

FINAL EXAM

**Instructions**

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

THIS IS A CLOSED BOOK EXAM!

While you are waiting for the exam to begin, be sure that you have written your EXAM NUMBER and "TORTS—SUMMER '92—FINAL EXAM" on EACH bluebook, that you have read these instructions, and that you are otherwise ready to begin.

*IMPORTANT:* This exam will last THREE HOURS. You should plan on spending AT LEAST 20 minutes reading the questions carefully and outlining your answers on a separate sheet of paper. Before writing your answers, REREAD each question to be sure you haven't missed anything.

DOUBLE-SPACE your answers in the bluebook.

Use SEPARATE BLUEBOOKS for EACH QUESTION. Do NOT refer in one answer to the discussion in another answer; instead, make each answer so that it can be read independently. Label each bluebook according to each question and, if necessary, book number, e.g., "Question 1, Book 1"; "Question 1, Book 2"; "Question 2"; etc. When you are finished, turn to the back cover of the first bluebook, and place the second, third, fourth, etc. bluebook in order inside the end of the first bluebook, so the whole makes a single package, reading in sequence. Then put it in the box at the front.

You are welcome to use abbreviations, but indicate what they are, e.g., `Andropov ("A") would be sued by Brezhnev ("B"), alleging that A would be liable to B ... !

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury.

Plan on spending at least 15 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the State of Grace, on some issues. If no law is specified on the point you are interested in, please comment on the possible alternatives.

Each question has been assigned a point total, and the exam as a whole has a point total of **135**. Spend the amount of time on each question reflecting its relative worth.

You may KEEP your copy of the exam questions if you wish.

REMEMBER THE HONOR CODE! Don't identify yourself.

DOUBLE SPACE!

DOUBLE SPACE!

DOUBLE SPACE!

GOOD LUCK!!!

QUESTION 1 (35 points)

Sandra Seitz was admitted to Humana Hospital on February 28, 1985, as a result of pregnancy complications involving a ruptured membrane. On March 10, 1985, she began experiencing pain, which she believed to be the beginning of labor. A nurse examined Ms. Seitz and informed her that she was not in labor. The pains, however, continued through the night until the early morning of March 11, 1985. Seitz contacted nurses through the bed communicator unit in her room. She was sedated and was given pain relief medicine. At about 6 a.m., she attempted to contact the nurses, but the light on her bed unit failed to come on. She "believed" the unit had been disconnected by the nursing staff. She was served breakfast and had her vital signs checked shortly after 7 a.m. After the nurse left, she felt a sharp abdominal pain. She thought she had to "go to the bathroom." Her roommate advised her not to get out of bed, but rather to use a bedpan. The roommate shut the door to the room, and at the same time, Seitz began delivering the baby into the bedpan. The roommate attempted to notify the nurses on Seitz's intercom, and when it did not work, she used her bedside unit. Receiving no answer, the roommate then went to the hall and yelled for help. In several minutes a cleaning woman responded.

Several minutes after that, nurses arrived and rendered assistance. During this time, one of the nurses shouted to Seitz, ordering her to "shut up" because she was disturbing other patients. A few minutes later, Seitz's obstetrician, Dr. Welby, came into the room, on a regular visit, and examined the fetus and Seitz. He pronounced the baby dead.

A nurse wrapped the deceased baby in a sheet, and Seitz inquired where the nurse was going to take the baby. According to Seitz, the nurse said, "Honey, we dispose of them right here at the hospital." Seitz then began to weep inconsolably, and she has hired a lawyer to represent her. The lawyer has obtained an affidavit from Dr. Welby stating that, based on the history of the incident and his personal observation, the nurse "failed to demonstrate the amount of compassion that a nurse should demonstrate toward a patient. Although different treatment would not have avoided the loss of the fetus, I think that the case was mishandled, and that much of the trauma, emotional trauma, could have been avoided."

You represent the hospital. What would you tell them to expect in terms of liability?

QUESTION 2 (50 points)

Anthony Rice was severely injured in 1990 while riding the rotary head of a portable oil drilling rig manufactured and sold by Ingersoll-Rand to Jackson Drilling Company in 1979. Rice was 25 years old at the time of his injury; the accident occurred less than two hours after he began his first day of work with Jackson Drilling Company. Rice apparently had no prior experience working around drill rigs.

