

ARKANSAS BAR EXAMINATION
FEBRUARY, 2001

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30 Minutes

CRIMINAL LAW AND PROCEDURE

John and Mark are best friends. John is 19 years old and Mark is 15 years old. John and Mark are angry because the Mayor has instituted a curfew. Mark goes to the liquor store and buys a six pack of beer. John and Mark each drink three beers while John is driving them toward the Mayor's house. When they get to the Mayor's house, John drives the automobile through the front window. The Mayor, who was sitting in a chair in front of the window, is struck and killed by the car. John and Mark get out of the car and John reaches over to the Mayor's dead body and takes the Mayor's wallet out of his pocket. When the Mayor's wife runs into the room, Mark picks up a diamond encrusted letter opener and tells her to "get back or else." Hearing the sirens on the police cars approaching, John and Mark then run out of the house with Mark still clutching the letter opener. Although the police shout at them to halt, John and Mark keep running into the night.

Question 1:

Identify each crime that the prosecutor could charge against John and describe the facts that would support that charge.

Question 2:

Identify each crime that the prosecutor could charge against Mark and describe the facts that would support that charge.

Question 3:

Identify each defense that John could raise to the charges against him and analyze whether those defenses would likely be successful.

Question 4:

Identify each defense that Mark could raise to the charges against him and analyze whether those defenses would likely be successful.

ARKANSAS ESSAY
ANSWER
CRIMINAL LAW AND PROCEDURE
February, 2001

Question 1:

John may be charged with a host of crimes based on these facts. The question asked does not ask me if the prosecutor will be successful with the charges, just "facts that would support." In contrast, questions 3 & 4 ask about the "likely success." With that in mind, John could be charged with:

1. Contributing to the delinquency of a minor by providing Mark with alcohol. This is a strict liability offense and does not require intent.
2. Driving under the influence & open container - the clerk who sold the beer could testify to this, but prosecutor probably can't prove intoxicated to point of being under influence. Nevertheless, he could be "charged with it."
3. Running from the scene of an accident - John caused the accident and fled on foot from police.

All of the aforementioned would probably be misdemeanors and the least of John's problems.

4. Murder - Murder is the unlawful killing of another human being. Arkansas has divided murder into 5 categories. They are (1) capital murder, (2) 1st degree murder, (3) 2nd degree murder, (4) manslaughter, & (5) negligent homicide. They are Class Y Felony, Class A Felony, Class B Felony, Class C Felony, and Class C/Misdemeanor A, respectively. John could be "charged" with capital murder since there is some indication that his anger (intent?) May have been premeditated and his action deliberate. Additionally, murder committed while committing a felony may be grounds for a capital murder charge if it was committed with a "reckless disregard for human life." The felony at issue that makes this capital murder is battery and under Arkansas, the breaking and entering (separate offense). John can be charged with the other categories of murder since he meets the elements of capital murder, the other degrees are lesser included offenses. If John is acquitted on capital murder he cannot be retried on the lesser included. Also, under Arkansas law, John could not be convicted of "attempted" murder and the completion of the act.
5. Battery - Battery is the unlawful or offensive touching of another with the intent of causing harm or injury. John can be said to possess the intent by driving his car into the home. The touching required can be something connected to the person and not the actual person. Here, hitting the house is sufficient.
6. Theft - is the taking of property with intent to permanently deprive the lawful owner. Stealing the wallet is sufficient.

Question 2 - Mark may be charged with:

1. Conspiracy - Conspiracy takes 2 or more persons to plan a scheme to commit a crime & take a step in furtherance of committing the crime. There is no indication that Mark was not aware of what

John was doing in that he did not assent to the acts.

2. Accomplice Liability - Mark need only aid or abet John in the furtherance of the crime or help him out after the crime with knowledge & intent to escape. Here, Mark was present & may have (assumption) suggested the trip over to the Mayors or to drive into the home.
3. Assault - Assault is the intent to commit battery or the intent to cause the fear & apprehension of harm in another. Here, Mark threatened the Judge's wife with the letter opener. Given the circumstances, she could have easily believed his action & statement "get back or else."
4. Theft - is the unlawful taking of the possession of another with/intent to permanently deprive. He stole the letter opener.
5. Robbery - Same standard as above (theft), but, he took under threat of force. Under AR law it would be aggravated robbery.
6. Murder - Same definition as above - Mark was in the commission of a felony and acted with reckless disregard with human life.

