Final Examination Memorandum
Property
Spring 2016
Professor Grimmelmann

I graded each question using a checklist, giving a point for each item (e.g., "Reynold lost his mechanics lien on the cab when he gave up possession.") you dealt with appropriately. Ten percent of the credit in each each question was reserved for organization and writing style. I gave partial credit for partially correct analyses; I gave bonus points for creative thinking, particularly nuanced legal analyses, and good use of facts.

Sample answers to the three questions are below. They aren't perfect; no answer in law ever is. Indeed, it was frequently possible to get full credit while reaching different results, as long as you identified relevant issues, structured your analysis well, and supported your conclusions.

If you have further questions after comparing your essays to the model answers, or would like to discuss the course or anything else, please email me and we'll set up a time to talk.

It has been my pleasure to share the past semester with you, to partake of your enthusiasm, and to learn from your insights.

James

Question 1: Non-Stop **(1373 words)**

Parties

If Thomas is found personally liable, his assets will be available to pay for Alexander's injuries. These include his house and his shares in Madison Avenue. The shares are likely to be worthless, since if Madison Avenue has enough assets to pay, those assets will be available to Alexander anway under *respondeat superior*. James's assets will not be available because under *Walkovsky* there are no facts justifying piercing the corporate veil and holding him liable as a shareholder.

Debts

In addition to any potential tort judgment in favor of Alexander, Madison Avenue potentially owes $10,000 to First National Bank (FNB) on the cab loan and $2,000 to Reynold for repairs. They may also attempt to collect their debts from Madison Avenue's property, reducing the amount available to Alexander to satisfy a judgment.

The Taxicab

When Madison Avenue acquired the cab, it gave a lien to FNB. That lien was recorded, giving future lenders and buyers record notice of FNB's interest. When Reynold performed repairs on the cab, he acquired a mechanic's lien to secure payment for the repairs. Under Schuyler law, Reynold's lien had priority while the cab was still on his lot. But when Reynold let James drive the cab off the lot, not only did Reynold's lien lose its priority, Reynold lost the lien entirely. Now he is just another unsecured creditor with no lien on the cab. (*M & I Western State Bank* is distinguishable, because there the mechanic recovered possession before the other creditor attempted to repossess.) FNB's lien has priority again.

Lien or not, however, the cab is not an asset of Madison Avenue because it was sold to Bursar. Bursar cannot qualify as a good faith purchaser as against FNB, because FNB's lien was recorded. But this only means that Bursar took the cab subject to FNB's lien, not that the sale itself fails or that Alexander has a right to unwind it. It is possible that the sales price reflected the lien, in which case the transaction stands and Alexander can attempt to execute any judgment on the $10,001 Madison Avenue received for the cab. Or perhaps Madison Avenue misled Bursar about the lien, in which case there is a risk that Bursar might attempt to sue Madison Avenue for breach of warranty of title under UCC § 2-312. The damages would be $10,000, effectively wiping out this asset as a source of recover for Alexander. Finally, it is possible that the sale was a fraudulent conveyance as in *Sawada v. Endo*, entered into specifically to keep Alexander from collecting on a tort judgment. The fact that the sale price almost exactly equals the amount still outstanding on the loan to FNB is suspicious. But it might also reflect six years worth of damage and depreciation.

The Hood

The hood was separated from the cab during the course of repairs. Is it still Madison Avenue's property? Probably not. One possibility is that it constitutes abandoned property, since Madison Avenue has made no attempt to recover it. Another is that Reynold used the hood to satisfy Madison Avenue's outstanding debt, as he was entitled

to do under his lien (which would reduce the debt the fair market value of the hood before Reynold banged it back into shape). A third is that Reynold and Lauren's Pants adversely possessed it: the three-year statute of limitations has long since run. The statute was not tolled, even if Madison Avenue has not discovered that Lauren's Pants now has the hood, because a diligent search would have started by going to Reynold's to inquire about it, which would have quickly brought out the full story. A fourth is that Reynold acquired the hood via accession when he repaired it (again, he would have to set off the fair market value of the unrepaired hood against his debt). A final possibility is that by entrusting the hood to Reynold's, Madison Avenue triggered UCC § 2-403, making Lauren's Pants a good-faith purchaser with good title to it.

