PROPERTY 1108(D) FINAL EXAM

PROFESSORS DE BEER AND BROWN

WEDNESDAY, 17 DECEMBER 2014, 09:00 – 12:00 (**180 MINUTES**)

IN **PART I**, YOU MUST **ANSWER 3 OF 4 QUESTIONS**.

THE THREE ANSWERS IN PART I ARE **WORTH 30%** OF YOUR SCORE.

IN **PART II** YOU MUST **ANSWER 3 OF 4 QUESTIONS**.

THE THREE ANSWERS IN PART II ARE **WORTH 60%** OF YOUR SCORE.

OVERALL IMPRESSION OF BOTH PARTS IS **WORTH 10%** OF YOUR SCORE.

YOU MAY COMPLETELY THIS EXAM AS A COMPUTERIZED EXAM, FOLLOWING THE FACULTY OF LAW'S RULES.

IF YOU HANDWRITE THE EXAM, YOU MUST WRITE **LEGIBLY** AND **DOUBLE-SPACE** ANSWERS IN **INK.**

YOU MAY USE NON-ELECTRONIC REFERENCE MATERIALS

(*E.G.* BOOKS OR NOTES, BUT NOT LAPTOPS, TABLETS, MOBILE PHONES OR SIMILAR DEVICES).

THIS EXAM IS WORTH 60% OF YOUR FINAL GRADE.

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STUDENT # _____

SCORE ____ /100

(INSTRUCTOR USE ONLY)

Letter Grade	Percentage	Grade Point Value	Definition
A+	90-100	10	Exceptional
A	85-89	9	Excellent
A-	80-84	8	Excellent
B+	75-79	7	Very Good
B	70-74	6	Very Good
C+	65-69	5	Good
C	60-64	4	Good
D+	55-59	3	Passable
D	50-54	2	Passable
F	0-49	0	Failure

Part I

Option 1												
Correctness, clarity, concision, and persuasiveness of answers												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Option 2												
Correctness, clarity, concision, and persuasiveness of answers												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Option 3												
Correctness, clarity, concision, and persuasiveness of answers												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Total Score Part I **/30**												

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Part II

Option 1												
Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Clear & organized (i.e. logically well structured, articulate, persuasive arguments)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Overall impression (i.e. demonstrated understanding of subject, possible creativity)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Option 2												
Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Clear & organized (i.e. logically well structured, articulate, persuasive arguments)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Overall impression (i.e. demonstrated understanding of subject, possible creativity)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Option 3												
Thorough & responsive (i.e. analyzed all key issues, focused on relevant discussion)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Accurate & insightful (i.e. correctly applied law/policy, deep evaluation of issues)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Clear & organized (i.e. logically well structured, articulate, persuasive arguments)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Overall impression (i.e. demonstrated understanding of subject, possible creativity)												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
Total Score Part II (÷2) **/60**												

Overall Exam Impression												
0	3	5	5.5	6	6.5	7	7.5	8	8.5	9	9.5	10
/10												

I. ANSWER 3 OF 4 QUESTIONS IN THIS PART, WHICH IS WORTH 30% OF THIS EXAM.

***** FOR QUESTIONS 1 AND 2 *****

On September 5, 2014, the New York Times reported the following story about Vivian Maier, a recently deceased and since-heralded photographer. This news report provides the context for Question #1 and Question #2 on this exam. On the basis of this report, you may choose to answer Question #1 *or* Question #2 *or* both Question #1 and #2. (Recall that you must answer only 3 questions total in this Part I of the exam.)

A Legal Battle Over Vivian Maier's Work

A 1954 self-portrait by Vivian Maier, whose art has become heralded since her death in 2009. Credit Vivian Maier/Maloof Collection

The story of the street photographer Vivian Maier has always been tangled — she worked much of her life as a nanny, keeping her artistic life a secret, and only after she died in 2009, at the age of 83, nearly penniless and with no family or will, were her pictures declared to be among the most remarkable of the 20th century. Now a court case in Chicago seeking to name a previously unknown heir is threatening to tie her legacy in knots and could prevent her work from being seen again for years.

