ANSWERS TO MORGAN EXAM QUESTIONS
Waltz & Park casebook, pp. 217-221

Q-1 Not hearsay. The promise is legally operative language. It is part of contract to marry. As a performative utterance, the promise is offered for what it does, not what it says.

Q-2 Reasonable arguments can be made on both sides:

(a) Argument: The statement is not offered to show that the declarant is the Pope, but to show that she is insane. Hence it is not offered for the truth of the matter asserted. Under an assertion-centered definition of hearsay the statement is thus not hearsay. It is circumstantial evidence of declarant's state of mind.

(b) Counter-argument: Saying "I am the Pope" is just another way of saying "I believe I am the Pope." The statement "I believe I am the Pope" is being offered for the truth of what it asserts when the proponent is seeking to prove that the declarant is insane. Accepting the truth of the assertion is a necessary first step in a chain of inferences leading to the conclusion of insanity.

(c) Some have said that even if the statement "I am the Pope" is the equivalent to "I believe I am the Pope," it is still not hearsay. (See McCormick, 2d ed., pp. 701-04.) The statement "I believe I am the Pope" might be called "circumstantial evidence" of insanity, or "nonassertive conduct." If she had been barking like a dog, we wouldn't treat that as hearsay, and Pope statements are analogous. The problem with this reasoning is that "I believe I am the Pope" is a direct assertion of what it is being offered to prove. It's an attempt to express a proposition that could be true or false. Perhaps if the only words that the declarant had ever said from birth to death were "I believe I am the Pope," then insanity could be inferred without any reliance upon the truth of her assertion. The mere repetition of the same phrase, over and over, to the exclusion of others, would indeed be circumstantial evidence of insanity. Suppose, however, that the statement was made for the first time to a prison psychiatrist who was examining a declarant who was trying to establish an insanity defense? The statement certainly cannot be classified categorically as one that in all situations can be used "nonassertively" as evidence of insanity. (See Park, McCormick on Evidence and the Concept of Hearsay, 65 Minn. L. Rev. 423, 427-31 (1981)).

(d) Whatever the proper classification under the assertion-centered definition of the federal rules, the utterance would be hearsay under a declarant-centered definition such as the one presented through Tribe's triangular analysis. The trier's use of the utterance requires it to rely upon the credibility of the declarant. The sincerity danger is present (the declarant might be pretending to be insane).

Under modern law, it does not make any difference whether the statement is considered to be hearsay or not. If the statement is considered to be a statement that the declarant believes she is the Pope, the statement is admissible to show the truth of what it asserts -- i.e., to show that she does believe she is the Pope. It is a statement of present state of mind admissible under the exception codified in Fed. R. Evid. 803(3). The statements "I am the Pope," "I believe I am the Pope," "I believe I am insane," and "I am insane" are all equally admissible to show insanity.

Q-3 Not hearsay on the issue of the adversity of the possession. On that issue, the public utterance "I am the owner of this farm" is legally operative language. The mere making of the statement establishes the element of adversity. (Examples like this one are confusing to
some students because there is congruence between the utterance "I am the owner" and the ultimate fact to be proven with the utterance -- that declarant is the owner. Therefore the words seem to be offered to prove the truth of the matter asserted. One way to account for classification of this statement as not hearsay is to say that when language changes legal relationships -- creates new rights, duties, privileges, or immunities -- it is not being used assertively. Rather than being used for what it says, it is being used for what it does. It is a performative utterance. (Some teachers like to refer to it as a "verbal act"; others find that phrase too vague.)

The assertion-centered definition of the Federal Rules and the declarant-centered definition illustrated in the Tribe triangle always reach the same result when the trier's use of the statement requires no reliance on credibility. When a statement's value does not depend to any degree on the credibility of the declarant, the statement is deemed not to be hearsay even if the words in the statement overlap with what is to be proven. For example, "I am alive" is not hearsay when offered to show that the declarant was alive despite the overlap.

Q-4 Not hearsay on the ground that, whether true or not, the statement by D went to X's provocation. D's statement is being offered to show its effect on the hearer (provoking the hearer to assault).

Q-5 Not hearsay on the issue of D's consciousness, simply because if she hadn't been conscious she wouldn't have been able to make the statement. On that issue, the statement is not being used as an assertion, nor to prove the truth of anything it asserts. Moreover, it does not depend for value on the credibility of the declarant. It is nonhearsay under either the assertion-centered or the declarant-centered definition.

