Final Examination Memorandum
Property Spring 2014
Professor Grimmelmann

I graded each question using a checklist, giving a point for each item (e.g., "Andropov is a bailee.") you dealt with appropriately. Ten percent of the credit in each each question was reserved for organization and writing style. 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 would like to know your scores on the individual essays, please email me. 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, your enthusiasm, and your insights.

James

Question 1 **(979 words)**

Jewelry

Duffman has the best claim to the jewelry. The best interpretation of the evidence available is that both Flanders and Burns abandoned it, so that it became the property of its first possessor, Duffman.

Start with where matters stood immediately before Chalmers began excavating. Eddie's photograph is circumstantial but not conclusive evidence that the jewelry belonged to Flanders at some point. If it did, however, Eddie has fallen short of showing that she has a present-day claim of ownership to it. She has not produced a will or deed or other evidence establishing a chain of title from Eddie to herself. Even if she had, however, the fact that the jewelry was buried in a safe on her land is best understood as making it part of the realty transferred via mesne conveyances to Burns. By analogy to *Goddard*, embedding the safe in real property that is then transferred makes it a fixture, so that title to it passes with the title to the land. Eddie's family's rights to the jewelry, if any, thus terminated when the land passed out of the family.

This approach avoids asking whether the jewelry was lost, mislaid, or abandoned. Of the three, mislaid is the best fit, as one does not typically abandon valuables by hiding them in a secure place on one's land, and one does not accidentally lose a safe several feet underground. If so, then whoever can claim as Flanders's heir (possibly Eddie) would own the jewelry, and in the absence of such a claim, it would belong to the owner of the land (i.e. Burns). But in this case, the statute of limitations would have long since run. To be sure, it appears that Flanders or her successor did not actually discover where the jewelry itself was until it was dug up. But given the strong implication that she or her successor buried the safe, they *should have* known where it was, which is sufficient for the clock to start running under the discovery rule many years ago. Note that if the jewelry did *not* previously belong to Flanders, then Eddie's claims would be even weaker, as her chain of title has would have no root at all.

Everything changes when Chalmers starts digging. Burns's statement that Chalmers should "cart it off somewhere" is an abandonment; she has voluntarily disclaimed any interest in the dirt. To be sure, this is an equivocal statement, but it seems unlikely that the parties expected that Burns could have demanded Chalmers return the exact same dirt. Nor does it matter that Burns intended to abandon the pile of dirt. If she is to be treated as a constructive possessor of the safe for purposes of the law of finds, she should also be treated as one for purposes of the law of abandonment.

Chalmers either never took possession or in turn abandoned the dirt to Duffman, who found the jewelry and unequivocally took possession. The dirt having been severed from Burns's land with Burns's permission, she no longer had a landowner's claims under *Goddard*; indeed, it was Duffman on whose land the jewelry was found. Chalmers might have a weak claim as Duffman's employer, but it appears that Duffman was acting as an independent contractor at the moment of the find. Duffman owns the jewelry.

Mudslide[*]

In a sense, Burns has trespassed on Amadopolis's land. To be sure, she did not enter his land or introduce any new objects on it. But she caused his land to subside and slide downhill onto her property, causing damage to his garage and car. It was not a willful trespass, as in *Jacques*, but she should certainly be liable for the harm her contractor caused. Similarly, it is easy to describe her actions as causing a nuisance: what she did on her own property substantially interfered with Amadopolis's use and enjoyment of his own land. It prevented him from using the area near the edge as he desired (for a driveway and garage) and caused tangible damage to his real and personal property. And finally, it is arguable that her agent, Chalmers, acted negligently in undertaking the excavation of the pool, forseeably and proximately causing injury to Amadopolis.

There are two complications. The first is the problem of reciprocal causation: the mudslide was caused both by the excavation and by the weight of the garage. Thus, as in *Stalnaker*, we must ask which of two incompatible uses should be allowed—a classic nuisance balancing test. Here, the harm to Amadoplis's garage is substantial and tangible. Moreover, the garage is an entirely reasonable use of land. Even if Burns's excavation "intrudes" into Amadoplis's land only indirectly, Amadopolis's garage intrudes onto Burns's land not at all. Finally and most importantly, the garage was there first (this was probably decisive in *Stalnaker*). Indeed, the garage was there for almost three decades. Even if there was initially any doubt about the matter, this is a strong case for saying that Amadopolis has acquired a negative easement by prescription not to have the garage's support undermined.

