

## **Property**

### Section 6

Professor William Fisher

May 21, 2003

Pick up: 8:30 -- 9:30 A.M.

Return: 3:30 -- 4:30 P.M.

This is an eight-hour, "take-home" examination.

The exam is "open book" in the following senses: In preparing your answers, you may rely upon any of the materials assigned in the course, any of materials distributed in class, any notes prepared before the start of the exam by yourself or by any other present or past student in the course, and any other material that you have actually read before the start of the exam. Once the exam begins, however, you may not do any additional research. Nor, after the exam begins, may you consult in any way with any other person concerning any aspect of the exam.

Do not write your name on any part of your response to the exam. If you are handwriting, please write legibly, skip lines, write on only one side of each page, and write your student I.D. number on the cover of each of your exam books. If you are using a typewriter or computer, please double space and write your student I.D. number on each page of your answer.

The exam contains four questions. You must answer all. Your answer to Question #1 may not contain more than 600 words. Your answer to Question #2 may not contain more than 1000 words. Your answer to Question #3 may not contain more than 700 words. Your answer to Question #4 may not contain more than 700 words. At the end of your response to each question, you must either indicate exactly how many words are contained in your response or provide a good-faith estimate of the number of words in your response plus a brief description of how you made that estimate. In the grading, the questions will be weighted as follows: Question #1: 20%; Question #2: 35%; Question #3: 20%; Question #4: 25%.

## **Question #1**

Between 1970 and 2000, Frank taught Chemistry at Harvard. He and his wife Mary had two sons, Sam and Tom. Mary died when Tom was 10. Thereafter, Frank raised the boys himself.

In 1995, Sam graduated from Yale and took a job as a software programmer in a start-up company. In 1996, he married Ann, an executive in the same company. Together, they bought a large house in Bedford, Massachusetts. In 1998, they had a daughter, Beatrice.

To Frank's great disappointment, Tom decided not to attend college. Since 1997, he has been teaching sailing on Martha's Vineyard during the summers and skiing in Colorado during the winters.

In 2000, Frank retired. He sold his house in Cambridge for \$1 million. With half of the proceeds, he bought a cottage in Wellfleet, Massachusetts, where he planned to live for the rest of his life. With the other half, he bought stock in BioResearch, Inc., a small biotechnology company.

In the summer of 2001, while walking on the beach, Frank met Gloria, a widow, who also lived in Wellfleet. The two quickly became close friends. In the fall of 2001, they married. Gloria sold her own cottage and moved into Frank's house.

Soon after their marriage, the company for which Sam and Ann worked went bankrupt. Ann found another job – although at a much lower salary. Sam has been unable to find work. They have been having trouble making the payments on their mortgage. Unbeknownst to Sam, Ann owes a large debt to Ingrid, an old friend who had helped finance the company. Ann has been feeling increasingly guilty about her inability to repay the loan. Sam, depressed, has been thinking of joining the Army.

In 2002, Frank became seriously ill. He spent much of the next year in the hospital. Gloria's sister, Holly, left her home in Chicago to live with Gloria in Wellfleet and help take care of Frank.

In January of 2003, Frank drafted a will, which read, in pertinent part: "I give my house in Wellfleet to my dear wife, Gloria, and her sister, Holly, as joint tenants. Half of my BioResearch stock I give to Sam and Ann, as tenants by the entirety. The other half I give to Tom if and when he serves in the United States military. If he doesn't, then the stock shall go to the first of my descendants to serve in the military." Frank signed the will. It was witnessed by Larry, his lawyer, and Larry's secretary.

On May 15, 2003, Frank died. The next day, Larry revealed to the family the contents of the will. The Wellfleet house is currently worth approximately \$500,000, and the BioResearch stock is worth approximately \$1 million. Frank had no other significant assets.

Gloria is upset at the prospect of sharing the Wellfleet cottage with her sister, whom she has grown to dislike. Tom is furious at the condition placed on his bequest. Yesterday, Ann, relieved, assigned all of her interests in the BioResearch stock to Ingrid in return for a release of her debt.

Who has what rights? If you need more information in order to answer the question, indicate what that information is and why it is relevant. Your answer may not exceed **600** words.

## **Question #2**

In the 1970s, Charles and Deborah owned adjoining 10-acre parcels of land in a rural section of the state of Ames. A stream flowed southward through Charles' property, then through Deborah's property, and finally into the Ames River. River Road bordered their land on the west.