Question 3

John cannot defend on age (19) or capacity (facts unclear here).

1. As a general rule, in Arkansas voluntary intoxication is not a defense. Also, arguably, John formed his intent (premeditation) prior to drinking. Additionally, 3 beers is probably not enough for a 19 year old to escape the "volitional" nature of his action.
2. John can defend on the first 2 misdemeanors in question #1, because, prosecutor cannot prove each element of that offense by proof beyond a reasonable doubt.
3. John will argue he did not have intent (mens rea) with regards to battery. That will not work because his act was intentional and was also a reckless act with no regard for human life.
4. John will argue intent on theft - but intent on theft only takes a second to form, therefore, he intended to take wallet the moment he grabbed it.

Question 4 Mark will defend on.

1. Age - He is 15, but when a minor acts as an adult, he will be adjudicated like one.
2. Did not know - (1) John was going to drive into house or (2) commit other offenses. Question is for a jury, it was probably not foreseeable under these facts that Mark knew what John was going to do.
3. As a general rule, in Arkansas, voluntary intoxication will not be a defense.
4. On murder charges - Mark will argue (1) he did not have intent, (2) He did not have control over the instrumentality that killed the judge, and, (3) It would be a due process violation to convict of capital murder given he was not the person who did the killing.

Mark will probably be successful in defending against the murder charge.

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TORTS

Mr. and Mrs. Smith live on property that they own which is located one-half mile from XYZ Mining Company ("XYZ"). Both the Smith and XYZ properties are outside the city limits and, therefore, not subject to any zoning laws or land use restrictions. Periodically, but no more than once a week, XYZ blasts on XYZ property with resulting noise, vibration and dust from the blasting being experienced on the Smith's property. Because you are an exceptional torts attorney, the Smiths have come to you for advice concerning their legal rights and possible remedies against XYZ. Please discuss the issues and how you would advise the Smiths.

ARKANSAS ESSAY
ANSWER
TORTS
February, 2001

Plaintiffs Smiths (Hereinafter "Plaintiff")
Defendants XYZ (Hereinafter "Defendant")

1. Plaintiffs may have a cause of action for nuisance, since Defendants' actions are causing "noise" and "vibrations" in a manner that deprives Plaintiffs of the reasonable use and enjoyment of their land. It is not a defense that one who moves to the nuisance cannot later sue to have nuisance stopped.
2. Plaintiffs may have a cause of action for "trespass." That dust caused by the blasting is sufficient. Again, because Defendants are trespassing and interfering with Plaintiffs' enjoyment and use of their land, Defendants are liable.
3. Defendants may be liable for negligence. Negligence requires: (1) duty, (2) breach of that duty, (3) causation, and, (4) damage. Defendants have duty not to use their land in a way as not to interfere with the enjoyment and use of another's land. Here Defendants' actions of blasting are in breach of their common law duty. Also, blasting is an "inherently dangerous" activity and as such, Defendants are "strictly liable" for that action. Lastly, Defendants should blast in a manner that a reasonable company, given same or similar circumstances would blast. This last standard is not a defense to strict liability.
4. Damages - The Plaintiffs will be entitled to any foreseeable damages that result from Defendant's breach of their duty. Plaintiffs will be entitled to compensatory damages and special damages (pled specifically). Plaintiff is entitled to punitive damages if they can prove wantonness, willfulness or malice.
5. Plaintiffs will also ask for permanent injunctive relief since money damages will not be enough, i.e., the blasting will continue. In considering the injunctive request, the court will balance the inequities that will be borne by both parties. A court is reluctant to grant injunction where one side will disproportionately bear the loss.

I would recommend the Smith's file both tort claims and equity claim for injunctive relief. They may even be entitled to have Defendants buy their land for fair-market value and receive whatever damages they are entitled to.

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PROPERTY

I

Albert Green and Betty Johnson are validly married on October 1, 1966. Shortly thereafter, they purchased Black Acre in Hillside County, Arkansas. The granting clause of the deed to them reads in part "...hereby grant, bargain, sell and convey to Albert Green and Betty Green, his wife, as tenants by the entirety."