The drill rig on which Rice was injured consists of a derrick which is mounted on the back of a truck. At the drilling site, the derrick is raised hydraulically to a height of approximately 37 feet. The drill head rotates, forcing a drill bit and a 25-foot length of pipe into the ground. When an entire length of pipe is in the ground, it is disconnected from the head. The rotary head is returned to the top of the derrick, another length of pipe is attached and the process is repeated until the desired depth is reached. The drill rig is operated from a control panel located immediately to the right of the rotary head on the rear of the rig. The control panel contains a drill feed lever which

controls the upward and downward travel of the rotary head, levers that control the speed of this travel and several emergency shutdown devices. The maximum speed of the rotary head is approximately 100 feet per minute. The derrick itself can be lowered in a few minutes under ideal conditions.

Rice was injured when he fell while riding the oil rig's rotary head to the top of the derrick. Rice was asked to ride the drill's rotary head by his site foreman in order to paint certain markers on the derrick which allow the drillers to determine the depth to which they have drilled. The crew on which Rice was working began drilling in the early evening, and there was some fear that the foreman would not see the markers in the dark. Rice climbed several feet up the derrick, straddled the rotary head, rode to the top of the derrick and, when the rotary head's upward movement was not stopped, was crushed between the top of the head and the derrick.

The crew foreman stated that he intended to stop the head at the marker five feet from the top of the derrick but that the drill feed control malfunctioned and he was unable to stop the drill rig's ascent immediately. In the few seconds it took the crew foreman to react, Rice's body became jammed between the upper portion of the derrick tower and the rotary head. A few seconds later, when the foreman was able to reverse the head, Rice fell to the ground. He fell 25 to 30 feet from the top of the derrick, striking a truck before he hit the ground. His injuries included severe and permanent atrophy of his left side, several fractures, a concussion and multiple internal and external injuries.

You represent Ingersoll-Rand. Your investigation reveals:

(1) Ingersoll-Rand knew that oil workers routinely used the head as an "elevator" to get up and down the derrick for maintenance. Rice contends that Ingersoll-Rand knew this practice existed in 1979 when the rig was manufactured and marketed.

(2) Ingersoll-Rand claims that the drill rig was manufactured in accordance with industry standards; Ingersoll-Rand also claims that liability rested with Jackson Drilling Company because the rig on which Rice was injured was poorly maintained. Various parts, including the emergency shutdown button, were missing from the control panel. The throttle controls were "wired" for the highest speed, the lights designed to illuminate the derrick were missing, the machine was covered with grease, and the operator's manual was in the company office in Tennessee rather than in the cab of the drill rig. In addition, Ingersoll-Rand's evidence is that Jackson had not formally trained the crew foreman to operate its drill, and that the foreman had not read the operator's manual for the rig.

(3) Plaintiff has an expert witness, James Wiatt, who has a degree in mechanical engineering and worked for 32 years for a manufacturer of machine tools. Wiatt observed a drill rig in operation, reviewed photos and engineering drawings of the rig and opined that Ingersoll-Rand's rig was an "accident ready to happen."

(4) The medical bills and lost wages just for two years exceed \$130,000.

Please analyze Ingersoll-Rand's legal prospects.

### QUESTION 3 (50 points)

David Jenks was raped and murdered on June 25, 1991, by James Loudon, age eighteen.

Louden had, from an early age, a history of drug use and other criminal activity, including acts of violence. In July 1987, Loudon was adjudicated delinquent and committed to the custody of the Grace Department of Youth Services.

After three years, Loudon was paroled and placed in the custody of the Youth Drug Program, a state agency. The Youth Drug Program provides both residential and outpatient care and treatment. The program provides a structured system of rewards and punishments to deter misconduct and promote socially acceptable behavior. Loudon began as a resident in the program.

The Youth Drug Program was aware of Loudon's history of violence and criminal activity. While a resident in the program, Loudon threatened another inmate with a baseball bat. On another occasion he threatened another resident with violence. He was allowed to visit his sister, but admitted to use of drugs while doing so. The program was also aware that Loudon had a serious problem of sexual identity. The view was developed, however, that Loudon had made progress in controlling his negative behavior and that, by April 15, 1991, his long-term residential treatment goals had been met. Psychological testing indicated that Loudon was in the normal range of behavior.

The next step in Loudon's treatment was outpatient care. The Youth Drug Program, with the approval of the Grace Department of Youth Services, placed Loudon in foster care with the Cooper family, who also had a son in the program. The Cooper family was not made aware of Loudon's history of violence or his sexual identity problem. The Youth Drug Program told the Coopers that Loudon was in the program for "a few B & E's [breaking and entering] and breaking probation."