The case was filed in June by a former commercial photographer and lawyer, David C. Deal, who said he became fascinated with Maier's life in law school and took it upon himself to try to track down an heir. He did so, he said, because he was upset that prints of her work — from more than 100,000 negatives found in a storage locker at an auction, containing images now possibly worth millions of dollars — were being sold by people who came to own the negatives but had no family connection to Maier, who spent most of her childhood in France and worked in Chicago, where she died. …

Chief among the owners of Maier's work is John Maloof, a former real estate agent in Chicago who bought tens of thousands of the negatives for less than $400 in 2007 and has spent years tending and promoting her work through commercial galleries, museum exhibitions, books and a recent documentary, "Finding Vivian Maier," that he helped direct. Mr. Maloof hired genealogists to find heirs to Maier in France and eventually paid an

undisclosed amount for the rights to her work to a man named Sylvain Jaussaud, whom experts identified as her closest relative, a first cousin once removed.

For decades, Maier photographed street scenes in Chicago and New York, including in front of the New York Public Library. Credit Vivian Maier/Maloof Collection

But Mr. Deal hired his own genealogists and last year traveled to Gap, an alpine town in southeastern France, home of Francis Baille, a retired civil servant whom he believes to be another first cousin once removed.

Mr. Baille, who had no idea he was related to Maier, agreed with Mr. Deal to seek to be recognized as her heir under American law. … His French lawyer, Denis Compigne, said: "It's an extraordinary situation. You can imagine what it's like to get a telephone call about someone who died that he never knew, with this precious legacy. He is very, very surprised." …

The state public administrator's office for Cook County, in Chicago, which is charged with overseeing estates until relatives or others are approved by the courts to do so, created an estate for Maier on July 1 and has sent letters to Mr. Maloof and others who sell her work — prints can cost more than $2,000 apiece — warning them of possible lawsuits over Maier's assets.

The Stephen Bulger Gallery, in Toronto, which lists dozens of Maier prints on its website, received a letter on Aug. 19 from a Chicago law firm, Marshall, Gerstein & Borun, representing the estate, asking it to preserve all documents related to her work and its sale.

"We are investigating the potential misuse and infringement of copyrighted works whose rights are held by the estate," the letter said, adding that the firm anticipated "filing litigation against the responsible parties upon completion of our investigation." An exhibition of her work is on view at the Toronto gallery. …

Mr. Maloof said that he had been working for more than a year to register copyright to the images on the negatives he owns, based on his agreement with the man he believes to be Maier's rightful heir, but that the copyright applications were still pending. …

He said that he had begun to make money on her archive only this year, after several years of putting much of his own money into preserving, scanning and promoting the work.

Mr. Deal said he believed it was "profoundly unfair" that Mr. Maloof and other owners of Maier's work were profiting from it instead of her heirs. …

"None of these guys have legal copyright," Mr. Deal added. "What they're doing is breaking federal law." …

Joanne Zlotek, the general counsel for the public administrator's office in Chicago, said that estate cases like Maier's, especially ones complicated by potential relatives who are not United States citizens, can sometimes take several years to be resolved. …

1. **Assuming Ms. Maier's estate was subject to the laws of Ontario instead of Illinois, which of the following cases or statutes is most relevant to resolving the legal issues surrounding the rights of her heirs, and why?**

    a. *Unger v Gossen*.
    b. *Conveyancing and Law of Property Act*.
    c. *Hayes v Meade*.
    d. *Succession Law Reform Act*.
    e. *Perpetuities Act*.

(D) is the correct answer. The *Succession Law Reform Act* is most relevant, specifically Part II dealing with intestate succession. The *Conveyancing and Law of Property Act* deals with *inter vivos* transfers of property in Ontario. Since there was no contingent interest involved with the problem, the *Perpetuities Act* is not most relevant. *Unger v Gossen* focuses on impossible conditions, while *Hayes v Meade* deals with uncertain conditions. Common mistakes on this question included: believing that the *CLPA* deals with real property not personal property; believing there is no *Perpetuities Act* in Ontario, or believing that the *Perpetuities Act* only applies to wills; and lacking any specificity as to why the *Unger* and *Hayes* cases are not relevant in these circumstances.

and/or

2. **Assume that you are a summer student at the law firm representing The Stephen Bulger Gallery in Toronto. A partner asks you for your opinion on this case. Which of the following statements of advice would you say is most appropriate for the client, and why?**

    a. *Intel v. Hamidi* entitles your client to put copies of the Maier images on its website.
    b. *Schmeiser* suggests owning film rolls is distinct from intellectual property in images.
    c. *Théberge* entitles Maloof to sell copies of images developed from film rolls he owns.
    d. *Mattel* prohibits your client from using Maier's name in advertising the exhibit.
    e. *Michelin* entitles your client to exhibit prints of the Maier images in its gallery.

