

Question I

The Chalet

Steven has LE, Ursula and Victor have VRMSD (and subject to open) with cross-remainders contingent upon other children disclaiming skiing by 21; Steven's unborn children have the same interest, plus contingent on birth. The children's interest may be as JT, but unclear if "jointly" is enough. There's a presumption in ambiguous cases in favor of TC; if Mass. requires "right of survivorship" specified, this is TC. Even if not, "jointly" is more ambiguous than "as joint tenants," so likely that court will construe as TC. There are no RAP problems because Steven cannot have another child that would turn 21 21 years after Steven's death (technically this is possible – he can die after conception, pre-birth – but not taken into account for RAP).

There is a possibility of partial intestacy if all Steven's children disclaim skiing. If no residuary clause, the reversion would go through intestate succession to Ophelia's heirs. Literally read, the will might allow giving the disclaiming-child's interest to a previously-disclaiming sibling. Though the testator's intent is likely that Steven's children only obtain exclusive rights if skiers, this construction avoids partial intestacy. A court mostly concerned by intestacy would allow this construction; but otherwise Ophelia's heirs will have the reversion.

The Cottage

Assuming the devise of the cottage is valid as written, Daphne and Eric have a FSEL as TE, with Daphne possessing a ShEI in FS, contingent upon their divorce. The TE is mostly unproblematic – the five unities of time, title, interest, possession, and marriage are satisfied. Eric could argue that there is no unity of interest because in

addition to the 50/50 present interest, Daphne also has a future interest in the property. However, that interest is separate from the present possessory interest, and *that* interest is shared evenly, satisfying TE.

Eric can more plausibly argue that the portion of the devise following “but if” is void against public policy as a version of restraint on marriage. Giving Daphne a ShEI contingent upon divorce incentivizes divorce, chilling Daphne from staying married to Eric. This argument is strengthened since this is an EI, not RM – remainders are said to “wait patiently,” but EI’s divest an estate; thus, though the distinction is largely fictional, it’s plausible that Daphne’s ShEI can be viewed as contra policy as encouraging divorce to “strip” an estate. Daphne can argue that the purpose is not to encourage divorce but to care for Daphne (estates ended by marriage are appropriate if designed to provide support to an unmarried person and not to deter marriage), but Ophelia’s dislike for Eric rebuts that. Under this argument, this portion of the devise is invalidated and Daphne and Eric have a TE.

This argument likely fails. First, with no-fault divorce, it is no longer clear that public policy disfavors or wishes to restrain divorce. Second, partial restraints on marriage are enforceable if reasonable under circumstances, and could include restricting marriage to Jews (small fraction of population). Here, marriage to only *one* person is disincentivized, so likely ok.

Word Count: 500

Question II

Nuisance

If this is a nuisance, it is intentional (the harm need not be – *Morgan*) and per accidens, doesn't fit into the small category of per se nuisance. Courts consider 6 factors: nature of the act, kind of harm, degree of harm, expediency, custom/usage, and coming-to-the-nuisance.

- Nature of act – Transient's windmill is meritorious in resource-saving, though custom may cut against this.
- Kind of harm – if harm is listening to songbirds, Pastorals may be extra-sensitive (which tilts the analysis against you). However, a "giant vacuum" sound may interfere with quiet enjoyment, which is central to property and serious harm.
- Gravity – Contingent on resolution of above.
- Expediency – If Coaseian bargaining occurs, may be neutral, but given Pastorals' annoyance with Transient, a deal may be unreachable. Transient's usage is more productive than listening to songbirds, but her eccentricity may be socially wasteful (*Prah* dissent, questioning the social value of solar power; the court here might view Transient's "off-the-grid" lifestyle as inefficient).
- Custom – cuts in favor of Pastorals, other farmers don't use windmills, necessary only to support Transient's peculiar lifestyle – which may make *her* "extra-sensitive."
- Coming-to-the-nuisance – favors Transient; the nuisance likely contributed to the discount, enjoining it would result in a windfall. However, this factor is never dispositive.

The calculus is close and depends on the court's valuation of Transient's lifestyle. A court like the *Prah*-majority likely finds for Transient; *Prah*-dissent likely finds for Pastorals.