Betty dies in childbirth in 1969, giving birth to the couple's only child, Charlie. Albert then marries Donna Gaston on April 1, 1975. Donna also has a son, named George, from a previous marriage. In 1980, Albert secures a deed form from the stationary store and deeds the property to "Albert Green and Donna Green, his wife." He has Donna also sign the deed. Albert and Donna separate in 1991. He remains in Arkansas. She moves to Chicago, Illinois, and deeds Black Acre to her son George.

All the deeds were warranty deeds and otherwise valid instruments; all were delivered to and accepted by the Grantees; and, all were properly recorded.

Although Albert and Donna were separated, they were never divorced. Donna dies followed in a few months by Albert's death. Albert has no will. When Albert dies, both Charlie and George claim the property.

What are the respective interests of Charlie and George in the property? Fully explain.

How, if at all, would your answer change if Albert and Donna were never married?

II

Jack and Jill are brother and sister. As a high school graduation present, their parents convey 40 acres, known as Black Acre, in Hillside County, Arkansas, to them. The granting clause of the warranty deed contains the following language: "...to Jack and Jill, as joint tenants with right of survivorship and not as tenants in common."

Neither Jack nor Jill want anything to do with Arkansas. Upon graduation, Jack moves to California; Jill to New York.

Twenty years later, Jill gives a valid conveyance of Black Acre, by warranty deed, to her son, Robert.

Robert becomes a recluse, moves to Arkansas, records his deed, and finds Black Acre. On a two acre parcel of Black Acre, he finds an old house. The two acres are surrounded by a run-down fence. He repairs the fence sufficiently to keep his dogs in. After Robert has lived on the two-acre portion for 20 years, his uncle, Jack, dies. Uncle Jack dies intestate, but with heirs. Robert misses Uncle Jack's funeral because no one in the family can find him. He has not communicated with any of his family in over 20 years.

Thereafter, oil is discovered on Black Acre.

1. What interest in Black Acre can Robert successfully assert against the heirs of his late uncle based on his (Robert's) deed?

2. What interest can Robert assert against Jack's heirs in the two acres?

Explain your answers.

**ARKANSAS ESSAY
ANSWER
PROPERTY
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(I)

Charlie takes 100% in the property as sole decedent. Since Albert never adopted George, George cannot take from Albert's intestate estate.

Black Acre was conveyed to Albert and Betty as tenancy by entirety with right of survivorship. Upon Betty's death, title transferred to Albert in fee simple.

In 1980, Albert transferred, by gift, the property to himself and Donna. In Arkansas, such a conveyance is found to be a tenancy by entirety (even though no straw man is involved to unify the unities of title in joint tenancies). Upon separation, the property remains the same. Donna's deed to George is of no effect. In Arkansas a tenancy by the entirety can only be terminated by death, divorce or mutual encumbrance or inter vivos sale. Therefore, the deed from Donna to George accomplished nothing to sever the tenancy.

Therefore, upon Donna's death, the property is transferred to Albert by operation of law, to the exclusion of George upon Albert's death.

George would be entitled to a $\frac{1}{2}$ undivided interest as tenant in common with Charlie (upon Albert's death). If Albert and Donna never married, the conveyance would have been a tenancy in common, as is the default in Arkansas. As such, Donna's conveyance to George would have sufficiently transferred her undivided $\frac{1}{2}$ interest to him.

(II)

- (1) Jack has an undivided $\frac{1}{2}$ interest in the land as a result of the inter vivos conveyance to him from his mother. A joint tenancy may be severed by inter vivos conveyance of one tenant's interest. Upon this occurrence, Robert and Jack become tenants in common.
- (2) Robert could possibly gain the two acre plot by adverse possession. It is hard, however, to obtain land against a co-tenant by adverse possession.

Adverse possession is accomplished by the open, continuous, exclusive, adverse and notorious possession of land with intent to take against the true owner for a period of seven years. In addition, the claimant must have color of title to either the claimed land or land contiguous thereto and pay taxes on same for that seven year period.

If Robert and Jack were not co-tenants, Robert could easily gain adverse possession. Jack's absence from the state makes no difference because you are charged with notice of the facts you would have known had you been present.

Since, however, they are co-tenants Robert probably has no right to adverse possession. This generally requires that the claimant tenant place the other person on notice of such adverse intentions through ouster or personal notice. The statutory time period normally does not begin to run until such notice or ouster.