The answer is (b) or, arguably, (c). Both were scored equally with adequate justification. Although *Schmeiser* was a case concerning patent law, the case confirms the principle—clearly applicable in this case—that ownership of tangible property does not necessarily permit use of intellectual property. It would be appropriate to advise the Bulger Gallery of this legal principle, since it suggests Maloof may not have the right to offer copyright

licences for images. The *Théberge* case could arguably support the opposite proposition—that the owner of tangible property may sell copies of images, as permitted in that case—although student should have recognized that this case is factually distinct. The challenge of this question was requiring students to go beyond the obvious distinction between patents and copyrights, and to focus on the underlying principles and factual nuances of options (b) and (c). Option (a), *Intel*, deals with cyber-trespass, not copyright. Its circumstances have virtually no applicability to the problem here. There is also no apparent trademark issue, making (d) incorrect. *Michelin* (e) deals more with free expression and fair dealing than exhibition rights. With sufficient explanation, however, students answering (a), (d), or (e) could still obtain a "good" score on the question. The overwhelming majority of students chose either (b) or (c); "very good" or "excellent" scores for those answers depended on the accompanying explanations.

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and/or

3. **In February 2014, CNN.com posted a story titled, "California couple strikes gold after finding $10 million in rare coins."**

Couple finds $10M in gold coins

(CNN) – Eureka!

A husband and wife are reveling in their good fortune after finding $10 million in rare gold coins buried on their property in Northern California.

The gold country discovery is thought to be the largest of its kind in U.S. history, according to David Hall, co-founder of Professional Coin Grading Service, which authenticated the find.

"It's quite a story. People were walking along on their property in Northern California, noticed something, began digging and they found cans of gold coins," Hall said.

The coins were unearthed in February 2013 by the husband and wife, who wish to remain anonymous.

They were walking their dog when they spotted something shiny on the ground.

The couple dug and eventually discovered eight metal cans, containing more than 1,400 gold coins.

No one knows how they got there, or whom the coins might have belonged to.

The coins, in $5, $10 and $20 denominations, date from 1847 to 1894. Most were minted in San Francisco.

They have a combined face value of about $27,000, but experts believe they could fetch $10 million or more.

Many are in pristine condition, including at least 14 coins that are considered the finest known for their date and mint mark. A

highlight from the hoard is an 1866-S No Motto Double Eagle, valued at close to $1 million.

The finders in this case would not have the best right to possession if it were a fact that:

a. They had leased the part of their property where the coins were found to a third party.
b. They had received a signed offer to purchase the fee simple interest in their property.
c. They could not agree amongst themselves who spotted the coins first.
d. The coins were proceeds of a crime committed in the 19th century.
e. No heir to the estate of the true of owner of the coins could be found.

Why?

The answer is (a). Had they leased the relevant part of the property, the lessor having exclusive possessory rights to the land would have the best claim to the coins. Students drawing even more subtle distinctions between the exclusive legal rights of a lessee and the fact of occupancy were highly rewarded. *Parker v British Airways* states the principle that an occupier's rights are superior to a finder's where chattels are found in or attached to the land. The ruling in *Trachuk* would also support this answer, although in that case *Trachuk* was not the finder of hidden property, whereas in this case the couple was. The hypothetical lessor in this question would be analogous to Amoco in *Trachuk*. Option (b) is incorrect, since an offer to purchase confers no rights to exclusive possession of the land (analogous to Marathon in *Trachuk*). Disputes between co-finders, as in *Perry v Gregory* or *Keron v Cashman*, would not impact their collective rights vis-à-vis third parties, making (c) incorrect. Option (d) is incorrect, since cases like *Millas v BC* suggest it would not matter if the coins were proceeds of a crime, as long as the true owner was unknown and the finding couple were not themselves wrongdoers (like in *Baird v British Columbia*). The couples' claim would be strengthened is there were no true owner or heir, making (e) incorrect. The difference between "very good" and "excellent" or "exceptional" answers to this question was the extent to which the cases above were mentioned and briefly analogized/distinguished.