Q-6 Hearsay. One has to believe D's statement that X shot her in order for it to be probative.

Q-7 Hearsay. One would have to believe the statement about the threats in order for it to be probative.

Q-8 Not hearsay. The statement is not offered for the truth of the matter asserted, but to show its effect in influencing the hearer's belief or knowledge. Moreover, its use for the purpose of showing that X knew he was dying does not require reliance on the credibility of the declarant.

Q-9 Hearsay. This statement is offered for the truth of the matter asserted. One would have to believe X's statement for it to be probative. (Although hearsay, the statement would be admissible to show X's state of mind under Fed. R. Evid. 803(3), the exception for statements of present state of mind.)

Q-10 Not hearsay. These are words of independent legal significance, because a gift involves a transfer of possession, plus words of donative intent. (Even in a jurisdiction that requires subjective intent on behalf of the donor for the gift to be effective, the statement likely would be classed as nonhearsay. Language that changes legal relationships either by itself or in conjunction with a contemporaneous intent tends to be classed as nonhearsay on grounds that has independent legal significance. In a subjective intent jurisdiction, a different classification is arguably appropriate. One could say that the words are words of donative intent that are offered to prove the intent stated, and that they depend for value upon credibility because if the putative donor is misstating intent, then the gift is invalid in a subjective intent jurisdiction. Courts have ignored this theoretical difficulty and tend to classify all such statements as nonhearsay. In any event, classification makes no practical difference because of the availability of the state of mind exception.)
Q-11 Hearsay. Assuming that under the substantive law the statement of donative intent must accompany the physical transfer in order to create a gift, the words now no longer have independent legal significance and are probative only if one believes D. Of course, if under the substantive law a statement "I gave you the chattel" is effective to create a gift even if it is made after transfer of the chattel, then the statement is not hearsay.

(At the time of Morgan's exam there were a fair number of cases treating retrospective statements about testamentary acts as nonhearsay, and the reasoning of these cases would seem to apply to gifts. The reasoning proceeded through what Wigmore called a "pretended double inference:" The statement that a gift had been made could be used not to prove its truth, but to show that declarant believed he had made a will, from which a further inference could be drawn that he did make the will. See 2 Wigmore, §§ 267, 271 (3d ed. 1940). In the case of gifts, the chain of inferences could be refined as follows: the statement "I gave you the chattel as a birthday present" is circumstantial evidence of present donative intent, from which past donative intent can be inferred, from which making a past gift can be inferred. But the mental operations required to use the evidence in this fashion, and not for the truth of the matter asserted, are beyond human capacity, and in any event generalizing this approach would destroy the hearsay rule. For a fuller discussion, see 65 Minn. L. Rev. 423, 431-33 (1981).)

Q-14 Not hearsay. On the issue of damages to the reputation, the reputation before and after the event is relevant, regardless of whether the reputation was earned and hence true.

Q-15 Not hearsay. The statement is not being offered to prove its truth -- that X is in fact a liar and a hypocrite -- but to prove that D disliked X. It is circumstantial evidence of declarant's state of mind. (The foregoing analysis applies the assertion-centered federal definition. If one applies a declarant-centered definition under which a statement is hearsay if it depends for value on the credibility of the declarant, one can argue that this statement is hearsay because the dangers of insincerity and misnarration are present. The declarant might be trying to create a false impression that she disliked X, or she might have misspoken, saying "X" when she meant "my Ex."

Q-16 Not hearsay. The statement is not offered to prove the truth of its assertion, but to show its effect on the hearer. After X heard the statement, it was reasonable for X to fear Y. Moreover, the value of the statement would in no way be undermined by the discovery of defects in D's credibility.

Q-17 Not hearsay. Y's reputation, whether or not it is deserved, would more likely make X reasonably fear him. The collection of statements that make up the reputation are offered for their effect on the hearer, not for the truth of what they assert. Moreover, the probative value of the reputation, on the issue of fear, would not be diminished by discovery of defects in the declarants' credibility.

Q-18 Not hearsay. On the issue of probable cause, P's reputation is relevant even if it is undeserved.

Q-19 Not hearsay. On the issue of probable cause, to believe P guilty, Y's reputation, even if undeserved, is relevant. (Note that the question refers to Y's reputation, not P's reputation.)