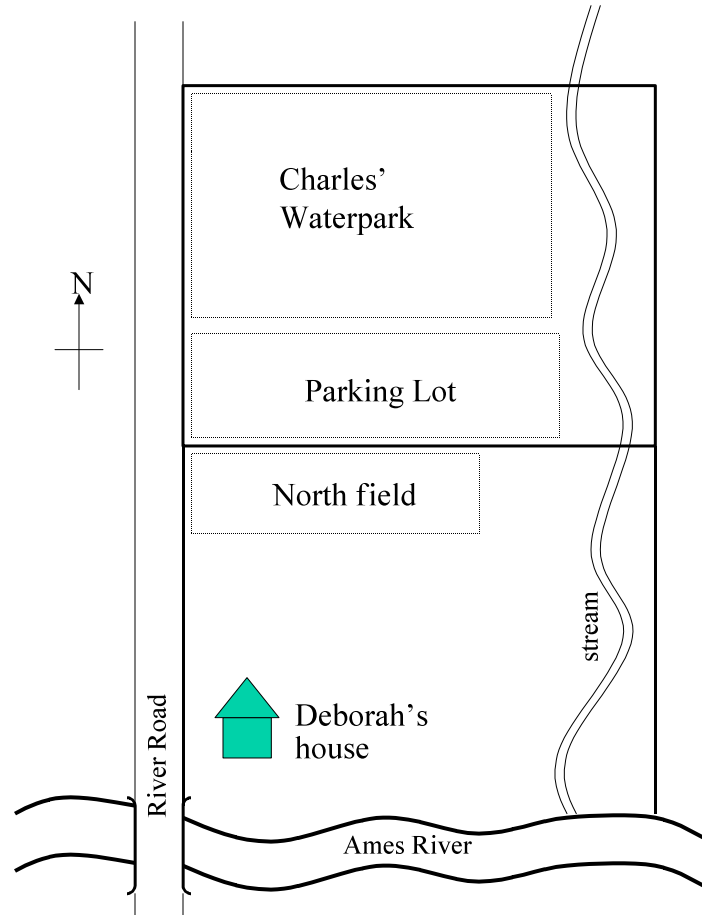
Deborah, her husband, Edward, and their daughter, Felicia, lived in a modest farmhouse on the western side of their land. Most of the rest of the property consisted of open fields. The couple from whom Deborah had bought the land had used it to grow wheat, but neither Deborah nor Edward had any interest in farming, so they let the fields go fallow. Both commuted to Ames City, a half-hour drive away.

In 1980, Deborah died, leaving her property "to my husband, Edward, for life, thereafter to my daughter, Felicia." Felicia was 17 at the time. Her relationship with her father gradually deteriorated. In 1983, she moved to an apartment in Ames City and began working in a record store. Edward continued to live in the house.

In 1985, Charles decided to convert his land to a waterslide park. On the northern two thirds of his parcel, he built an elaborate network of pools and slides. On the southern third, he built a large parking lot to accommodate visitors to the park. The water necessary to run the park Charles extracted from the stream. To ensure that the water was healthy, he added chlorine to it. Approximately half of the water used in the park evaporated. The remainder Charles returned to the stream. Business boomed.

By 1990, the number of visitors to the park on hot summer weekends exceeded the capacity of the parking lot. Charles offered Edward \$20,000 if he would allow weekend visitors to park on the field on the northern edge of Edward's land. Edward happily agreed. He gave Charles a signed document indicating that: "on behalf of myself, my heirs, and assigns, I grant you permission to park cars on my north field." During the ensuing decade, Charles' business continued to grow, use of the "overflow parking area" was heavy, the grass on the northern field was worn away, and erosion increased.

The parcels in question – and the uses to which each was put – are illustrated in the diagram on the following page.



In February, 2003, Edward died. In his will, he left all of his property to the Sierra Club. His business affairs proved to be complex, and his estate has not yet been probated.

In March, Felicia moved back to the homestead. Horrified at the damage done to the northern field, she ordered Charles to stop parking cars there immediately. In April, she planted corn on all of her other fields, using water from the stream to irrigate the crops. In early May, she noticed that the corn was not growing well. Tests of the water revealed the presence of chlorine, which both was damaging the plants and would render the corn unmarketable. She sent Charles a letter insisting that he both cease diverting water from the stream and cease adding chlorine to the stream. She also demanded compensation from Charles for the damage his conduct has done to her land.

