: Chain of Distribution**

All commercial sellers in the distribution chain—manufacturers, wholesalers, distributors, and retailers—can be held strictly liable for defective products causing injury. A retailer is liable even if it had no control over manufacturing and no ability to inspect. Theories: manufacturing defect, design defect (consumer expectation or risk-utility test), and failure to warn.

**Rule: Products Liability: Substantial Alteration Defense**

A manufacturer is not liable for injuries caused by substantial alterations or modifications made to a product after it left the manufacturer's control, if those alterations caused the injury. The alteration must be: (1) substantial (not merely a failure to maintain); (2) made by a third party; (3) the actual cause of the injury. Foreseeable misuse by the consumer is not the same as substantial alteration.



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## V. Misrepresentation

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### **Rule: Fraud (Intentional Misrepresentation)**

Requires: (1) false representation of a material fact; (2) scienter (knowledge of falsity or reckless disregard for the truth); (3) intent to induce reliance; (4) justifiable reliance by the plaintiff; (5) damages. Punitive damages are available.

### **Rule: Negligent Misrepresentation**

Requires: (1) false representation made in a business or professional capacity; (2) breach of duty of care; (3) justifiable reliance; (4) pecuniary (economic) loss. Damages are limited to economic losses—personal injury damages are not recoverable. Punitive damages are not available.

## VI. Privacy Torts

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### **Rule: Invasion of Privacy**

Four torts: (1) intrusion upon seclusion (intentional intrusion into a private matter that would be highly offensive to a reasonable person); (2) public disclosure of private facts; (3) false light (widespread publication of material placing the plaintiff in a false light); (4) appropriation of name or likeness for commercial advantage. Defenses: no invasion of privacy when the event occurs in a public place (no reasonable expectation of privacy), the matter is newsworthy or of legitimate public concern, or publication was not for exploitative commercial purposes. Photography in public spaces is generally privileged.

## VII. Defamation

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### **Rule: Slander Per Se**

Oral statements imputing: (1) commission of a crime of moral turpitude; (2) a loathsome disease; (3) conduct adversely affecting a person's business, trade, or profession; or (4) serious sexual misconduct. Damages are presumed; no need to prove special damages.

### **Rule: Defamation: Full Elements and Constitutional Standards**

Elements: (1) a false and defamatory statement of fact; (2) publication (communication to a third party); (3) fault (degree depends on plaintiff status); (4) damages. Libel (written/permanent) — damages presumed. Slander (spoken/transient) — requires proof of special damages unless slander per se. Constitutional fault standards: public officials and public figures must prove actual malice (knowledge of falsity or reckless disregard for truth) per *New York Times v. Sullivan*. Private figures need only prove negligence (Gertz). Defenses: truth (absolute defense), absolute privilege (judicial proceedings, legislative debate, spousal communications), qualified privilege (employer references — defeated by actual malice), and opinion (pure opinion on disclosed facts is protected).

## VIII. Defenses to Negligence

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### **Rule: Comparative Negligence**

Pure comparative negligence: plaintiff's recovery is reduced by their percentage of fault, even if the plaintiff is more at fault than the defendant. Modified comparative negligence: plaintiff is barred from recovery if their fault exceeds 50% (or 51%, depending on the jurisdiction).

### **Rule: Assumption of Risk**

Express: plaintiff explicitly agrees to accept the risk (e.g., a waiver). Implied: plaintiff voluntarily encounters a known risk by conduct. Must be voluntary and informed.



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Assumption of risk remains a defense even in strict-liability actions for abnormally dangerous activities.

### **Quick Hitting High Priority Rules for the bar exam**

☐ **Civil Procedure: Supplemental Jurisdiction (28 U.S.C. §1367)** Rule: Federal courts can hear state claims sharing a common nucleus of operative fact with a federal claim. Wrinkle: Discretionary decline if state issues predominate or novel; diversity-destroying claims by plaintiffs are barred, but counterclaims and crossclaims are okay.

☐ **Civil Procedure: Erie Doctrine** Rule: In diversity cases, apply state substantive law and federal procedural law. Wrinkle: Substantive if outcome-determinative or encourages forum shopping; FRCP applies if valid under Rules Enabling Act—test with *Hanna v. Plumer* (federal rules trump conflicting state law if on-point).

☐ **Constitutional Law: Dormant Commerce Clause** Rule: States can't discriminate against or unduly burden interstate commerce absent federal law. Wrinkle: Discriminatory laws get strict scrutiny (important local purpose, no alternatives); nondiscriminatory use Pike balancing—burden vs. local interest; market participant exception (states can favor locals when buying/selling, not regulating).

☐ **Constitutional Law: Standing** Rule: Requires injury (concrete/imminent), causation (traceable to defendant), redressability (remedied by decision). Wrinkle: Third-party standing allowed if close relationship, injury to third party, and third party can't sue (e.g., doctors for patients); taxpayer standing rare except Establishment Clause violations (*Flast v. Cohen* exception).