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and/or

4. A property investor runs a blog about Singaporean property law. He posted the following report on November 20, 2014:

Buying property as a gift

A Singaporean man is suing his ex-lover for the return of gifts given to her during their courtship, including $340,000 for a condominium unit bought under the woman's name.

The ex-lover defended that he offered the property to her as a gift. He only asked for its return when their relationship turned soured.

On the other hand, the man complained of being cheated. He claimed that he was the rightful owner of the property.

He purchased the property for investment, and said she was only holding it in trust and she knew that it had to be returned one day.

He added that he wouldn't even give his wife such a big present. He was hinting that his ex-lover, who is even younger than his eldest child, is merely a dispensable mistress in his eyes.

Singapore, like Canada, has a common law system inherited from England. If this situation arose in Canada, which of the following legal declarations would a court most likely make, and why?

a. A resulting trust would be declared to exist, like *Pecore v Pecore*.
b. A constructive trust would be declared to exist, like *Soulos v Korkontzilas*.
c. An express trust would be declared to exist, like *Kerr v Baranow*.
d. A gift would be declared to have been given, unlike *Nolan v Nolan*.
e. A gift would be declared to have been given, like *Bayoff Estate*.

Option (d) is the best answer. At the time of the initial transfer of money or property, the gift requirements of intention (to give and receive) and delivery seem to have been met. A subsequent change of circumstances or intention does not negate the gift. The facts of this case are much more like *Nolan v Nolan* than *Bayoff Estate*, the latter of which involved a *donation mortis causa*. And, if a gift were declared in this case, it would be "unlike" *Nolan*, making (d) a better answer than (e). There is no express trust, ruling out (c) as the answer. Many (perhaps even most) students selected option (a); this was incorrect, but nevertheless rewarded with a "very good" score if students provided adequate reasons. Specifically, students had to indicate the high burden of proof to establish gifts, and engage with the rebuttable presumptions in the law of advancement/resulting trusts. The fundamental problem with (a) is that we know from Justice Rothstein's judgement in *Kerr v Baranow* and *Vanasee v Seguin* that resulting trusts are no longer relevant in the context of relationship breakdown. Moreover, in *Pecore v Pecore* the presumption of resulting trust was rebutted to establish a gift, and its facts were distinguishable (father-daughter instead of lovers), so it is not "like" this case in several respects. It was clear to me from the answers that many students did not actually read the relevant cases (understandable, given the timing of their coverage at the busy end of term), but instead relied on their class notes or summaries. (Yes, I can tell.) Unusually, if this were an appropriate case for a trust, it would be a constructive trust in the man's favour. But (b) is an incorrect answer because *Soulos v Korkontzilas* is not a good authority; it concerns constructive trusts in the fiduciary context, not unjust enrichment following relationship breakdown. This was, admittedly, a very complex and difficult question. Scores were adjusted accordingly.

II. ANSWER 3 OF 4 QUESTIONS IN THIS PART, WHICH IS WORTH 60% OF THIS EXAM.

***** FOR QUESTIONS 5 AND 6 *****

On November 7, 2014, CBC News featured the following report. This news report provides the context for Question #5 and Question #6 on this exam. On the basis of this report, you may choose to answer Question #5 *or* Question #6 *or* both Question #5 and #6. (Recall that you must answer only 3 questions total in this Part II of the exam.)

Homeless woman charged for building her own home

A First Nations woman in Northern Ontario has been issued with a stop work order and faces thousands of dollars in fines for attempting to build a cabin in the place where she grew up.

Darlene Necan is a member of the Ojibways of Saugeen First Nation, but she's been unable to acquire housing in that community, about 400 kilometres northwest of Thunder Bay, since the reserve was created in the late 1990s.

Last year, Necan began building with donated materials on land where her family home once stood, 20 kilometres south of her reserve, in the unorganized township of Savant Lake, Ont.

"This is my castle and I'm so proud to have it, even though it's not done yet," Necan said during a recent visit to the one-room, plywood house she is not allowed to live in.

