Note on Answering the Sample Exam

This memorandum contains some general notes on answering the sample exam previously distributed. It is not really a sample answer, since I have not been educated by the process of reading through many actual answers. Rather, it is a rough sketch of what a good answer might look like. Actual answers tend to vary widely in style and content, and it is very possible that an excellent answer could cover points not mentioned herein, or omit some that I do mention.

General Comments.

I begin with three general comments.

(1) By far, the most important task in actually writing up a final examination is a sense of pacing; time will be a factor, and it is very important to cover all of the questions, and each of their main parts. No one, within the one hour allotted to each question, will be able to cover everything, or to discuss any particular issue in too much depth. Develop a rough outline that will serve as a checklist to get through each question, and pace yourself accordingly. Make sure you leave one hour for each question, and that you address all sub-parts.

(2) A second general comment is that, although the three questions move from a basic issue spotter to a more open-ended "policy" question, I do not think that there is a radical difference in approach to each question. Thus, on the first, issue spotting, question, I am not looking for a large amount of technical, doctrinal detail — and I strongly suspect that anyone attempting to provide this will run afoul of the first general point, discussed above, on timing. In moving necessarily quickly through the issues raised, I expect a brief discussion of the major arguments on both sides of each issue. This will almost certainly involve "policy." In contrast, on the final question, I expect, as the question explicitly notes, some attention to "law" or "doctrine."
Answers that are too abstract — that fail to tie the policy discussion into what we have learned about property law — will not be ideal.

(3) Finally, a reminder of what the sample exam was intended to show — and what it is not. The sample is meant to suggest the form of the final, and to be reflective of general matters, such as the relative timing pressures and the amount of doctrinal detail I am expecting. You can expect the actual exam to be slightly over three hours, to consist of three equally weighted questions, with the first an "issue spotter" and the third a "policy" question (but see above on the similarities between good answers to these questions). Question 2 will be something, literally and figuratively, in the middle. The exam will be open book.

I will not expect great depth or detail in doctrinal analysis. In this regard, I mean the exam to mirror the style of discussion we have had in class. On the other hand, the precise nature of the questions and the issues addressed will of course vary. As one example, the issue spotter may focus on different arguments over a given piece of property, different claimants, or different parcels of property. One skill in answering any examination is to use your judgment, and write an answer responsive to the question, not to any specific prior expectation of what the question would be asking.

What follows are general discussions of answering each question.

Question I.

This question reflects the form of my issue spotters. There will be a fair number of issues, fairly transparent in the fact pattern, and I expect a rather brief, well organized discussion of each. Since it is most important to cover all of the issues, no one issue can be, or is expected to be, covered in tremendous depth. This will force you, I hope, to focus on the best arguments for and against each claimant in this case (in another issue spotter, you might be expected to move quickly through different claims or types of property, say). You might imagine a rather casual setting, in which some non-lawyer is asking you whether or not she "has a case": can she sue? can someone sue her? would she win? what are her best arguments, and what counts against her? etc. In this kind of process, conclusions are far less important than seeing the big picture: the major arguments on both sides of the major issues. In general,
the stronger or more complicated the claim, the more discussion would be warranted. We will see this below; Mickey will probably take up more time than Pluto.

In the case of this particular question, the best and most obvious way to organize discussion is around each potential claimant. Other outlines are certainly possible — and I give no specific points for organization per se — but I would be concerned that an overly complex or abstract organization might lead to missing some key issues (e.g., forgetting to talk about one of the claimants). Arguments against a particular claimant can arise from discussion of other parties; cross referring is fine, and repetition is not very prudent. A good answer would be careful to distinguish between claims for the $100, the duck itself, and the value of the duck.

Beginning with Mickey, his best arguments focus on the fact that he found the duck; he looks like the finder in Pierson v. Post. Possession, after all, is nine-tenths of the law. The "find" cases (Armory, etc.) could also be cited here, although, as I have said, there is no particular bonus for citing cases — that is up to you, and how you might best remember the material. Mickey also acted reasonably, in looking around, and in taking the duck to the Museum. He would seem to have a very strong argument to the $100, at least (the counter arguments come below), but he will want more than that. His claim to the duck itself, or to its value, will depend on showing that the deal with the Museum for the $100 was somehow illegitimate: fraud, a mistake, even a "theft." (There are, of course, contract issues here, but ones that relate to a property question — who owns the duck).

Pluto's best argument is that he shot the duck, so he was the one who "added value" or "labor" to it, in a Lockean sense. He looks like the whale killer in Ghen v. Rich. OTOH, it is not clear that we want to encourage or reward duck shooting, and, however strong this argument looks, it has to be made relative to Mickey; ownership is relative. The fact that he got lost, etc., then cuts against him.