The second complication is that it would have cost $50,000 to build a retaining wall to prevent $10,000 in damage, which sounds like an unreasonable level of precaution to require. But Burns's alternative was not just to build with a retaining wall; she could also have chosen not to build a pool at all.

Burns is liable to pay Amadopolis $10,000 in compensatory damages for his garage and car. (She may be able to demand that she be made whole by Chalmers, who directly caused the injuries, but that is a matter to sort out under the law of torts and the law of contracts.) The car loan is unaffected; Amadopolis is still responsible for paying it back, even though Gunderson's lien on the car itself may now be worthless.

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[*] [JG: Hornbook law states that neighbors owe each other a duty of lateral support and are strictly liable for any subsidence, e.g. mudslides, that occur because they have removed the land that supports their neighbors' from the side. But this rule only applies to land in its natural state; if the land has been improved, e.g. with a heavy garage, neighbors are only responsible for acts constituting negligence.]

Question 2 **(800 Words)**

Parcel A

Hibbert has a clean chain of title, notwithstanding two issues. The fist potential problem is the deed to Moleman. It is highly likely, however, that Krustofski is protected under the Recording Act. Krustofski probably lacked actual notice of the deed to Moleman because Moleman never told anyone about it. (It is possible that *Jones* told Krustofski, a risk that requires further investigation.) Krustofski lacked record notice because Moleman never recorded. And Krustofski lacked inquiry notice because Moleman never entered into possession. Since Jones "sold" to Krustofski, Krustofski was a purchaser for value. And Krustofski recorded first; Moleman still hasn't. So the Recording Act kicks in and Moleman's deed is ineffective as against Krustofski.

Hibbert, then, is protected three ways. First, under the shelter rule, Krustofski had good title to give to Lovejoy and on to Hibbert. Second, Hibbert *also* qualifies for the protection of the Recording Act, since it too purchased in good faith without notice of Moleman's deed. Third, even if Moleman *did* have good title, Krustofski and Lovejoy together adverse possessed it by continuing in possession for the statutory period.

The second issue is that Lovejoy's deed is unrecorded. Since no one else has recorded a conflicting transfer from Krustofski, no one else can claim the Recording Act as against Lovejoy and Hibbert. But Hibbert should not leave that risk open. Record the deed from Krustosfki to Lovejoy as soon as possible, to put everyone else on record notice of Hibbert's chain of title.

Parcel B

Ormand's lease continues until 2028; Hibbert obtained only Neagle's reversion, not the right to present possession. Hibbert cannot evict the store without breaching the lease; since Ormand has the right to continue in possession, Ormand can sue for damages or to be put back in possession. Hibbert's only option is to negotiate with Ormand and buy out the remainder of the lease. One option may be to offer to pay relocation costs during construction and give Ormand a good deal on a retail storefront in the new tower when it is complete. As a business owner, Ormand will be focused primarily on its bottom line.

Parcel C

Hibbert faces substantial risks under CERCLA and other environmental laws. It could be held responsible for the cleanup costs if Parcel C is contaminated with perc. Hibbert probably cannot claim the innocent landowner defense, as it would most likely have been aware of the previous use of the parcel as a dry cleaner (although this is not completely certain). Hibbert should have the site thoroughly tested for the presence of perc and proceed with extreme caution during construction to avoid rupturing any underground tanks or causing other contamination (as happened in the *Acme Printing* case).

Parcel D

It will be extremely hard to obtain a zoning change, as rezoning Parcel D from single-story residential to large-scale commercial would be both a substantial change (attracting opposition) and quite possibly spot zoning (since it would affect a single parcel). The

best argument Hibbert could make here is that the parcel is currently spot-zoned, since it appears to be surrounded by commercial parcels.