The Medallion

Similar reasoning applies to the physical medallion. It is more likely to be mislaid than abandoned property, as James did not deliberately give up ownership and indeed quickly obtained a replacement. It was not property being repaired, so the mechanic's lien does not apply to it. Accession does not apply, as attaching it to Maria's car involved no irreversible physical transformation. And Reynold's Repair is not likely to be a merchant who deals in taxi medallions. But the adverse possession reasoning, as applied to the physical medallion, is the same. Maria owns it now; Madison Avenue owns the replacement medallion.

The Franchise

The medallion by itself is just a piece of metal. It symbolizes and provides evidence of the associated franchise, but it gives no rights to operate a taxicab. That privilege is controlled by the Schuyler Taxi Commission, and possession of the physical medallion is not sufficient to convey rights in the franchise. Madison Avenue's franchise is property under the *Kremen* test, since only one owner can legally operate a cab with medallion #1800 at a time. It is also property under *Turoff*; indeed, it is almost precisely the type of property at issue there. As such, the franchise is probably property of Madison Avenue that could be used to satisfy a tort judgment; it is likely to be worth at least the $15,000 Madison Avenue paid for it.

Madison Avenue's conversion claim against Maria is likely to fail. Maria may have committed an offense by operating an unlicensed taxicab and by imitating Madison Avenue's franchise number. But she has not deprived Madison Avenue of the use or value of the franchise; it has been operating a taxicab the entire time since it obtained a replacement medallion. As such, its claim for her $240,000 in fares will fail; those fares were not obtained through misuse of Madison Avenue's property. (Even if they had been, $240,000 is far too high; a property owner is only entitled to the defendant's *net profits* from deliberate misuse of its property, not to the defendant's *gross revenue*.)

On the other hand, Maria has not acquired ownership of the franchise. She could take no title to it from Reynold, since he never had title to the franchise (not even voidable title) to convey. (And she would probably fail to be a good-faith purchaser because it is presumably easy to check with the Schuyler Taxi Commission who owns franchise #1800, and also because the price she paid is suspiciously low.) She is not an

adverse possessor because she never "possessed" the franchise as against Madison Avenue for the same reasons she did not commit conversion as against Madison Avenue.

The Insurance

The $100,000 liability insurance policy Madison Avenue carries is intended for precisely this kind of situation, and should be available to pay for Alexander's injuries. The fact that Madison Avenue carries only the statutory minimum will not increase the liability of Madison Avenue or its owners. *Walkovsky*.

Thomas's House

When the house was conveyed to Thomas and Lancelot, they were not married, so they could not be tenants by the entireties. A joint tenancy likely resulted instead, since survivorship makes it the next closest tenancy. Schuyler's subsequent adoption of same-sex marriage probably does not retroactively alter the effect of previous conveyances. The result is that Thomas's share of the house can be seized by his creditors, who can then force a partition. (If Thomas and Lancelot were tenants by the entireties, Thomas's individual creditors could not reach the house without Lancelot's consent, which would not be likely to be forthcoming. *Sawada v. Endo*. Unlike in *Craft*, there is no overriding federal policy that would disregard state law on tenancy by the entireties.)

James's House

If James were personally liable, Alexander could try to collect James's interest in the mansion. But it is not likely to be worth much. If James did have a guaranteed long-term leasehold interest in the mansion at the low rent of $100 a year, this would be a valuable asset even if it fell short of full fee simple ownership. But under *Effel v. Rosberg*, this lease is probably a tenancy at will, which Burr can cancel at any time.