Charles promptly hired an Ames City law firm to advise him concerning his rights and responsibilities. You are working as a summer associate at the law firm. The partner in charge of the case asks you for a preliminary memorandum assessing the legal position of all of the parties to this narrative. Your response may not exceed **1000** words.

### Question #3

Pick **one** of the following two options. Your answer may not exceed **700** words.

(a) On May 15, 2003, the *New York Times* published the following story:

Andrew C. Revkin, "Commercial Fleets Reduced Big Fish by 90%"

In just 50 years, the global spread of industrial-scale commercial fishing has cut by 90 percent the oceans' population of large predatory fishes, from majestic giants like blue marlin to staples like cod, a new study has found.

Oceanographers not connected with the study say it provides the best evidence yet that recent fish harvests have been sustained at high levels only because fleets have sought and heavily exploited ever more distant fish populations.

Other studies had shown such trends for individual species and some coastal fisheries, but experts said this was the first systematic study to measure the effect throughout the oceans...

The authors, from Dalhousie University in Halifax, Nova Scotia, said they hoped the findings would spur countries to honor a declaration most signed last summer at the World Summit on Sustainable Development in Johannesburg, which called for restoring stocks by 2015.

American fisheries officials and representatives of the fishing industry said that declines in fish stocks were inevitable but that progress was being made in stemming damage to the most depleted stocks.

The study, drawing on decades of data from fishing fleets and research boats, paints a 50-year portrait of fish populations under siege as advances like sonar and satellite positioning systems allowed fleets to home in on pockets of abundance.

Even as sought-after species like tuna and swordfish declined, many other less popular fishes also dropped enormously in numbers as they were caught unintentionally on long lines of baited hooks or in bottom-scouring trawls.

"With all this technology together, the fish hardly have a chance," said the lead author, Dr. Ransom A. Myers, who spent 10 years combing archives of information from Japanese long-line fleets, research trawling expeditions and other sources.

But representatives of the seafood industry called the study unnecessarily alarmist.

Glenn R. Delaney, a consultant to American fishing companies and a government-appointed member of the International Commission for the Conservation of Atlantic Tunas, said some fleets had overfished in the past and some continued to do so, particularly rogue vessels connected mainly to Taiwanese companies. But he said that major ocean fisheries were being managed better now.

The study was financed mainly by the Pew Charitable Trusts, a foundation that has long promoted efforts to alert the public to problems with the oceans. It was extensively reviewed by experts from the industry and other institutions before appearing in *Nature*, the authors said.

The authors and other experts said recent improvements in stocks of some species, like swordfish, were creditable but reflected only a tiny increase in populations that remained the dimmest shadow of what they were two generations ago.

This level of depletion not only threatens the livelihood of fishers and an important source of protein, but could also unbalance marine ecosystems, experts and the study's authors said.

In some places, the study found that when top predators were removed, competing species thrived and filled the gap in the food web. When cod declined in the Grand Banks east of Canada in the 1950's, flatfish numbers soared, and when populations of blue marlin plunged in the tropical Atlantic as they were caught on tuna hooks, sailfish and then swordfish became abundant.

But in each case, the statistics showed, the replacement species were quickly decimated by overfishing or by accidental catches. That left the oceans largely bereft of big predators as a whole.

One remarkable aspect of the new study is the 50-year statistical portrait it paints that reveals not just the extent of the damage, but also the pattern, with charts showing year by year how, as oceangoing fleets fanned out, catches boomed each time they reached new waters, then plummeted in their wake.

In almost all exploited areas, it generally took just 10 or 15 years for populations to crash. One measure was fish caught per 100 hooks on the Japanese lines. The study said the rate went from 10 fish per 100 hooks to 1 or less in that period.

"This shows that the reason we've had so much tuna and swordfish, the only reason this has been sustained, is because boats kept going farther and farther away," said Dr. Jeremy B. C. Jackson, a professor at the Scripps Institution of Oceanography. Dr. Jackson has conducted other studies showing declines and ecological effects in coastal waters but was not involved in the new work.

"The problem now is there's no place left to go," he said. "There are a lot of people out there willing to fish the last fish. But that's just not going to work."

One of the biggest concerns is the potential effect on global ecosystems, said Dr. Boris Worm, the second author of the study. He is affiliated with Dalhousie and the University of Kiel in Germany.

"You can't cut off the head of an ecosystem and expect it to behave the same way," he said. "From all we've studied in parts of the ocean, you can end up with things being less stable, less predictable, and maybe less hospitable."