The Ministry of Natural Resources and Forestry has charged Necan with breaches of the Public Lands Act that carry fines of up to $10,000, and up to an additional $1,000 fine each time she is caught continuing to build. Necan believes it is because somehow the place she grew up has become Crown land. The ministry did not respond to questions from CBC News about this story.

As an unorganized township, Savant Lake doesn't have a municipal leader. Denis Mousseau owns the only store, across the

street from his hotel, on one of the community's two main roads.

"It's a common thing for First Nations people to do, is build their own house without title to the land," Mousseau said. "First Nations people have the right to do that and I don't see why [the Ministry of] Natural Resources should be hassling her over this."

Necan has boarded up the unfinished doorway to her cabin for the winter, and said she feels "shattered" by the charges against her.

"I still keep going with this fight no matter how awful it makes me feel for trying to house myself and help people, because a lot of people don't believe in themselves or that things can change if you fight hard enough," Necan said, her voice cracking.

"It's what I try to believe. I try to be hopeful. That's hard too and a lot of times I cry by myself here. But I talk to my [late] mom and my [late] dad and it keeps me going because I keep thinking of them."

Necan has spent much of her adult life couch-surfing among relatives and camping out on the family trap line when the weather allows. The 55-year-old was looking forward to a different life, living in her own home and offering shelter to family members.

"This is exactly the same spot where we lived," Necan said. "We slowly started moving to the cities because we didn't have anything after my dad got hurt and we were pretty well desperate."

Necan's father was injured while working for the railway.

"My family... they're not any better in the city than they were here," she says. "Here, at least they were free to roam around in the bush and go hunting and all that, but in the city you need at least five, 10 bucks to even live for the day."

'Aren't we under treaty?'

Fewer than 100 people live on the reserve up the road. Edward Machimity has been chief for nearly two decades, since the reserve was created. Necan said he refuses to help her, or even answer her questions.

"He has said that he has to be careful about how he helps the off-reserve people and that really got me confused because I thought, aren't we on Anishinaabe land right now? Aren't we under treaty?" Necan said.

"Isn't this why we elected him for, is to help all people, not only the people inside reserve? That is so crap because natives are scattered all over Canada. How can they say only the people on reserve have rights?"

Machimity did not return repeated calls from CBC News.

5. Specifically explain and advise Ms. Necan on establishing her property rights as an Aboriginal person of Canada.

The quality of answers to this question varied widely. The difference between good and excellent answers was mostly focus and depth. Students who performed less well tended to transcribe large chunks of a generic framework for assessing Aboriginal property issues. Generic descriptions of the law pertaining to the nature, proof, and infringement of Aboriginal title were not rewarded. Students who focussed on specific aspects of those

issues, and applied the law carefully, were. For example, the most relevant aspect of Aboriginal title to this question is its communal nature. The best students first advised Ms. Necan that if she could establish title, it would be for/through her community not herself. This could make her strained relationship with Chief Machimity especially problematic. Not wasting time discussing the theory or history of Aboriginal title (all interesting, but not really the key to giving Ms. Necan practical advice) allowed students to engage more deeply with the heart of the question: how can the Ojibways of Saugeen (not Ms. Necan) prove title? The test comes from *Delgamuukw*, not *Tsilhqot'in*, although the latter is of course relevant to its application. Students commonly confused these cases; some students also conflated test for rights (*Van Der Peet* and other cases) with the test for title. It was not sufficient to simply state the test; it was necessary to apply it. The best students indicated in their advice to Ms. Necan what material facts were *not* known, and indicated the need for further details from her. (Related to that point, the very best students structured their answer as an opinion/advice letter written to Ms. Necan. Most students ignored this aspect of the instructions, and simply wrote a generic answer in the abstract.) It was also appropriate, after assessing the claim for title, to consider whether building a house would be consistent with the community's historical and ongoing attachment to the land, which is an inherent limitation on the title. Students were also rewarded for considering whether the title was validly extinguished, or whether the Crown's current actions would constitute infringement. The duty to consult and honour of the crown were relevant considerations. Finally, students were able to significantly distinguish themselves from their peers by demonstrating clear and correct understanding of the relationship between treaties and title. This was among the most subtle and difficult aspects of the question; addressing it properly typically led to "excellent" or "exceptional" scores.

