

962200

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Institution **Harvard Law School**  
Course / Session **S21 Fisher Property**  
Extegrity Exam4 > 20.11.23.0

Exam Mode **TAKEHOME**  
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Event **NA**

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Exam ID **962200**

Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	<b>997</b>	<b>4649</b>	<b>5635</b>
Section 2	<b>286</b>	<b>1351</b>	<b>1633</b>
Section 3	<b>478</b>	<b>2299</b>	<b>2773</b>
Section 4	<b>158</b>	<b>805</b>	<b>960</b>
Section 5	<b>1831</b>	<b>10422</b>	<b>12239</b>
Total	<b>3750</b>	<b>19526</b>	<b>23240</b>

Answer-to-Question-\_1a\_

**1A:**

**Sam:**

Sam holds his land in **FS**. When Owen died, Paula took full ownership of the land, as Tenants in the Entirety have a right of survivorship. She then passed the land in FS through valid testate succession to Talia, as the will was signed, notarized, and witnessed by two disinterested witnesses. Talia then validly passed the land to Sam through testate succession, as her will was also signed, notarized, and witnessed by two disinterested witnesses.

Sam bears the **burden** of the agreement that Dan and Talia entered into regarding how the land Sam now holds in FS may be used. The agreement will run regardless of it is a real covenant or equitable servitude. If it is a **RC**, it runs to Sam because Talia agreed to it in writing, there was mutual (horizontal) privity because Dan had an easement to use the driveway, vertical privity exists because Sam succeeded Talia's entire interest in the property, Talia and Dan made their intention for it to run explicit in the writing, and the burden "touched and concerned" Talia's land. If Illinois requires the RC touch and concern Dan's land, this is likely too satisfied, as the RC related to his ability to enjoy his land. If the agreement is a **ES**, the burden runs because it was in writing, Sam likely knew about it even if he didn't participate in the negotiation, Dan and Talia made their intention for it to run explicit in the writing, and the burden touched and concerned

Talia's land. Sam may attempt to argue that he did not have notice because he did not participate in the negotiations, but it is highly unlikely he managed to completely stay unaware of the details at all points from the time of the agreement to when he inherited the land.

Sam also has a **right to the fish** he catches in the stream. Unless Illinois has a legal rule around wild animals based on local custom, we assume the common law rule applies: Sam gains a property right to the fish when he establishes firm possession of them.

**Ellen:**

Ellen seems to hold the land she bought from Dan is **FS**, as there does not seem to be any qualification to the sale.

Ellen bears the **benefit** of Dan's agreement with Talia. If it is a **RC**, the agreement was in writing, Ellen succeeded to Dan's possessory (and entire) interest in the land, Dan and Talia intended the RC to run and put that in writing, and the benefit "touched and concerned" Dan's land by affecting how he would be able to enjoy it. Sam might argue the writing only indicates an intention for the burden to run, not the benefit, as there is no mention of successors in interest to Dan. However, the nature of the writing suggests Talia intended the agreement to remain in force in future generations, including to successors in interest. If it is a **ES**, the agreement was in writing, Dan and Talia made their intention for it to run explicit, Ellen succeeded to Dan's entire interest in his land (if IL requires this), and the agreement touched and concerned Dan's land (if IL requires

this).

Ellen also has an **appurtenant affirmative easement** to use the driveway on Sam's land to gain access to her own. The easement is appurtenant because the benefit is inseparable from Ellen's own land and is affirmative because it is a right to do something on someone else's property. The benefit of the easement ran to Ellen because appurtenant easements automatically run.

Ellen may have a **prescriptive easement** to walk onto Sam's land and fish. There is no indication that her trespass was permissive, actual use is satisfied by her occasional use, Sam evidently knew that she was doing this because he is demanding she stop, the use is continuous, and it has been going on for at least 15 years. Sam might argue that Ellen was not trespassing in good faith (if IL is one of the minority of jurisdictions that require this) or that the use has not been long enough (if IL's statutory period is longer than 15 years). If Ellen's use does not satisfy the prescriptive easement requirements, then Sam likely has a right to compensatory or injunctive relief, as Ellen's use does not fall under any of the exceptions to trespass.

Ellen may argue that Sam is **violating the RC/ES** because he is operating a home school on his land, which is not "residential purposes or farming" in the abstract. However, Sam will likely counter that he is providing the children with hands-on farming experience, which does not violate the RC/ES. Ellen will likely be able to receive relief surrounding the indoor traditional school, but relief for the farming portion is less likely.