Trespass

The distinction between trespass and nuisance is based on size of the particle crossing the boundary; bird carcasses are likely large enough to constitute trespass, which can be enjoined irrespective of above analysis.

Prescription

Transient can argue she gained the right to operate the windmill by prescription. A threshold question is whether one can acquire nuisance rights prescriptively. If she can, Transient, though on a lot smaller than Ellickson's optimum, can prescriptively expand her rights to do harm over such a zone without paying. However, though this argument is strong in preventing a brickyard from doing this when land is undeveloped, here Strong was present, and could have noticed and asserted his rights. Because "coming to the nuisance" is never a categorical bar a court might not allow any prescriptive easement here, but, under the previous argument, one might.

If so, more information is necessary concerning the nuisance's commencement (Strong's 1992 was speculative), the statute of limitations in Ames, and whether Ames requires "acquiescence." If the statutory period is satisfied, open and notorious is clear given the facts, and unless Strong gave permission, the use was adverse. If Ames has a strong acquiescence requirement (i.e. allows a small window for prescription instead of inferring acquiescence as some do), it might not be satisfied, but knowledge of any non-permissive but overt acquiescing steps taken by Strong towards Transient would change

this. Finally, continuity could be challenged because the use is not throughout the year; the practice of windmill-operators in the locality should be investigated, but most likely half the year is enough for prescription— though the rights are only for that half.

Recourse against Strong

Strong probably had a duty to disclose the nature of Transient’s windmill, particularly if it affects the value of the property. Strong may not have lied – he answered whether “he was bothered” – but that answer did not discharge any obligation to disclose what may be a material defect in the property (this assumes that Ames has abandoned the caveat emptor doctrine).

Strong’s counter-argument is that this defect was not latent; the windmill was visible, so Pastorals could have done research. However, though they could have researched the make of the windmill, the disturbance likely varies based on local facts, peculiar here to direction, duration, and speed of wind. Pastorals could have asked neighbors, but a court concerned with least-cost-avoiders likely puts the duty on Strong, giving Pastorals recourse by rescission or damages. However, a court might not grant relief given the visibility of the defect and the likelihood that it contributed to the discount.

If Transient obtained a prescriptive easement, failure to disclose is a breach – an easement is a defect to clear title and, since prescriptive and not recorded, latent. If, though unlikely, Strong granted a warranty-deed, you have additional recourse.

Water

This case involves interaction between groundwater rights and rights to non-navigable bodies, which the law treats separately; the interaction works differently

depending on how rights are conceived. If rights to use groundwater trump rights to surface ponds, Transient is favored. Under the English rule, landowners may extract unlimited groundwater, which allows Transient to continue – but this rule has lost adherents. The majority reasonable use rule is similar, except competing claims are balanced for “unreasonable” uses – but uses on the parcel are presumptively reasonable. This may be rebutted by Transient’s eccentric usage, but the rule generally favors Transient. Under correlative rights, which balances all uses, Pastoral can claim pond-filling rights.

If surface water-rights trump groundwater, in a riparian jurisdiction Pastorals have a stronger case. Under “natural flow” (unlikely), they have a right to a full pond. Under reasonable use doctrine, “natural” use is protected but artificial use is balanced against competitors. As *Evans* found, water for irrigation is artificial, though in arid jurisdictions might be considered natural; how *Ames* treats irrigation is relevant, but I’ll presume artificial. Still, Transient can argue that this generally applies to commercial farming; “natural” means needs for survival, her farming is for off-the-grid survival. But if the court determines that irrigation is *generally* artificial, it may have bright-line preferences and not make exceptions. If natural, Transient’s use continues. Otherwise: Pastorals’ use (swimming, bird-watching) is not for survival so full pond not guaranteed, but court balances, may require Transient to leave Pastorals some pond-water. If *Ames* is a prior appropriation jurisdiction, Pastoral would be a junior appropriator with no rights over Transient.

If the outcome is unfavorable, you can construct a well to extract water for your pond, restricted only by percolating water law discussed above (under reasonable use you cannot extract extra, wasted water for spite).