and/or

6. **Ignore the fact that Ms. Necan is an Aboriginal person. Explain and advise Ms. Necan on her rights based on relevant materials you have studied in our property law course.**

Most students, but not all, who attempted question 5 also attempted question 6. A handful of students attempted question 6 but not 5. There were really two fundamental issues to address in question 6: (a) adverse possession, and (b) *Charter* rights. For some reason, a surprisingly large number of students also made up an expropriation argument here. But direct or *de facto* expropriation requires clear title in the first place; there's simply no basis on which to engage in this kind of analysis. This was a waste of time and space, and tended to show a lack of focus and understanding. A small number of students wrote at length about the philosophical foundations of property rights, which I doubt Ms. Necan would be interested in when asking for your advice. To the extent first principles were relevant, students ought to have integrated them into the analysis of homelessness issues specifically to establish *Charter* rights. Almost everyone correctly identified *Victoria v Adams* as the relevant authority. The best marks went to students who deeply analyzed the allegedly *Charter*-infringing actions in each case, and the numerous similarities and differences between those facts and these. On the adverse possession issue, again almost everyone

identified the issue and the relevant case law. However, some students merely transcribed the legal test, while others made the effort to apply it specifically to the facts presented (or noted which additional facts would be relevant and how, specifically).

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7. **On the eve of the Thanksgiving holiday in the United States, Fox News published the following opinion editorial.**

Why I am thankful for property rights (yes, you read that correctly)

Knowing that your property is really yours makes it easier to plant, grow, invest and prosper.

This Thanksgiving, I give thanks for something our forebears gave us: property rights.

People associate property rights with greed and selfishness, but they are keys to our prosperity. Things go wrong when resources are held in common.

Before the Pilgrims were able to hold the first Thanksgiving, they nearly starved. Although they had inherited ideas about individualism and property from the English and Dutch trading empires, they tried communism when they arrived in the New World. They decreed that each family would get an equal share of food, no matter how much work they did.

The results were disastrous. Gov. William Bradford wrote, "Much was stolen both by night and day." The same plan in Jamestown contributed to starvation, cannibalism and death of half the population.

So Bradford decreed that families should instead farm private plots. That quickly ended the suffering. Bradford wrote that people now "went willingly into the field."

Soon, there was so much food that the Pilgrims and Indians could celebrate Thanksgiving. There's nothing like competition and self-interest to bring out the best in people.

While property among the settlers began as an informal system, with "tomahawk rights" to land indicated by shaving off bits of surrounding trees, or "corn rights" indicated by growing corn, soon settlers were keeping track of contracts, filing deeds and, alas, hiring lawyers to sue each other. Property rights don't end all conflict, but they create a better system for settling disputes than physical combat.

Knowing that your property is really yours makes it easier to plant, grow, invest and prosper.

In Brazil today, rainforests are destroyed because no one really owns them. Loggers take as many trees as they can because they know if they don't, someone else will. No one had much reason to preserve trees or plant new ones for future harvests; although recently, some private conservation groups bought parcels of the Amazon in order to protect trees.

The oceans are treated as a commons, and they are difficult to privatize. For years, lack of ownership led to overfishing. Species will go extinct if they aren't treated as property. Now a few places award fishing rights to private groups of fishermen. Canada privatized its Pacific fisheries, saving the halibut from near collapse. When fishermen control fishing rights, they care about preserving fish.

Think about your Thanksgiving turkey. We eat tons of them, but no one worries that turkeys will go extinct. We know there will be more next year, since people profit from owning and raising them.

Hernando de Soto (the contemporary Peruvian economist, not the Spanish conquistador) writes about the way clearly defined property rights spur growth in the developing world. Places without clear property rights -- much of the third world -- suffer.

"About 4 billion people in the world actually build their homes and own their businesses outside the legal system," de Soto told me. "It's all haphazard and disorganized because of the lack of rule of law, the definition of who owns what. Because they don't have [legally recognized] addresses, [they] can't get credit."

Without deeds, they can't make contracts with confidence. Economic activity that cannot be legally protected instead gets done on the black market, or on "gray markets" in a murky legal limbo in between. In places such as Tanzania, says de Soto, 90 percent of the economy operates outside the legal system.

So, few people expand homes or businesses. Poor people stay poor.