Q-20 Not hearsay. This is evidently a case in which the principal claims not to be bound by a contract negotiated by her alleged agent. There are two potential issues:

(1) Did D have authority to act as the agent, and
Morgan's question states that the issue is the "terms" of the contract. In other words, does the contract by its terms provide that D is acting as agent, as opposed to acting for himself? On that issue -- the issue whether, assuming D had authority to act as agent, D did act as agent on this particular occasion -- D's statement is not hearsay. By stating that he was acting as agent, D did act as agent. Assuming there is sufficient other evidence of D's authority, whether apparent or real, the issue is whether he had in fact used this authority to bind his principal, P. His words, invoking the authority, become words of independent legal significance which bind P, and hence, on the issue of the terms of a contract, are not hearsay.

Q-21 Hearsay. This statement has probative value on the existence of the agency only if one believes D. Here the issue is D's authority to act as agent. D does not give himself authority merely by stating that he has authority. The words are not words of independent legal significance.

Q-22 Not hearsay under the Federal Rules definition. If this is regarded as a nonverbal conduct case, the conduct is not hearsay because Fed. R. Evid. 801(a) provides that nonverbal conduct is hearsay only if it is intended as an assertion. The doctor here did not intend to assert that X had tuberculosis -- quite the contrary.

There were undoubtedly verbal elements to the conduct described in the question -- for example, the doctor probably made statements while "concealing from X and X's relatives the character of the hospital." The verbal statements of the doctor would not be hearsay under the assertion-centered definition of the Federal Rules. The statements concealing tuberculosis would certainly not be offered for the truth of any assertions they contained.

Under a declarant-centered definition, the conduct and statements would be hearsay. They depend for value upon the doctor's belief, and hence her credibility. Some of the hearsay dangers are present -- the doctor might have been mistaken about her diagnosis in ways that could be revealed on cross-examination. Hence, in a Wright v. Tatham jurisdiction both the conduct and the concealing statements would be hearsay.

Q-23 This is also non-assertive conduct that would not be hearsay under the Federal Rules. However, it would be hearsay under a declarant-centered definition that treats conduct as hearsay when the probative value of the conduct depends upon the credibility of the actor. Here, the conduct is used to show the belief of the actor that X was honest, and the value is affected by the danger that the belief is mistaken. (Tribe's danger of "ambiguity" is also present -- the conduct might not actually reflect the belief the proponent seeks to have us infer from it, and cross-examination might be useful to help clear up that ambiguity.)

Q-24 Hearsay under either definition. If we were not told that these actions were "in order to draw suspicion upon himself," the conduct would look like -- and probably would be held to be -- non-assertive conduct.

Q-25 This would be non-assertive conduct on the part of whoever confined X, and therefore, not hearsay under the Federal Rules. As conduct reflecting a belief, it would be hearsay under a Wright v. Tatham declarant-centered definition of hearsay.

Q-26 One could make a somewhat tenuous argument that this is not hearsay under the Federal Rules definition. The declarant literally does not say that X forged a will. However, the declarant does intend to assert forgery, so the statement ought to be considered hearsay.
under the Federal Rules. The assertion-centered definition would be arbitrary if one used a purely formal approach to decide whether an assertion is offered to prove the truth of what it asserts. The definition should be interpreted in a way that leaves at least some chance that the utterances classified as hearsay and nonhearsay will be different functionally, that is, different in the dangers they present. Hence, assertions made metaphorically, sarcastically, or in some other non-literal form should be considered hearsay. Here, the context indicates that the declarant intended to make an accusation of forgery. Indeed, the statement has no value for the proponent unless the trier infers that the declarant intended an accusation. All the hearsay dangers that would be present if a direct accusation had been made are present here. This hypothetical differs from an "implied assertion" statement in which the declarant did not intend to assert the belief reflected by the statement. In the latter case, there is at least some chance that the absence of an intent to assert the belief reduces the sincerity dangers involved in using the statement to prove the belief. Cf. Advisory Committee's Note to Rule 801(c), p. 1084.

The statement is clearly hearsay under a declarant-centered definition, since its value depends upon the sincerity, perception, memory, and narrative ability of the declarant.

Q-27 This would be non-assertive conduct that would not be hearsay under the Federal Rules. Under a strict Wright v. Tatham declarant-centered approach, it would be hearsay. Of course, if the person escaping was the defendant in the case, it would be admissible as the admission of a party.

Q-28 Not hearsay. These are words of donative intent which have independent legal significance.

Q-29 Non-assertive conduct. Not hearsay under the Federal Rules, but hearsay under a strict Wright v. Tatham approach.

Q-30 Not hearsay on the issue of the adversity of the possession. See discussion of Question 3.