While with the Coopers, Loudon was supervised by a parole officer of the Grace Department of Youth Services, who observed no problems. Mrs. Cooper observed, however, that Loudon was becoming depressed and isolated, and she called the Youth Drug Program on several occasions to advise them of the fact. A clinical psychologist, John Korte, who had been a consultant with the Youth Drug Program, confirmed that Loudon began to deteriorate after leaving the residential program. However, no change was made in Loudon's case plan.

Several weeks prior to the murder, the Coopers were told by their son that Loudon threatened a young neighbor boy with a knife. Loudon gave the knife to Mr. Cooper when asked to do so. The Youth Drug Program was advised of the event. The Coopers and the program only learned after the murder that this earlier act also involved rape.

Mrs. Cooper made several telephone calls to the Youth Drug Program prior to June 25, 1991, to advise the program of Loudon's problems. The program took no action. On June 25, 1991, Loudon raped, repeatedly stabbed, and murdered David Jenks, a neighbor.

Arelene Jenks, David's mother and sole beneficiary under the wrongful death and survival statutes, has come to you for advice. Further information:

(1) Your estimate of the damages in this case is \$1,000,000.

(2) The Department's expert in such matters, Dr. Korte, will testify at trial that, based on his experience and review of the case, there was no way to predict with any accuracy that Loudon would commit murder, and that in his opinion the counsellors at the Youth Drug Program did not deviate from the applicable standard of care in their treatment of Loudon. However, immediately after the killing, Jeff Chandler, a counsellor on the program staff, told the Coopers "they knew Loudon was going to snap but they didn't know when."

The question is, what kind of liability judgment can be obtained, and against whom? What would you tell Mrs. Jenks?

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GRACE REVISED STATUTES ANNOTATED  
TITLE VI. FINANCIAL ADMINISTRATION  
CHAPTER 44. CLAIMS UPON THE TREASURY

**§ 44.072. Legislative intent as to sovereign immunity in negligence claims.**

It is the intention of the general assembly to provide the means to enable a person negligently injured by the Commonwealth, any of its cabinets, departments, bureaus or agencies, or any of its officers, agents or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies to be able to assert their just claims as herein provided. The Commonwealth thereby waives the sovereign immunity defense only in the limited situations as herein set forth. It is further the intention of the general assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, agents or employees while acting in the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies in all other situations except where sovereign immunity is specifically and expressly waived as set forth by statute. The board of claims shall have exclusive jurisdiction to hear claims for damages, except as otherwise specifically set forth by statute, against the Commonwealth, its cabinets, departments, bureaus, agencies or any of its officers, agents or employees while acting within the scope of their employment by the Commonwealth, its cabinets, departments, bureaus or agencies.

**§ 44.073. Jurisdiction of board of claims—Sovereign immunity.**

(1) [Reserved]

(2) The board of claims shall have primary and exclusive jurisdiction over all negligence claims for the negligent performance of ministerial acts against the Commonwealth, any of its cabinets, departments, bureaus or agencies, or any officers, agents or employees thereof while acting within the scope of their employment by the Commonwealth, or any of its cabinets, departments, bureaus or agencies.

(3) The board of claims shall have primary and exclusive jurisdiction to make findings of fact, conclusions of law and legal determinations with regard to whether the alleged negligent act was on the part of the Commonwealth, or any of its cabinets, departments, bureaus or agencies, or any officers, agents or employees thereof.

(4) The board of claims shall have primary and exclusive jurisdiction to make findings of fact, conclusions of law and legal determinations with regard to whether the alleged negligent act was on the part of the Commonwealth or any of its cabinets, departments, bureaus or agencies, or any of its officers, agents or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies.

(5) No action for negligence against the Commonwealth, any of its cabinets, departments, bureaus or agencies, or any officers, agents or employees thereof may be brought initially in any other court or forum in the Commonwealth except the board of claims until the board of claims makes a determination, that has become final, that the board of claims has or does not have primary and exclusive jurisdiction over the claim.

(6) The determination by the board of claims becomes final only after all appellate rights have been finalized or waived.

(7) Any applicable statute of limitations for bringing negligence actions in any court or forum other than the board of claims shall be tolled pending the final determination that the board of claims does not have primary and exclusive jurisdiction of the negligence claim.

(8) No action for negligence may be brought in any court or forum other than the board of claims against the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, agents or employees while acting within the scope of their employment by the Commonwealth, or any of its cabinets, departments, bureaus or agencies.