This holiday season, give thanks for property rights and hope that your family will never have to relearn the economic lesson that nearly killed the Pilgrims.

John Stossel is host of "Stossel" (Thursdays at 9 PM/ET), a program highlighting current issues with a libertarian viewpoint. Stossel also appears regularly on Fox News Channel.

You have been invited to write a response for MSNBC, a news agency well known for its liberal slant. The agency wants a counterpoint to Fox's libertarian commentary above. They assume (rightly or wrongly) that you, as a Canadian law student, would support a

socialist perspective. Prepare a response that will at the same time resonate with MSNBC's left-leaning audience and also engage supporters of a free market economy.

I believe that almost everyone attempted this question, but scores varied widely. The main difference was between students who took a "shotgun" approach, spraying theoretical bullets hoping to somehow hit key points, and students were focused and persuasive. The best students wrote their answer in the form of an editorial commentary, not a generic essay. Students did not do well by trying to explain what "property" is, or diving into every one of the various theoretical justifications for it. The best students concentrated on two essential points, geared to reach the two audiences identified in the question: (a) that the commons isn't always tragic, and (b) that property can be a problem as well as a solution. The first of those points would have drawn on the work of scholars like Nobel-prize winning economist Elinor Ostrom as a counter to Garrett Hardin and Hernando de Soto. (A parenthetical: try to spell people's names correctly or at least close; among other things, it shows who has read the materials and who has not.) Practical examples of successfully managed commons were helpful. Some students drew on Aboriginal perspectives in this context, thus taking Stossel's "pilgrim" narrative in interesting directions. In addressing the second point, about the problems of property, the best students usefully explained both Heller's theory of the anti-commons as well as concerns about inequality and access (homelessness and medicines were frequently discussed as practical illustrations). Finally, a small number of students wrote editorials supporting Stossel's position. While that position is entirely legitimate (and indeed was often well-supported), it is not at all what the question asked students to do. Some students wrote a balanced opinion, which was somewhat more effective, but still not ideal. The question required students to take a position they may or may not entirely agree with; an important skill that was tested.

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and/or

8. **In the Spring of 2014, the popular website Ars Technica reported on Delaware's new *Fiduciary Access to Digital Assets and Digital Accounts Act*.**

Delaware becomes first state to give executors broad digital assets access

By Tim Redpath

Delaware has become the first state in the US to enact a law that ensures families' rights to access the digital assets of loved ones during incapacitation or after death.

Last week, Gov. Jack Markell signed House Bill (HB) 345, "Fiduciary Access to Digital Assets and Digital Accounts Act," which gives heirs and executors the same authority to take legal control of a digital account or device, just as they would take control of a physical asset or document. …

"If a California resident dies and his will is governed by California law, the representative of his estate would not have access to his Twitter account under HB 345," Kelly Bachman, a spokeswoman for the Delaware governor's office, said by e-mail.

"But if a person dies and his will is governed by Delaware law, the representative of that person's estate would have access to the decedent's Twitter account under HB 345. So the main question in determining whether HB 345 applies is not where the company having the digital account (i.e., Twitter) is incorporated or even where the person holding the digital account resides."

While an important first step, Suzanne Walsh, an attorney with Cummings and Lockwood in Connecticut, told Ars that she is waiting for the most populous state to adopt its own version, which could also have an important influence on other states.

"I think California is the most important," she told Ars. "It's even more important that we have uniformity and uniform enactment."

"You will not share your password"

Specifically, the new Delaware law states:

A fiduciary with authority over digital assets or digital accounts of an account holder under this chapter shall have the same access as the account holder, and is deemed to (i) have the lawful consent of the account holder and (ii) be an authorized user under all applicable state and federal law and regulations and any end user license agreement.

Typically, when a person dies, access to a digital service officially dies with them. Even giving your password to your spouse or a trusted loved one is forbidden under Facebook's terms of service.

You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account.

You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.

In 2004, Yahoo famously denied access to a US marine's e-mail account to his family after the marine was killed in action in Iraq.

Jim Halpert, an attorney with DLA Piper, and the director of the State Privacy and Security Coalition, an umbrella group that represents Google, Yahoo, Facebook and other firms, said that he opposes the new Delaware law.