Q-31 This is hearsay under either definition. It is offered to prove the truth of the matter asserted, and it depends for value on declarant's credibility. However, the statement would be admissible under the state of mind/body exception codified in Fed. R. Evid. 803(3).

Suppose someone argues that to say "I have a pain," is not to say, "I am ill," and hence the statement is not offered for its truth. That argument should be rejected. The trier is being asked, as a first step, to infer that the declarant was in pain, and therefore the utterance is offered for the truth of what it asserts.

Q-32 To show hostile feelings, this is not hearsay. The conduct is circumstantial evidence of state of mind that is not offered to prove the truth of any assertion.

Q-33 Same as above. The act is circumstantial evidence of state of mind that is not offered to prove the truth of any assertion.

Q-34 Also circumstantial evidence of the testator's state of mind. (We are beginning to get the idea, are we not, that the testator did not like X.)

Q-35 Not hearsay. The words have independent legal significance. They allocate the $500 payment to the purchase of the car rather than to any preexisting debt or to a gift or loan.

Q-36 Hearsay. Under the assertion-centered definition, the words are offered to prove the truth of the matter asserted. True, the statement is not offered to prove that the declarant was glad to pay cash for the car, but the fact that the statement contains multiple assertions makes no
difference, if the statement is being used to prove one of its assertions. Here, the statement asserted that the payment had been made, and that the declarant was glad to pay; it is hearsay because it is offered to prove the truth of the first assertion. Under a declarant-centered definition, the words are clearly hearsay because they depend for value on the credibility of the declarant.

Q-37 Also hearsay. This is the same as Q-36, except that the hearsay is written instead of spoken.

Q-38 Hearsay. The words are offered for the truth of what they assert and one must rely on the credibility of the mechanic.

Q-39 Not hearsay under either definition. The words are not offered for the truth of what they assert, but to show their effect on the hearer. The hearer was put on notice of the risk. The risk must be proven with other evidence if it is in issue. Even if one does not trust the mechanic at all, the statement tends to show that the plaintiff assumed the risk about what she was told.

Q-40 Some would classify this abstractly described problem as non-assertive conduct. Yet if one imagines the evidence coming out on the witness stand, certainly there would have to be testimony about assertions. If the testimony was that P said to W, "D owes me money," then that statement would be offered to prove the truth of what it asserts, and would depend for value on the credibility of the declarant.

Q-44 Hearsay. Admittedly, the declarant is on the witness stand and subject to cross-examination. That fact does not automatically mean that the hearsay rule does not apply. Note the full language of Rule 801(c): "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The declarant's statement to his wife was made by the declarant while out of court and is offered for its truth. It also depends for value upon the credibility of the declarant.

Q-48 Same as Q-44. Even though W is on the stand at the time, and even though he is also the declarant, the statement is hearsay, since it was not made while the declarant was on the stand.

Q-50 Not hearsay. When offered merely to fix the time, the content of W's statement makes no difference and its use does not depend on W's credibility. Suppose W had testified that he saw D do act X, and then within an hour said to M, "Please marry me." When M's testimony that W said "Please marry me" at 3:30 is offered to fix the time, the statement obviously would not be hearsay. The same analysis applies when W's statement is "I just saw D do act X." The fact that those words were said at that time, not the truth of their content or the credibility of the speaker, is what is significant.

Q-51 Hearsay, at common law and under the California Evidence Code. The Federal Rules of Evidence, however, -- for reasons that are somewhat inscrutable -- define admissions as nonhearsay. This is not a good question to ask unless you want to get into Rule 801(d)(2).

Q-52 Of course, under modern law the silence would be inadmissible on Fifth Amendment grounds. However, so far as the hearsay rule is concerned, it is not hearsay under the federal definition, but rather non-assertive conduct. Under a declarant-centered definition, it would be hearsay because it is offered to show the defendant's consciousness of guilt. The defendant might be mistaken, and at any rate the inference of consciousness of guilt raises the ambiguity danger (see Tribe triangle, p. 92). However, the hearsay ban would be
overcome because a confession is the admission of a party and therefore defined as nonhearsay under Rule 801(d)(2).

Q-53 Hearsay under either definition. A conviction is simply a hearsay statement by the jury or finder of fact that the defendant did it. (Note that the rulemakers thought that an exception -- Fed. R. Evid. 803(22) -- was necessary in order to make certain that convictions were admissible.)