Word Count: 999 (excluding bullets)

Question III (b)

Reform begins with a Hohfeldian premise – recognition that government granting privileges to discriminate is as interventionist as enjoining discrimination. Advances like *Shelley* are jeopardized by worries that the same principle finding state action in enforcing restrictive covenants also finds state action in ejecting black trespassers from racists' dinner parties; indeed, on Hohfeldian grounds such distinctions are dishonest. Therefore, anti-discrimination reform should recognize the ubiquity of state action and craft a policy response. That policy should be to grant a privilege to discriminate only when important property values, based on personhood and a potential constitutional right to intimate association, demand permitting discrimination.

Such an approach is consistent with sliding scales in the speech context. In *Marsh and Lloyd Corp.*, the court struck different balances on the property-speech spectrum, recognizing that property rights sometimes, but not always, prevail over other values. In anti-discrimination law, the balance should permit discrimination in the limited context of the home, applying Radin's emphasis on the home as personal (contra fungible) property. This approach is problematic in recognizing personhood actualized via racism, and necessarily impinges on the *victim's* personal flourishing. However, the compromise is necessary. First, personhood via property requires freedom to exercise

moral muscles; if people have the right to exclude from dinner parties, they will have to decide whom to exclude, opening themselves up to social sanctions for racist choices. Second, as Fisher points out, property perspectives emphasizing the good life have a delicate relationship with paternalism. Ultimately, some paternalism is required to achieve positive freedom – in this case, to foster egalitarianism – but paternalism must not be so overwhelming to seriously undermine autonomy; the home should thus remain free from paternalistic dictates. Third, as Posner argues, attempts to make racists deal intimately with other races entails costs. Given this reform’s basis in positive visions of the good life, we need not accept Posnerian racist efficiency as acceptable; however, we must internalize the observation that anti-discrimination does have costs, which prudentially cannot be ignored.

This reform may not mean practical changes, but it is important. First, it bolsters future challenges to private-sphere discrimination from the state action critique by acknowledging the ubiquity of state action and crafting out limited property right exceptions on policy, not laissez-faire, grounds. Second, wholesale societal reform (the goal) may be quickened by government forthrightness about racism. As Genovese argues, slave law, though used to oppress slaves, gave them human agency and language with which to recognize and undermine hypocrisies in society. Similarly, government forthrightness about permitting discrimination may galvanize and empower those in society oppressed by discrimination to change the culture.

For that reason, another reform should be extending FHA’s §3603(b)’s “Mrs. Murphy’s boarding house” exemption to §3604(c). The right to discriminate in this case is justified by the above analysis arguing for privileging discrimination in intimate

contexts, but keeping it quiet is not. There is a convincing utilitarian argument for not extending the exemption to advertising discrimination, on the grounds that the demoralization of being individually discriminated against is much smaller than the demoralization to segments of society seeing racist ads in the newspaper. However, by focusing not on present interests in avoiding “feeling” racism but on society’s interest in eradicating it (a social planning model is required here only to overcome majority preferences for racism; if more people prefer egalitarianism more deeply than their opposites, this approach is justified by utilitarianism), it becomes preferable, on the same Genovesean argument, to expose racism to the light of day.

A third reform should be made to the FHA to deal with the problem of exclusionary zoning. To return to the Hohfeldian premise, privileging communities to discriminate via zoning is government action, and in this case is not justifiable based on the above exceptions. While some exceptions are necessary both to preserve autonomy and to shine the light of day on racism, proactive steps to compel society to deal with the problem are also required, and this mandates against allowing internally-democratic cliques barring outsiders. Thus, the 2d Circuit’s *Huntington* disparate *impact* approach should be codified, to prevail where other circuits would require discriminatory intent. Though community autonomy helps further a democratic good life, racist expressions of that autonomy, though necessary to allow in homes, cannot be tolerated from communities for their far greater adverse impact. Instead, integration, limited by tipping-point realities, should be actively promoted to require communities to overcome discriminatory barriers. A further measure supporting this would be explicitly adopting integration as an FHA goal, allowing creative *Starrat City*-type integrative experiments.

Word Count: 750.