Question 2: The Rooms Where It Happens **(1251 words)**

Joint Tenancy

After P.J.s death, Angelica, Eliza, and Peggy owned the rowhouse as joint tenants with equal one-third shares. Although Schuyler construes ambiguous conveyances as tenancies in common and this one did not use the "magic" words "joint tenancy with right of survivorship," P.J.'s will unambiguously expressed an intent to create survivorship between the sisters. As a result, when Angelica died, survivorship made Eliza and Peggy joint tenants with equal one-half shares. (If P.J.'s will were treated as creating a tenancy in common, they would take Angelica's share via intestacy as her nearest living (known) relatives – they are descendants of Angelica's parents – and would therefore be tenants in common with one-half shares each.

All three sisters had the right to use the premises. The division into two apartments was not an ouster of Peggy, who continued to use the rowhouse to store suitcases and to visit at the holidays. But when Eliza prohibited Peggy from entering in the dispute over the guns, that was an ouster. As a result, Peggy could sue for half the reasonable rental value of the entire rowhouse, in addition to her rights to seek partition.

Either surviving sister could demand partition of the rowhouse at any time. A court would be likely to prefer partition in kind, because the rowhouse is already divided into two apartments. So while Eliza should attempt to patch things up with her sister (perhaps by giving her the antique cabinet) even a partition would likely allow Eliza to continue living in the rowhouse.

George

Co-tenants are allowed to use the property and to allow others to use it, so Eliza's lease to George was proper. George paid approximately $500/mo x 12mo/yr x 10 yr = $60,000 in rent. Eliza was obliged to share this income with her sisters; she owes Peggy 1/3, or $20,000.

George breached his lease when he stopped paying rent. Eliza could sue him for accumulated back rent (approximately $500/mo x 12mo/yr x 11 yr = $66,000). She was not subject to a *Sommer v. Kridel* duty to mitigate, because that duty applies only when the tenant surrenders his interest under the lease and moves out, which George did not do. But the statute of limitations will bar her ability to collect some of the back rent.

George has not adversely possessed the apartment. His possession is actual and exclusive (as a tenant's possession under a lease almost always is), open and notorious (Eliza and certainly knows he is there), and continuous for more than ten years. But George is possessing in bad faith: his lease with Eliza demonstrates his recognition that she is the true owner of the apartment.

Eliza can and should evict George. If she is concerned about adverse possession, she could bring a suit to quiet title and declare that he has no rights to the apartment.

Cabinet Battle #1

The cabinet was probably a fixture when the apartment passed to the sisters: although it was removable without significant damage, it was bolted to the wall. As such, it was

subject to their joint tenancy interests in the rowhouse. If it were treated as personal property, it passed by intestacy to P.J.'s heirs – the sisters – and then by intestacy to Eliza and Peggy at Angelica's death. Either way, Eliza and Peggy each have one-half interests in it. Peggy's claims about P.J.'s wishes and Eliza's dream are irrelevant in construing P.J.'s will, which must be interpreted to determine his intent based solely on its contents. Nor did P.J. make a completed *inter vivos* gift; even if he intended for Peggy to have the cabinet, he never delivered it to her.

Angelica (and/or Eliza in the years after Angelica's death) may have adversely possessed the cabinet during the years it remained in her room, but since it was moved there by the three sisters during the remodeling, Angelica's possession was probably not tortious and therefore never started the statute of limitations clock running.

The Covenant

The sisters have notice of the covenant because it is in their chain of title. True, it is not recorded and Eliza herself had not actually seen the deed. But since she claims the property through P.J., she would have found the covenant if she inspected the deed by which she owns an interest in the rowhouse. More to the point, the sisters are not good-faith *purchasers* of the rowhouse, because they received it via will rather than by giving value for it, so they cannot claim the protection of the recording act.

(Eliza should immediately record the deed to P.J. and perform a full title search. While the chances of anything going wrong are small, as adverse possession would clean up any title defects, Eliza can easily eliminate even this small chance by recording. Having a proper recorded paper trail will help if she needs in the future to sell the house or to take out a loan secured by it.)