Snow White has the possible claim of an owner, a ratione soli (by reason of the soil) type argument. This depends, at least in part, on showing that Mickey was a trespasser. Was he? He might have a prescriptive easement, or even (less likely) adverse possession. Even if he did not, though, would
Snow White get the duck? This seems like not the right measure of damages, especially since the duck would probably have decomposed before she ever found it. OTOH, perhaps we do not want to reward or encourage trespassers, so Snow has an argument after all.

Note that both Snow White and Pluto have to step into Mickey’s shoes, so to speak, to get to the duck – once they have established a right to it, they have to find away around the deal with the Museum, just as Mickey did.

The Museum will have problems with Mickey’s arguments for fraud or mistake, since the duck really was very valuable, and they (if not Goofy), knew it, and Mickey obviously did not. OTOH, there are lots of good, sound, policy type arguments for letting the Museum keep the duck – they are the most efficient user; without them (and the special fluid), the duck decomposes; the duck is most valuable there. But, even if a court lets them keep the duck, what about its value? Is it fair for the Museum to get rich here, or should they pay Mickey (or whomever) more than a mere $100? The case looks a little bit like Moore v. Regents – the UCLA, spleen case, which we only briefly discussed in class.1 But the same type of policy arguments obtain: the efficiency and utility of a large institutional owner as opposed to the individualistic concerns of a private owner.

Finally, the Seven Dwarf Tribe has a different kind of claim. Their claim to the land itself may be a bit weak, under current doctrines. We did not read the Indian land cases, but I take it that most of you could intuit this. OTOH, the claim for the duck does not have to rest on a land claim. After

1. This brings up a general point. It may seem like an issue relates to something we did not cover in class, or covered only briefly. Most likely, it does not, really. In any event, it would be a grave mistake to try to teach yourself something during the exam — spending time reading Moore, say. I really do mean to base the exam on what we covered in class. In this case, having actually read Moore adds little to the analysis, which is common-sensical, reasonable, and policy driven, and I am not looking for any specific citation. The same goes for any Native American cases relevant to the Tribe’s claim, say. If you really think that something is relevant that we did not cover, by all means just say so: "It looks like cases on Indian land rights might be important here, but we did not read any." Then just go on.
all, Snow White (the closest person to a landowner) does not necessarily win
the above discussion, and the Museum is not making land claims. The Tribe
looks like a different kind of institutional user than the Museum -- not a
wealth-maximizing one, but an important one nonetheless. Why should we
give the duck to the Museum, to use in commerce, rather than to the Tribe,
to use in cultural and religious capacities? It turns out not to be an easy case
(as one should expect in an issue spotter!). Mickey, the Museum, and the
Tribe are probably the strongest claimants, and the court may look for some
way to compromise, or "split the duck," as they say.

Question II.

In hindsight, I realized that this question was too long. On the real
exam, I would drop one of the sub-parts, probably Part C. You will, however,
no doubt face time pressures on the actual exam, and, once again, it is
important to do the best you can within the time allotted. Remember that
everyone else has the same constraints, even if I mess up, as I did here, and
give you too much to do.

In any event, this question illustrated the form of a second question —
moving towards a policy type question, with a more in-depth look, perhaps,
at one particular issue. It is important to pay attention to what you are being
asked, and the role that the question puts you in. It is also important to
answer all of the sub-parts as best you can. Generally, when I include sub-
parts, I am thinking of helping you to organize what could otherwise be a
single, coherent essay -- the subparts serve the purpose of helping you to
outline a good answer.

This question illustrated what I mean by this. The focus is on landlord
and tenant law, with a backdrop of gangs and ethnic tensions. You are told
that you are a legislative assistant. Part A was meant to begin with a general
statement of the common, that is, case, law. I did not intend any trick with
the wording of this question; I was looking for a quick sketch of general
common law themes. How, that is, would courts approach this issue? Here,
you might say that courts could be expected to be pro-tenant (Berg v. Wiley,
Hilder v. St Peter, etc.), to be suspicious of any possible invasion of privacy
(Nahrstedt, appellate court) or interference with families (Moore), and any
ethnic bias (Shelley v. Kraemer; Starrett City; Mt. Laurel). Thus, at the outset, there is reason to believe that the courts would not be giving the landlords and concerned tenant groups quite what they want - increased power and ability to control the gang problem. OTOH, there has perhaps been a growing sense of the need for communities to control "nuisances," (Belle Terre; Nahrstedt, as reversed), and the anti-gang attitude is not necessarily different from the anti-student attitude seen in Belle Terre. Also, things change, and one might expect just this problem — of gangs — to get courts to rethink their pro-tenant bias. It is significant that other tenants are asking for this, too, although that was a factor present in Starrett City (i.e., tenants were on the side of the landlord), to no avail in that case.