☐ **Contracts: Statute of Frauds** Rule: Writing signed by party to be charged for MYLEGS (marriage, year-plus, land, executor, goods >\$500, surety). Wrinkle: Part performance exception for land (two of: payment, possession, improvements); UCC merchant's confirmation memo binds if no objection within 10 days.

☐ **Contracts: Parol Evidence Rule** Rule: Integrated writing bars prior/contemporaneous terms contradicting it. Wrinkle: Exceptions for ambiguity resolution, fraud/duress/mistake, condition precedent, or consistent additional terms in partially integrated agreements; subsequent modifications always admissible.

☐ **Contracts: Perfect Tender Rule (UCC §2-601)** Rule: Buyer can reject goods for any nonconformity in single-delivery contracts. Wrinkle: Seller's cure right if time remains or reasonable belief of acceptance; installment contracts use substantial impairment standard (§2-612); revocation of acceptance only if defect substantially impairs value and not discovered earlier. \*This is for merchants not common law! Common law follows substantial performance.

☐ **Criminal Law: Felony Murder** Rule: Killing during inherently dangerous felony (BARRK: burglary, arson, rape, robbery, kidnapping). Wrinkle: Merger doctrine—no felony murder if underlying felony is assaultive (merges into homicide); death must be foreseeable, during felony or immediate flight; agency theory (majority)—only killings by felon/co-felons liable.

☐ **Criminal Law: Accomplice Liability** Rule: Liable if aids/encourages with intent to promote crime; liable for natural/probable consequences. Wrinkle: Withdrawal requires neutralizing assistance and timely notice to co-conspirators; mere knowledge (e.g., selling tools) insufficient without intent; accessory after the fact is separate, lesser offense.

☐ **Criminal Procedure: Warrant Exceptions** Rule: Warrants need probable cause; exceptions include exigent circumstances, consent, plain view. Wrinkle: Automobile exception—probable cause for vehicle/containers; search incident to arrest limited to grabbing area (*Chimel*) or vehicle if unsecured arrestee/evidence likely (*Gant*); inevitable discovery cures exclusionary rule violations.



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- **Evidence: Hearsay Exceptions (FRE 803)** Rule: Availability immaterial: present sense impression, excited utterance, state of mind, medical diagnosis, business records. Wrinkle: Business records need regular practice, made near time by knowledgeable person; public records exclude police observations vs. criminal defendant; past recollection recorded read in but not exhibited.
- **Evidence: Character Evidence (FRE 404)** Rule: Inadmissible to prove propensity; admissible for MIMIC (motive, intent, mistake absence, identity, common plan). Wrinkle: Criminal defendants can offer good character opinion/reputation (opens door to bad); victim's pertinent trait admissible (e.g., violence for self-defense); prior bad acts need notice in criminal cases (FRE 404(b)(3)).
- **Evidence: Impeachment with Prior Convictions (FRE 609)** Rule: Felonies admissible (FRE 403 balance); dishonesty crimes automatic. Wrinkle: 10-year limit—older admissible if probative value substantially outweighs prejudice; applies to any witness (including defendant); remote convictions refreshed by release date.
- **Real Property: Adverse Possession** Rule: Open/notorious, actual/exclusive, continuous, hostile for statutory period. Wrinkle: Tacking allowed with privity (voluntary transfer); color of title shortens period in some states; no adverse possession vs. government; taxes payment required in some jurisdictions.
- **Real Property: Recording Acts** Rule: Protects BFPs (value, no notice) from prior unrecorded interests. Wrinkle: Race-notice (majority)—BFP must record first; notice includes inquiry (e.g., possession); shelter rule protects grantees from BFPs even with notice; wild deeds (outside chain) give no constructive notice.
- **Real Property: Implied Warranty of Habitability (Residential Leases)** Rule: Landlord warrants premises fit for habitation, complying with codes. Wrinkle: Non-waivable; remedies: withhold rent, repair/deduct, terminate; notice + reasonable cure time required; applies only to residential, not commercial.
- **Torts: Negligence Per Se** Rule: Statute violation = breach if plaintiff in protected class, harm type statute prevents. Wrinkle: Not automatic—excuses like impossibility or greater harm from compliance; licensing statutes: regulatory (protective) trigger per se, revenue-raising do not.
- **Torts: Res Ipsa Loquitur** Rule: Infers negligence if accident type doesn't occur without negligence, exclusive control, no plaintiff contribution. Wrinkle: Permissive inference (not presumption); multiple defendants possible if joint control; Ybarra exception for unconscious plaintiffs (shifts burden to defendants).
- **Torts: Strict Liability for Products** Rule: Commercial sellers liable for defective products causing injury (manufacturing, design, warning defects). Wrinkle: Design defects: risk-utility (safer alternative) or consumer expectation test; substantial alteration defense if unforeseeable; no privity required—bystanders recover.
- **Torts: Defamation (Constitutional Standards)** Rule: False defamatory fact, publication, fault, damages. Wrinkle: Public figures/officials need actual malice (knowledge/reckless disregard); private figures need negligence for actual damages, malice for presumed/punitives; opinion protected if not implying provable fact (Milkovich).