The covenant prohibiting the property from being owned by a woman is unenforceable. *Shelley v. Kraemer.* It is probably also void as a restraint on alienation. It does not violate the Civil Rights Act of 1866 (which mentions only race) or the Civil Rights Act of 1964 (since a residence is not a place of public accommodation), but it probably violates the Fair Housing Act's prohibition of discrimination in the "sale" of housing.

The covenant against commercial uses is so broadly drafted that it would prohibit both renting out the apartment to George and Eliza's writing in a chair by the window, even though neither of these would affect the residential character of the neighborhood. Eliza should investigate whether others in the neighborhood work from home or have tenants; if either of these is widespread, she will have a strong argument for changed circumstances. The fact that she has rented out the apartment since 1995 also likely makes the covenant unenforceable by analogy to adverse possession.

The Survey

Eliza is superficially trespassing on the land of her neighbor to the east and superficially has a trespass claim against her neighbor to the west. But all of these mistakes have been long since corrected by adverse possession. The legal boundary lines now match where the houses actually are, since for decades the occupants of the houses have been occupying the land owned by their neighbors. If Eliza's case is typical, they have all been doing so in good faith.

Even if adverse possession does not apply, a court would be highly unlikely to issue an injunction to fix the trespasses, as it would require knocking down an entire block of houses. *Golden Press*. Compensation for the trespasses in the form of permanent damages would be almost completely a wash; each owner would simply be paid by the neighbor to the west and then pay the neighbor to the east.

Zoning

The sisters have a valid preexisting nonconforming use. As such, depending on state law, they cannot be required to come into conformance with the new zoning code either at all, or at least until after a reasonable amortization period. 180 days is far too short to be constitutional.

The Mortgage

The loan application with the Seabury Bank is a forgery, since P.J. did not sign it. Eliza does not own any money to Seabury Bank, and the bank's lien on the property is void.

Question 3: Who Lives, Who Dies, Who Takes Your Picture (491 words)

Copyright

Hercules Mulligan owns a copyright in the photograph of Philip. As the photographer, he is responsible for providing the necessary "modicum of creativity" by arranging the shot and lighting and choosing when to take the picture. As copyright owner, he properly licensed the photo to the Hurricane Cereal Company (Hurricane). It also appears that he made copies of the photograph and gave them to Kings College Elementary School (Kings).

By mailing the photograph unsolicited to Alexander, Kings College made a gift of it to him. *UMG v. Augusto*. Alexander can keep the photograph and he is not required to pay Kings the requested $25. Because Alexander is now the owner of the physical copy of the photograph, he is allowed under first sale to dispose of that copy as he chooses. He does not infringe by putting it in the scrapbook.

Right of Publicity

The use of the photograph in an advertisement for Hurricane violates Philip's right of publicity. This is a commercial use of his likeness without permission. Mulligan's license of the copyright does not apply to Philip's right of publicity, which was never Mulligan's to license. Nothing Philip or Alexander has done could be construed as an implied grant of permission to use the photograph in this way. The edits to the photograph to add a cereal bowl are not significant enough to make the photograph newsworthy or to transform the image so that it no longer appropriates the value of Philip's image.

The Urine

Philip does not have property rights in his urine. Either under *Moore* as a substance produced by his body it is not a proper subject of property in the first place, or he abandoned it by giving it to the school nurse. Thus, under *Moore*, he has no property rights as against General Wee for researching the rare compounds found in the urine. He has no claim against General Wee for lack of informed consent because General Wee committed no personal torts (e.g. battery) against him that would require his consent in the first place. He might have an argument against the school for lack of informed consent, but (a) the school does not appear to have committed a battery requiring consent, and (b) the school did not know that General Wee would also use the sample for research. I would also want to know more about the school's drug-testing policy and its contract with Alexander.

The Patent

General Wee's patent is probably valid, assuming that it meets the usual requirements of novelty, nonobviousness, disclosure, etc. The compound itself not new – it was created by nature rather than by General Wee – but as in *Moore* something derived from that compound (here, a new headache treatment) can be a proper subject of patent. General Wee will own the patent if one issues and does not need to share the patent or proceeds from the sale of the treatment with Philip or Alexander.