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EVIDENCE

I. INSTRUCTIONS
(READ CAREFULLY)

The following fact pattern contains an excerpt from the transcript of a criminal trial. In "real life" defendant's counsel stated his reasons for the objections that he made, but these have been deleted from the record, and you will be asked to supply the reasons (if any) in your discussion. Do not, therefore, discuss the "sufficiency" of defendant's objections under Rule 103; instead, supply whatever legal reason you believe supports the objection, and, if you believe there are no legal grounds for an objection, say so. You should not assume that any/all objections were proper or that the judge's rulings were proper or consistent. Instead, read the fact pattern carefully, and answer the questions posed at the end of it.

II. FACT PATTERN

Defendant was charged with raping his eight year-old daughter. His ex-wife and the victim testified against him. Defendant chose to take the stand, and denied the charges, alleging that they arose because his ex-wife wanted a divorce, and had demanded all the marital property, which he had refused.

On direct examination, defendant was asked by his counsel whether he "had ever been in trouble before, insofar as being convicted of a felony." The defendant said "no," and volunteered that he had a couple of DWI's back in the 70's.

On cross-examination, the prosecutor asked:

QUESTION "A": Do you ever recall a few years ago down on Highway 82 near Texarkana being with a fellow by the name of Carl Le Masters?

ANSWER: No, Sir, I don't know no...

QUESTION "B": Getting in trouble down there?

ANSWER: I don't know any Carl Le Masters.

Defense Counsel: Your Honor, I object to this. (STATES REASON)

The Court: Sustained.

QUESTION "C": Did you ever give an overdose of narcotics to a lady down there who died and as a result Carl Le Masters is now spending time in Cummins Prison on a manslaughter charge?

Defense Counsel: I object to that. (STATES REASON)

The Court: Overruled.

ANSWER: No, Sir, I do not know the fellow.

QUESTION "D": You never pushed dope; never sold dope?

ANSWER: No.

QUESTION "E": Have you ever used LSD?

ANSWER: Yes, Sir, sure have, one time. I don't like that either. That all happened in Vietnam in the two and a half years I was over there.

QUESTION "F": Do you remember the time a few years ago when you were in an automobile accident, a young girl was killed. You told the authorities she was driving when the true facts were you were driving?

Defense Counsel: Your Honor, I object to that. (STATES REASON)

The Court: Overruled.

ANSWER: She was driving, and I do remember the accident.

III. QUESTIONS

3. Were the court's rulings on Question "C" and "F" proper? If so, why? If not, why not?
4. Were any of the other questions (including Question "B") legally objectionable? Which ones, and why?
5. Can the prosecutor call witnesses in rebuttal to prove any of the following propositions:
 - (1) that the defendant and Carl Le Masters were involved in a drug overdose resulting in the death of a woman;
 - (2) that the defendant was involved in a traffic accident

involving the death of a woman, in which, contrary to his testimony, he was the driver;

(3) that the defendant sold dope or used drugs (besides the LSD he testified to)?

If so, why? If not, why not?

**ARKANSAS ESSAY
ANSWER
EVIDENCE
February, 2001**

(1)

The court's ruling was probably proper on C, but not on F. The questions seem to deal with the Ark. Rule of Evidence relating to the character of the accused. The general rule is that the prosecutor cannot go into the character of the accused unless the accused puts his character in issue. Because accused testified, probably put his character at issue. A further limit is that the prosecutor can only go into accused's character as it relates to accused's ability to be truthful. In this case, Question C is, at best, very loosely related to accused's character for truthfulness. On the other hand, Question F does relate to accused's character for truthfulness - whether accused lied to police. Question F was therefore proper. Question C, however, was improper and the objection should have been sustained.

(2)

Questions B, D, & E are probably all improper. When dealing with character of accused for truthfulness, specific bad acts can be asked about & opinion & reputation evidence admissible. However, general principles of relevance must be satisfied. The question needs to be logically (tendency to prove some fact more likely than not true) & legally relevant (probative value outweighs prejudicial effect). Along these same lines, the scope of cross examination cannot go unreasonably beyond scope of direct. In B, D, E, the prosecutor is asking irrelevant questions (to present charge) that seem to go way beyond the scope of direct, which dealt with felony questions. The issue of whether Defendant has ever used LSD does not relate to the pending matter nor does it do anything to impeach his testimony that he had never been convicted of a felony.