A variance is only slightly more likely. The biggest obstacle here will be showing a unique hardship. In a sense, the hardship is "unique" to Parcel C since the other four parcels don't have the same issue. But in another, more accurate sense, there is nothing particularly unusual or difficult about residential zoning. (*Euclid*, after all, broadly upheld zoning to keep commercial and industrial uses out of residential areas.) The parcel is currently being used for a single-story house, and it could easily continue to be so used. Hibbert may be able to use political connections or make other commitments to the local government to be able to obtain a rezoning or variance, but it will be a profoundly uphill struggle.

Parcel E

Üter held a life estate subject to executory limitation; Van Houten held a remainder in fee simple. (Van Houten's remainder is not subject to any form of limitation because if it had become possessory, it would be possessory forever; Üter cannot possibly commit or be convicted of a crime of moral turpitude after his death.) Wiggum holds an executory interest, which could still become possessory, cutting off Üter's life estate, should Üter commit a crime of moral turpitude. This would throw a wrench in Hibbert's plans for the office tower. Unfortunately, Hibbert cannot rely on Carrollton's 30-year limit on rights of entry and possibilities of reverter, as Wiggum holds an executory interest instead.

Hibbert should buy out Wiggum's executory interest (or wait for Üter to pass on) before committing to construction. Wiggum should be willing to sell inexpensively, since his interest is worthless unless Üter turns to a life of crime in his waning years.

Question 3 **(590 Words)**

House

Brandine is the sole owner of the house, subject to a lien to the Capital City Finance Company. The mortgage did not sever the joint tenancy, as both parties entered into it and (more importantly) Carrollton follows the lien theory of mortgages. *Harms v. Sprague*. Thus, Akira's will was ineffective to pass his interest to Dolph, who took nothing. Instead, Akira's interest terminated at his death and Brandie's right of survivorship made her into sole owner of the house. She is still responsible for making mortage payments and the mortgage is still secured by the house.

Powerboat

Tenancy in common shares are devisable, so Akira's will passed his share to Cecil. He could not will the entire powerboat to Cecil, as he only owned a one-half (I assume) share. Thus, his will should be construed to pass what he did own, leaving Cecil and Emily as tenants in common.

Cabin

The cabin passed via intestacy to Akira's surviving spouse, Brandine. It is possible that Akira meant to will it to Cecil, but since his will was silent on the matter, any oral intention not expressed in writing in compliance with the Wills Act is void.

Cecil, however, is likely the owner of the cabin by adverse possession. He has been in actual possession for 11 years, longer than the statutory period, with no indication that it is anything but continuous. Occupying a dwelling, as in *Howard v. Kunto*, satisfies the test for exclusivity. And his possession was open and notorious, enough so that Dolph noticed and objected. Cecil's own state of mind is irrelevant in Carrollton, leaving only the possibility that he was there with Brandine's permission. But there is no indication that she allowed him to be there; indeed, Dolph believed that Cecil was not supposed to be there at all, and Cecil did not believe that he was there by Brandine's permission.

Trust

Frink is in breach of trust. He violated his duties of loyalty and prudence by gambling with the trust corpus, and will be liable in a suit by Gerald for the missing $20,000. The casino is not responsible for the trust's losses, unless it had notice that Frink was gambling with trust funds, of which there is no suggestion in the facts.

Android's Dungeon

Horatio, Brandine, and Emily now each own one-third of the shares in the Android's Dungeon. ("Shares" and the reference to the vote indicate that the store is held as a corporation.) The business judgment rule protects Brandine and Emily's decision to expand into gaming. The late Akira's wishes are irrelevant; this decision is a good-faith decision to take actions in the best interests of the company and its shareholders.

Furniture

Dolph, as owner of the furniture, bailed it to Scratch Your Itch, which then converted the furniture by selling it rather than returning it to Dolph. However, Dolph cannot now

recover the furniture from Julius, who is a good-faith purchaser for value. Scratch Your Itch is a "merchant who deals in goods of that kind," § 2-403(2), so it had the power to give good title to a buyer. Dolph can sue Scratch Your Itch for damages. Under principles of restitution, he will recover the full $10,000 for which it sold the furniture , so that Scratch Your Itch is not unjustly enriched by its wrongdoing. (It may potentially be able to offset the value of its cleaning work against the $10,000, but I would not expect a court to be particularly sympathetic.)