Question IV (a)

Personality theory, though empirically not relevant throughout property law, is the most useful theory in delimiting what property law should and should not do. The deficiency of rights-based approaches like labor-desert theory is their difficulty in resolving competing claims of right – in *Prah*, deciding between a right to sunlight and a right to development on “rights” grounds becomes arbitrary, requiring courts to look to alternative values like efficiency. Utilitarianism, however, particularly in its law and economics variant, values efficiency irrespective of rights, and in so doing systematically undervalues the preferences of those “unable and unwilling” – because of capabilities – to pay. Personality theory, in distinguishing between personal and fungible property, better allows for prioritizing claims of right, and, by giving rights vitality, allows for certain rights to stand up to efficiency when law and economics’ biases undervalue the needs of the poor.¹

The implied warranty of habitability (IWOH) is favored by this approach. Even if accepted that the housing market runs efficiently (it is debated whether or not tenants are at bargaining disadvantages vis-à-vis landlords), markets, as Pritchard points out, have their limits. Though a market for babies may be wealth-maximizing, Pritchard demonstrates, it is grotesquely distasteful, in part because of the “cost of costing.” Baby

¹ Utilitarianism and personality are not inveterately opposed when utilitarianism expands to take these deficiencies into account; for example, “demoralization costs,” reinterpreted from Michelman’s usage, could mean societal costs to not respecting people’s personhood. Even if plausible, though, law and economics is dominant, so personality theory’s opposition in practice is important.

market-efficiency arguments break down by recognizing that while a market may maximize wealth for buyers and sellers, and may in some sense benefit the baby, price tags on babies demean their humanity. By analogy, the same argument can be made with respect to rat-infested apartments. Shouldn't it be similarly distasteful to ask how large a discount people would want to live in demeaning conditions? Though IWOH may harm efficient outcomes, personality allows a limited right – home conditions acceptable for human development – to trump economic efficiency.

To be sure, arguments abound that IWOH ultimately hurts the poor. If these arguments are valid, personality theory demands a reconsideration of contemporary landlord/tenant policy. However, an important contribution of personality theory is conferring legitimacy on the very conversation over whether IWOH *in fact* shifts wealth from rich to poor. Ackerman or Kennedy may be right about the affects of IWOH, but critics can still retort that such a shift is merely rent-seeking wealth transfers, not efficient outcomes. Indeed, rights-based theorists may go even further, arguing that landlords' rights have been stripped to achieve this transfer. Personality theory allows for a principled distinction between hurtful rent-seeking in zoning contexts and humanity-affirming rent-seeking (to the extent it is rent-seeking; unlike the normal conception, the government, not the benefactors themselves, seeks rent on their behalf). It also answers rights-based theorists, prioritizing, like *Shack*, humanity-affirming rights over more mundane property rights. Thus, if Ackerman has the numbers right, personality provides a justification for letting the numbers work.

Personality theory has more trouble with the non-waivable component. Because some *will* take the discount for rat-infestation, it may demean autonomy to disallow that.

Unlike babies, who cannot protest when we price-tag them, adults might consciously make such choices. Social planning, though not immune from paternalism worries, more readily solves it in the name of a societally-experienced good life; if imposing non-waivability makes the policy work globally, social planning can endorse that. However, personality theory's virtue is allowing individual rights to stand up to societal demands. Though arguments can be made that non-waivability furthers people's unrecognized interests, paternalist anti-autonomy in IWOH is an insufficiently addressed concern from a personality perspective.

Another merit of landlord/tenant law from the personality perspective is the transition from dependent to independent covenants, allowing tenants more leeway in escaping eviction. From a strict efficiency perspective, parties to deals should be able to characterize covenants as dependent or independent at will. Personality theory recognizes that even if one were to enter into an agreement which could result in swift eviction, circumstances change when one sinks her personhood into a place. Rights-based approaches, meanwhile, fail through inability to recognize a higher plane for tenants' "rights" to homes over landlords' "rights" to checks. Personality theory and its emphasis on the self-actualization potential of homes, in this and IWOH contexts, provides a limited but important sphere in which certain individuals, particularly disadvantaged ones, can assert superior rights against competing individual or societal claims.

Word Count: 747 (including footnote)