Admittedly, the prior judgment is legally operative language. However, legally operative language is hearsay when offered to prove something other than the legal relationship that it creates. Here the legally operative language is not being used for what it did (made the defendant vulnerable to legal sanctions) but for what it said (that the defendant is guilty of a crime).

Q-54 Hearsay. This, indeed, makes the answer to the previous question even more clear.

Q-55 Not hearsay. This would be circumstantial evidence of the husband's state of mind.

Q-56 Not hearsay. This is an offer which has independent legal significance. (It is conditionally relevant on the assumption that there will be some evidence of acceptance.)

Q-57 Some would classify offering the reward as non-assertive conduct. However, it is likely that the testimony about the offer would reveal an assertion by an FBI official that the defendant was guilty of crime, or at least suspected of it.

Q-58 Technically this is not hearsay. It violates the rule requiring testimony based on personal knowledge. If defendant testified quoting someone to the effect that the deceased was the defendant's father, that would be hearsay.

Q-59 Offered for the truth of what it asserts and dependent on the credibility of the defendant. Nonetheless, some would analogize this statement to nonverbal conduct treating the child as a son, and strain to classify the statement as "circumstantial evidence" of the declarant's state of mind.

In any event, under the federal rules the statement would be deemed nonhearsay under the special exemption for admissions created by Fed. R. Evid. 801(d)(2).

Q-60 Not hearsay. We generally regard the actions of machinery -- even if they have to be set by human hands -- as nonhearsay.

Q-61 Many would classify this statement as not hearsay, on grounds that the knowledge of the speaker has been revealed without any reliance on his credibility. This issue is like the one presented by the Bridges case, described on p. 120 of the casebook. Please refer to the discussion of Bridges earlier in this Manual.

Q-62 Not hearsay. The nuptial vows are the marriage itself and hence of independent legal significance.

Q-63 Not hearsay under either definition. Under the Federal Rules, the behavior is not hearsay because it is nonassertive conduct. Under a declarant-centered definition, the behavior is not hearsay on the issue of notice because it shows notice regardless of what we think of the declarant's credibility.
Q-64 Not hearsay. The very statement, "I am alive," shows that the speaker is indeed alive, even if he were also a liar.

Q-65 Not hearsay. The behavior of animals is regarded as instinctual and not as a statement. At any rate, under the Federal Rules, only statements of a "person" can be hearsay.

Q-66 Some would classify this as non-assertive conduct, and hence not hearsay under the Federal Rules. See Zenni, p. 106, fn. 7 (commands cannot be assertions). Under a declarant-centered definition, the letters would be hearsay. The hearsay dangers are there to some degree. The writers may, for example, have been mistaken about the nature of defendant's business.

Q-67 Not hearsay. It is non-assertive conduct, not a statement. Probably even under the declarant-centered definition it would be classified as nonhearsay. It does not reflect a belief, and is like conduct such as weeping.

Q-68 Not hearsay. This is not testimony of a statement, and it in no way relies on the credibility of anyone not in court.

Q-69 Not hearsay. The pointing is a statement, but the statement is made by the declarant while testifying in court.

Q-70 Hearsay. Indeed, this is double hearsay, because the statement of the client is hearsay and the statement of the attorney is hearsay. Under the Federal Rules, however, both statements would be deemed nonhearsay under the special exemption for admissions created by Fed. R. Evid. 801(d)(2), but they are hearsay so far as Rule 801(c) is concerned. This is not a good question to ask unless you have assigned Fed. R. Evid. 801(d)(2).

Q-71 Not hearsay under either definition. The sign is not offered to prove the truth of any matter asserted in it. Moreover, it has independent legal significance, creating a duty that the defendant allegedly violated in this case.

Q-72 Hearsay. The death certificate is a statement by someone not in court, offered for the truth of what it asserts and dependent on that person's credibility. A hearsay exception applies, but that is not the issue here.

Q-73 Not hearsay. There is no testimony about any statement, nor any testimony that depends for value upon the credibility of an actor not in court.

Q-74 Hearsay. This could be called circumstantial evidence of one's state of mind, but where the state of mind is directly the object of the assertion, we more often class it as hearsay. Note that if the declarant had said, "Please get me out of town, the deceased (presumably mentioned by name) is after me," that would be circumstantial evidence of declarant's fear, and not hearsay under the federal definition on grounds that it is not offered for its truth, but merely to show fear.

Q-75 Hearsay. The shades-down signal was a statement by the wife as surely as a written or oral statement. The statement is offered for the truth of what it asserted and depended for value on declarant's credibility.