(3) Witnesses in Rebuttal -

General rules - for character ev, reputation & op ev admiss & specific acts may be asked about BUT extrinsic ev inadmiss - means once ask about a specific act relating to accused's character for truthfulness, bound by answer defendant gives & may NOT introduce extrinsic ev to the contrary.

Convictions - extrinsic ev of a conviction is admissible if (1) felony & (2) conviction less than 10 years old & (3) pv outweighs prejudicial effect OR (1) felony or misdemeanor & (2) crime related to dishonesty or false statement & (3) pv outweighs prejudicial effect.

- (A) Crime relating to drug ev of woman - no extrinsic ev unless satisfies requirements for admiss of felony conviction,
- (B) Traffic accident - No unless felony conviction requirements satisfied - even though specific instance relating to character trait of honesty, can only ask about under character evidence rules - no extrinsic ev.
- (C) Sold or used drugs - no under character ev rules & no under conviction rules unless meets felony conviction requirements - not a misdemeanor relating to dishonesty/false statement.

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CONTRACTS

Steve Smith (Employer), Chief Executive Officer of Ace Plating Company, persuaded Joy Thomas (Employee) to come to work for his company. Thomas moved from Los Angeles to Little Rock in April of 1999, and began work immediately with the title of Executive Director. Her duties included securing financing to help overseas customers and handling personnel matters assigned by Employer. On June 8, 1999, Employee presented Employer with an employment agreement that she prepared. He asked her a question, they discussed it and then they both signed the agreement. It provides that: "Employer agrees to employ the full time services of a professional and administrative nature of the Employee... and the Employee agrees to accept employment from the Employer..." The agreement outlined Employee's compensation and benefits and in another paragraph states: "In the event of termination of employment for any reason, other than voluntary termination on the part of Employee, the Employer agrees to separation pay equal to one (1) year salary."

The relationship between the parties began to worsen almost immediately after the agreement was signed. Employer asked Employee to leave the company on July 19, 1999. She refused to leave citing her contractual obligation. The next day Employer gave Employee a signed note and informed her that her employment was terminated.

Employer claimed that Employee was a perfect employee for the first couple months of employment, then she began to be absent too much and was causing "chaos" with the other employees. He further alleges that he fired her for a number of reasons including: (1) not canceling an order; (2) telling an Arkansas Department of Economic Development employee that the company was not interested in any of its programs; and, (3) having a bad attitude. Employee claimed she was fired because

she would not lie for Employer in an Equal Employment Opportunity Commission investigation. She stated that Employer told her not to talk to the EEOC investigator but she did so anyway, giving the investigator examples of what was happening at the office. She also gave two or three employees articles on sexual harassment.

The Chief Executive Officer contends that the agreement does not obligate the Employee to do anything; thus, her promise to perform is illusory and there is no valid consideration on her part supporting a contract. He further argues that it is necessary to construe the employment agreement against Employee.

Employee is threatening to sue for breach of the employment agreement and to recover her salary for one year and benefits.

You are legal counsel for Ace Plating Company. Write a concise legal memorandum to the Board of Directors concerning whether a valid contract exists between the Company and the Employee.

**ARKANSAS ESSAY
ANSWER
CONTRACTS
February, 2001**

MEMORANDUM

To: Board of Directors

From: Legal Counsel

A valid contract exists between Ace Plating Company and Joy Thomas. To have a valid contract, there must be an offer, an acceptance and consideration. All three are present here. Ms. Thomas offered her employment services for a compensation and benefits package to our Chief Executive Officer authorized to enter into such employment contracts. There were some negotiations between the parties and then Mr. Smith accepted the offer of Ms. Thomas by signing the contract. In consideration of the contract, Ms. Thomas forwent her opportunity to work for any other company and agreed to work for Ace. An illusory contract is one that only binds one party and not the other. Ms. Thomas here was obligated to accept the employment of Ace. It is irrelevant that she had worked with Ace in the past. Ace's consideration was the compensation package and continued employment of Ms. Thomas.

It is true that agreements are construed against the drafter, however, the language within the four corners are not ambiguous and clearly create a contract. Ace can breach the contract and pay the liquidated damages. However, Ace must fire for good cause only and not as a retaliatory action for "whistleblowing."