He said that for most fish species, recovery was possible, even from such low numbers.

"On land, we did it with buffalo," Dr. Worm said.

"They went from 30 million to a thousand," he added, "and we saved them because we wanted to. With fish we haven't thought the same way yet."

There are already efforts underway to curb overfishing, create reserves that serve as nurseries for valued species and encourage consumers to avoid the most endangered fishes.

Fishing industry representatives also note that tuna and swordfish populations are stabilizing in many places. But the authors of the study and other experts note that most of these efforts are voluntary and grossly insufficient.

How might property systems be employed to prevent or correct the kinds of damage described in this article?

(b) Consider the following facts:

Plaintiff, Dustin Hoffman, is a highly successful and recognizable motion picture actor. For the past thirty years he has appeared in scores of motion pictures and has received numerous honors, including six Academy Award nominations and two Academy Awards. He has also been nominated and has been awarded a Golden Globe Award and an Emmy Award for his work. It can be said that Mr. Hoffman is truly one of our country's living treasures, joining the ranks of an exclusive handful of motion picture talent.

The right to use Plaintiff's name and likeness is an extremely valuable commodity and privilege not only because of Mr. Hoffman's stature as an actor, but because he does not knowingly permit commercial uses of his identity. Since appearing in the film *The Graduate*, Mr. Hoffman has scrupulously guided and guarded the manner in which he has been shown to the public. Plaintiff maintains a strict policy of not endorsing commercial products for fear that he will be perceived in a negative light by his peers and motion picture industry executives, suggesting that his career is in decline and that he no longer has the business opportunities or the box office draw as before....

At Page 118 of its March 1997 issue, Los Angeles Magazine published a photograph of Mr. Hoffman as he appeared to have appeared in the successful 1982 motion picture *Tootsie*, and through a process of technology employing computer imaging software, manipulated and altered the photograph to make it appear that Mr. Hoffman was wearing what appeared to be a contemporary silk gown designed by Richard Tyler and high-heel shoes designed by Ralph Lauren. Page 118 also contained the following text: "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."

Mr. Hoffman's photograph and name appeared in conjunction with an article entitled, "Grand Illusions," published on Pages 104 through 119 of the March 1997 issue of Los Angeles Magazine. The magazine article used computer technology to merge famous still photographs of famous actors/actresses, many of whom are now deceased, from classic films with photographs of body models wearing spring 1997 fashions identifying the designers of the articles of clothing used in the cannibalized photographs. Many of the articles of clothing used in the magazine article were designed by designers who were major advertisers in Los Angeles Magazine at the time of publication....

The photograph that is the subject of the present litigation used in the "Grand Illusions" article was, as stated before, a still from the film *Tootsie*, which starred Dustin Hoffman. The original still photograph depicted Mr. Hoffman entirely, in character, wearing a long red dress and standing in front of an American flag with the printed material, "What do you get when you cross a hopelessly straight starving actor with a dynamite red sequined dress?" and "You get America's hottest new actress." The new composite computer-generated photograph that appeared in the "Grand Illusions" article incorporated only Mr. Hoffman's face and head and the American flag from the original still photograph, and a new photograph of a male model's body clothed in the silk gown designed by Richard Tyler and high-heel shoes designed by Ralph Lauren.





The original (authorized) poster for *Tootsie*



A portion of the modified photograph

Does Dustin Hoffman have a legitimate property interest in the character Tootsie? If so, should Los Angeles Magazine be deemed to have violated that property interest? You may ignore, for the purposes of your answer, the First Amendment to the Federal Constitution.

**Question #4**

Justice Rehnquist's dissenting opinion in the *Penn Central* case (Dukeminier & Krier casebook, pp. 1164-1167) and Justice Scalia's dissenting opinion in the *Pennell* case (Course Materials, pp. 713-16), in combination, suggest that the "takings" clause of the Fifth Amendment should be construed to require governments to compensate the owners of land subject to serious land-use regulations much more often than they currently do. Do you find the Rehnquist/Scalia position persuasive? If so, explain why. If not, explain why not. Illustrate your response by applying it to the facts of two of the following cases:

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) [Casebook, pp.1140-48]

*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) [Casebook, pp. 960-74]

*Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) [Course Materials, pp. 695-708]

*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) [Course Materials, pp. 717-735]

Your answer may not exceed **700** words.

**END OF EXAM**