Part B asked you to think of a pro LATAG statute. This drives home the problems discussed above. If you wanted, you could take the LATAG request as a provisional statute. Then the question looked for you to discuss how this would work. How would landlords find out about gang membership? Could they just ask? Would they infer it from the ethnic group, the age of the parents, etc.? Is gang membership per se a problem? Would we have to wait for a conviction of criminal activities? Even there, why should the whole family be punished? Is it fair to give landlords the power in the first instance? How will this protect the legitimate concerns of members of the ethnic group from which the Greens come? What will be the remedies for unjust eviction, etc.? OTOH, the common law alone may not be fair to the innocent, peace-loving neighbors, and we might be in the grips of a "tipping" phenomenon, ala Starrett City. One (among several possible) clever suggestions is for some kind of quota system: allowing landlords to limit the number of potential Green households.

The above illustrates why including Part C was, no doubt, too much. This sub-part was intended to continue the discussion. Having come up with a statute, how would you expect a court to interpret it in light of the concerns expressed above? Here, the most plausible response is "stingily" — one would expect courts to be more concerned about the rights of minorities, families, and privacy-type interests than the legislator might be. So there is the real possibility of the legislation being merely symbolic here — a law that placates the constituency, but is not enforced, or is not favorably enforced, by the courts. But this would be nothing new — lots of situations (death penalty legislation; Prop. 187?) have this feature.
Question III

This was the policy question or, perhaps better put, the most policy-oriented of the questions, as I discussed above. You should expect some choice here, as you had in this question, and also sub-parts, to work as discussed in Question II. Once again, these subparts were intended to steer you all to a single, coherent essay – each sub-part leading into the next. They were also meant to stress the need to include law and policy, even under this "policy" question.

There are too many permutations (9) to discuss specifically here. Rather, the general idea was to be creative and have some fun – i.e., make policy questions to be more open-ended, and creativity, within constraints, is fine. I say "within constraints" because I would expect every good answer to address subpart (1): to sketch out, in a paragraph or two, the doctrine. This should not just be a matter of plagiarizing Gilbert’s, but rather of telling me, in English, what "the law" is. And you would want to do this with some sense of where you were heading — that is, set out the law with some idea of telling me about its policy justifications. For adverse possession, this would involve discussing the law as a conflict between a prior owner and a subsequent user. Similarly, the rule against perpetuities can be seen as a doctrine restricting the right of one owner to tie up her property too far into the future. In neither case do I need or want long, detailed, doctrinal discussions -- just a basic overview, the kind of thing you might tell a friend or relative. Human capital was meant to involve the degree cases in marital property (Elkus, etc.), but I have heard at least one student talk about discussing slavery here, which sounded just fine -- once again, creativity is perfectly appropriate on this question.2

Part (2) asked for a parallel description of the norm — again, one or two paragraphs, in clear and concise English. Utility is the principle of maximizing community utility or pleasure; you could plug in wealth maximizing here, as a special kind of utility. Liberty is the idea of ceding a

2. This brings up a general point. If there is ever something in the exam you do not understand, or that seems ambiguous, simply make a reasonable interpretation, explain it, and go on. If your interpretation is reasonable, even if not the one I specifically had in mind, you will get full credit.
domain to individual, private, interests, free from state or communal intrusion. **Pragmatism**, which we have not discussed all that much in class, is simply a characteristically American, common-sensical, "anti-theory" theory; Holmes gives a good example. Pragmatists generally reject fixed meta-theories, look to the facts of the case, and "do the right thing." In this sense, pragmatism may embrace any or all of the other theories we have discussed, depending, always, on the context.

Part (3) was intended to be the main part of the essay. Having set out (1) and (2), how do they fit together? Does the norm explain all of the doctrine? Or is there something left out; some cases that do not fit? Here, you were free to use cases, your own ideas, etc. The constraints were that you in fact talk about the connection between (1) and (2), and pay some attention to the inability of (2) to completely explain (1).

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That is about it. Let me reiterate that the above discussion was not meant to sketch out the definitive route to a winning answer. Good answers, like good lawyers and good people, vary quite a bit. There is no "magic" answer, no special trick that I am seeking. I hope that those of you who have kept up with the reading, and paid attention to what we have done in class, will be able to relax and do just fine on the exam. In any event, good luck to you all.