"This law takes no account of minimizing intrusions into the privacy of third parties who communicated with the deceased," he said. "This would include highly confidential

communications to decedents from third parties who are still alive—patients of deceased doctors, psychiatrists, and clergy, for example—who would be very surprised that an executor is reviewing the communications.

The law may well create a lot of confusion and false expectations because, as the law itself acknowledges, federal law may prohibit disclosing contents of communications."

When asked why an inherited paper letter should be treated differently under the law, he said that e-mail and other digital messaging has replaced paper correspondence.

"The volume of email is far larger and people usually consider much more carefully what they write in a letter," he said.

Assume you are a summer student at DLA Piper (the world's largest law firm, measured by revenue) working for Mr. Halpert on behalf of the technology companies' coalition. Worried that your firm's clients were unimpressed with the justification quoted in the report for distinguishing between email and paper mail (that the volume is larger and people are less careful with email) Halpert has asked you for a memo exploring specific property-law related arguments supporting the clients' position. Draft a memo answering the question: Why should the law not treat email and social media accounts as inheritable property, just like a deceased person's physical assets?

Fewer students answered this question than I expected, perhaps simply because it was last. Like each of the other questions on the exam, it required a specific form of response—a legal memo, not a generic essay. And it required students to take a specific and practical position. It was not an invitation to embark on a rambling philosophical excursion. Students were expected to integrate first principles and doctrinal authorities to support a particular position on a practical issue for specific clients. In doing so, the best students addressed two issues: (a) are these accounts "property" and (b) even if they are, should they be inheritable? To answer those questions in a practical way meant grappling with cases such as *INS v AP*, *Victoria Park*, *Tucows v Renner*, and *Intel v Hamidi*. Some of these cases could be drawn upon to support the position that digital intangibles are not or should not be property; other of these cases would have to be distinguished. Knowing which cases were which was important to demonstrate understanding of the course materials. Citing some or all of them without clear purpose demonstrated a lack of insight, and was not persuasive. While overreliance on abstract theories was not rewarded, briefly contextualizing the case law with the central concepts related to the nature of property was appropriate. Having considered whether or not digital accounts are property all, the best students then considered whether—even if they are property—they are necessarily inheritable. That depends on what aspects of the bundle of rights are integral, or not, to property. Students usefully drew not only on principles related to the bundle of rights from chapter 1, but also on materials dealing with inheritance in chapter 7. We know from those materials that there are numerous state limits on testamentary transfers of property. The

best students considered how those may or may not be applicable in the digital environment.

THE END.

Some final remarks are worth mentioning:

First, this was the first year computerized exams were permitted. Just over 60% of students wrote on computers. While there was little difference in outcomes, computerized exams tended to be better organized and were much easier to read and grade. However, types also tended to be written more carelessly than handwritten exams. Some typed exams were full of spelling and typographical errors; such errors are more rare in handwritten exams. While I attempted (as always) to emphasize substance over form, students who took greater care in the writing and presentation of their work deserved to be rewarded, and were. For your information, I calculated the average, mean, standard deviation, and total number of computerized versus handwritten exams. The data is below. I also compared this data to the midterm exam. The data show that students who wrote on computers performed slightly better and with less variation than students who wrote by hand. Yet the highest mark was awarded for a handwritten exam.

Note that the average on the final was lower than the midterm, with more variability. This typically indicates a relatively more difficult exam, on which the best students were able to distinguish themselves. This was the intention.

	Midterm	Final (Comp)	Final (Hand)
Number	78.0	48.0	30.0
Average	75.0	72.6	70.8
Mean	75.5	72.1	70.1
Std Dev	5.4	6.6	6.9
High	87.0	88.0	89.8

Second, for this year's exam, I amended the marking rubric for multiple-choice questions. This had the desired effect of permitting more flexible and fairer grading. Students who selected the wrong answer were not harshly penalized, and could still receive "good" or sometimes even "very good" scores with adequate justification. Students who selected the right answer did not automatically receive "excellent" or "exceptional" scores, if their answers were not strongly supported.

The class GPA, including the Response (10%), the Midterm (20%), and the Final (60%) was 6.14. The class grades are likely to increase after the Dispute Resolution portion is integrated, and grades are adjusted for consistency with other sections and in compliance with Faculty regulations. You can observe the pattern of distribution below.