In the future, we should draft our own employment contracts that include a time limitation of employment under contract and events that give rise for employee termination.

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CONSTITUTIONAL LAW

You are a lawyer in a small town. There is one high school in this town. This high school ("School") has an extraordinary amount of football talent, and for years the School has won the state football championship. The games are played in a stadium which is a part of and adjacent to the School. Due to the lack of other activities in this small town and the tremendous success of the School team, almost everyone in town attends School football games. For as long as anyone can remember, the minister from the largest Baptist church gives a traditional opening prayer. The words of the traditional prayer are:

Please bow your heads. Dear Heavenly Father, we thank you for allowing us to gather here safely tonight. We thank you for the wonderful year you have allowed these students to spend together at this school. We thank you for the teachers, who have devoted many hours to each of the students. Thank you, Lord, for the parents, and may each one receive a special blessing. Lord, bless this football game and give us a safe journey home. In Jesus' name we pray, Amen.

A Muslim family, whose child attends the School and plays in the School band which performs at the games, comes to your office. The parents believe that the prayer given before each football game is a violation of their child's Constitutional rights. When the parents communicated this concern to the School Board, the School Board responded that the main purpose of the prayer was to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. The parents

ask you whether they can prevail in a lawsuit to prohibit the giving of this prayer, or, in the alternative, whether a modified version of this prayer might be designed for future football games.

Please prepare a memo "for file" upon which you will rely in advising the parents. State the explanation for your advice in the memo. Do not concern yourself with procedural issues, if any, in the memo. The purpose of this memo is to address only the substantive constitutional issues.

**ARKANSAS ESSAY
ANSWER
CONSTITUTIONAL LAW
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MEMO TO FILE:

The Muslim parents have a strong argument that the prayer given at the games violates their 1st Amendment rights, namely it violates the Establishment Clause of the 1st Amendment.

First of all the school is a public school run by the state and even though the minister is not employed by the school he is considered a state actor because he is delivering the prayer at the request of the school and on the school property as its representative. Thus, there is state action sufficient to invoke the constitutional provision of the Establishment Clause.

For a state act to meet the requirements of the 1st Amendment Establishment Clause, it must meet the traditional test as set out in the Lemon case. Under Lemon the act in this case the prayer cannot be for a religious purpose, have a substantial religious effect, or cause excessive government entanglement with religion. Although in recent cases the Supreme Court has moved toward a test that looks more at the coercive nature of the act and if it appears that the act is meant to coerce others into believing or subscribing to a certain religion or religious belief it is invalid under the Establishment Clause. On the other hand, if it is not meant to coerce belief it is often held to be permissive. For example the nativity scenes on courthouse lawns have been held not to violate the Establishment Clause so long as the scene contains non-religious or secular characters such as Santa Clause or Rudolph.

In the case presented, the prayer is both coercive and fails the Lemon test. Though the school offers secular reasons for the prayer the main purpose of it is still to promote religious beliefs. The effect that it has is also religious and not as the school argues to promote sportsmanship and safety. Moreover, it promotes excessive government/state entanglement with religion because the prayer is given at a school sponsored event, or school property, and directed at a captive even unwilling crowd.

Furthermore, the intent of the act/prayer seems to be to coerce belief in religion. For example, not all reading from the Bible at a public school is coercive. If the class were to read the Bible as an historical document it would not be coercive, but here asking the "Lord to bless the game" is coercive.

Thus, under the Lemon test or under the more modern trend of coerciveness, the prayer most likely will be prohibited as violation of the Establishment Clause of the 1st Amendment as applied to the states through the 14th Amendment.

A more modified version of the prayer may be permissible if the school's true intent is to promote sportsmanship and safety and establish an appropriate environment for competition. The pre-game prayer need not be a prayer, such goals can be accomplished with anyone delivering a speech about sportsmanship and safety without even mentioning religious belief or figures. This would be the most constitutionally permissive way to revamp the prayer. However, if the school insists on a "prayer" the school could possibly have a moment of silence to observe sportsmanship and safety and honor the players of the

game. Such moments of silence would be more permissible than an actual prayer. However, the school must not single out individuals with different beliefs, etc., or they may face possible equal protection issues.