(9) Negligence as used herein includes negligence, gross negligence, or wanton negligence.

(10) The defense of contributory negligence is not a complete bar to recovery of plaintiff's claim in the board of claims and the doctrine of comparative negligence shall be utilized by the board.

(11) [Reserved]

(12) [Reserved]

(13) Sovereign immunity is retained for

(a) Discretionary acts or decisions;

(b) Actions in the performance of obligations running to the public as a whole; and

(c) Governmental performance of a self-imposed protective function to the public or citizens;

and

(14) The filing of an action in court or any other forum or the purchase of liability insurance or the establishment of a fund for self-insurance by the Commonwealth, its cabinets, departments, bureaus, or agencies or its agents, officers or employees thereof for a government related purpose or duty shall not be construed as a waiver of sovereign immunity or any other immunity or privilege thereby held. Except as specifically set forth by statute, no counterclaim, setoff, recoupment, cross-claim or other form of avoidance of the claim for damages may be asserted by any person when suit is brought against said person by the Commonwealth or any of its cabinets, departments, bureaus or agencies thereof.

(15) Neither the Commonwealth nor any of its cabinets, departments, bureaus or agencies or any officers, agents or employees thereof shall be liable under a respondeat superior theory or any other similar theory for the acts of independent contractors, contractors or subcontractors thereof or anyone else doing work or providing services for the state on a volunteer basis or pursuant to a contract therewith.

TITLE XXVII. LABOR AND HUMAN RIGHTS  
CHAPTER 342. WORKERS' COMPENSATION

**§ 342.690. Exclusiveness of liability.**

(1) The liability of an employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents,

dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by GRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner. The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

TITLE XXXVI. STATUTORY ACTIONS AND LIMITATIONS  
CHAPTER 411. RIGHTS OF ACTION AND SURVIVAL OF ACTIONS

**§ 411.180. Effect of Contributory Fault**

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

**§ 411.181. Right of Contribution**

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of § 411.182.

(b) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

#### **§ 411.181A. Enforcement of Contribution**

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by § 411.182, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution must be commenced within one year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within one year after payment, or (2) agreed while action was pending to discharge the common liability and, within one year after the agreement, have paid the liability and commenced an action for contribution.

#### **§ 411.182. Allocation of fault in tort actions—Award of damages—Effect of release.**

(1) In all tort actions, including products liability actions, involving fault of more than one party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:

(a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.

(2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of

the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.

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**RESTATEMENT (2D) OF TORTS**

**§8A. Intent**

The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

**§13. Battery: Harmful Contact**

An actor is subject to liability to another for battery if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) a harmful contact with the person of the other directly or indirectly results

**§15. What Constitutes Bodily Harm**

Bodily harm is any physical impairment of the condition of another's body, or physical pain or illness.

**§18. Battery: Offensive Contact**

(1) An actor is subject to liability to another for battery if

- (ae) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) an offensive contact with the person of the other directly or indirectly results.

(2) An act which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

**§21. Assault**

(1) An actor is subject to liability to another for assault if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) the other is thereby put in such imminent apprehension.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

**§35. False Imprisonment**

(1) An actor is subject to liability to another for false imprisonment if

- (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
- (b) his act directly or indirectly results in such a confinement of the other, and
- (c) the other is conscious of the confinement or is harmed by it.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

**§36. What Constitutes Confinement**

(1) To make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete.

(2) The confinement is complete although there is a reasonable means of escape, unless the other knows of it.

(3) The actor does not become liable for false imprisonment by intentionally preventing another from going in a particular direction in which he has a right or privilege to go.

**§ 46. Outrageous Conduct Causing Severe Emotional Distress**

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

**§63. Self-Defense by Force Not Threatening Death or Serious Bodily Harm**

(1) An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.

(2) Self-defense is privileged under the conditions stated in Subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself,

(a) by retreating or otherwise giving up a right or privilege, or

(b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.

**§65. Self-Defense by Force Threatening Death or Serious Bodily Harm**

(1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that

(a) the other is about to inflict upon him an intentional contact or other bodily harm, and that

(b) he is thereby put in peril of death or serious bodily harm or ravishment, which can be safely be prevented only by the immediate use of such force.

(2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by

(a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or

(b) permitting the other to intrude upon or dispossess him of his dwelling place, or

(c) abandoning an attempt to effect a lawful arrest.

(3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by

(a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or

(b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.