Ellen may also argue that Sam's actions constitute a **nuisance**. The barn painting will not be included unless it violates local **aesthetic zoning**. The manure piling may be considered an **intentional nuisance per accidens**. This claim will be evaluated with the *Middlesex 5+1* factors. The nature and kind of harm rule in Ellen's favor, as Sam is piling the manure simply to spite her and she is being robbed of smell-free enjoyment of her land. The gravity of the harm is likely to also rule in her favor, as the smell of manure is very offensive. The efficiency prong similarly likely rules in her favor, as Sam's actions may decrease her property value and have no clear economic benefit. Custom also likely rules in her favor, as it is likely customary not to place manure so close to property boundaries. Sam might argue that Ellen came to the nuisance, but at the time she bought the land, it was not being used for such large-scale farming. The court may grant Ellen a negative easement because the nuisance is somewhat related to air, or may simply enjoin Sam from placing the manure so close to her land.

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Answer-to-Question- 1b

**1B:**

**Frank** holds a **TY** in the apartment. His further rights depend on if Illinois is one of the 32 states that now permit waivers of an implied warranty of habitability. If so, the Frank has few rights as to the state of the apartment he is renting from Sam because he waived his rights to IWH by signing a lease with an express “as is” provision.

If not, Frank has certain rights related to the IWH (*Hilder*). These include a minimum level of habitability, likely to include livable temperatures throughout the seasons (in the form of sustainable heat) and functioning plumbing. Frank may self-help and install heating and fix the plumbing issues. If he does, he will likely be able to sue for reimbursement for doing so. He will likely also be granted some combination of other damages due to the state of the apartment: waiver of the rent he has withheld, expectation damages equal to the difference between a habitable apartment and the one Sam delivered, tort damages for his discomfort, and maybe punitive damages, as it seems like Sam allowed the house to fall into disrepair willfully and wantonly (*Hilder*).

**Sam** holds a **RV** in the apartment. If Illinois permits waivers of IWH, Sam can initiate summary eviction proceedings. If Frank pays the withheld rent, he has a right to

stay in the apartment. Otherwise Sam will be granted a warrant of eviction. If IL does not permit waivers of IWH, Sam may still initiate summary eviction. If Frank appears, Sam will likely not get a warrant of eviction, but if Frank (like many tenants who do not realize their IWH rights) fails to appear, the warrant may be granted under summary judgment.

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Answer-to-Question- 1c

**1C:**

**Sam** now has a **LE** in the land. If the original agreement between Dan and Talia was a **RC**, the burden no longer runs to Sam because he has not succeeded Talia's entire interest in the land- he only holds an interest during his natural life. If the agreement was a **ES**, the burden still runs to Sam because it was in writing, he likely had some form of notice, Talia and Dan intended it to run, and the agreement touched and concerned Talia's land. The benefit runs to **Ellen** either way because the changes to Talia's will do not change Ellen's succeeding Dan's entire interest, that the agreement was in writing, Talia and Dan's intention for the agreement to run, the horizontal privity by means of the driveway easement (required only for **RC** in some jurisdictions), and the fact that the agreement touched and concerned Dan's land. Ellen will likely prefer to characterize the agreement as an **ES** so that the burden runs to Sam, making the agreement enforceable. Sam may also now be in violation of the doctrine of waste, though expanding the barn and building the coop may be seen as permissible ameliorative waste.

The other interests depend on Illinois' approach to the **rule against perpetuities** (**RAP**). If **IL** has reformed the **RAP** in such a way that allows for the descendants clause to be valid, then **Rebecca** and **Quentin** have **CRMs** contingent on graduating from an

accredited graduate program in fine arts. Any future descendants of Talia (e.g., Rebecca and Quentins' children) also have CRMs, assuming neither Rebecca nor Quentin have fulfilled the condition by the time of the new descendants' birth and thus already taken possession of the land in FS.

If Illinois' approach is more similar to the classic RAP, the descendants clause is likely invalid. We could imagine a scenario in which Rebecca fails to complete her program, then either she or Quentin have a child (or both do), and then Sam, Rebecca, and Quentin all die. In that case, we would not know within 21 years if a descendant will satisfy the condition. The descendants clause would likely then be struck, meaning that Sam would still have a LE, but then Talia's estate would have a RV. Assuming no other testamentary provisions deal with the house and the farm, that property would pass through intestate succession upon Sam's death. Assuming the IL statute is similar to MA's, Rebecca and Quentin would receive equal share in the property (§2-103(1)). This interest would likely be a TC in FS as the default concurrent interest.

The burden of Talia's agreement with Dan would run to Rebecca, Quentin, or Rebecca and Quentin upon Sam's death (depending on how the RAP is enumerated) because in any of those cases, either Rebecca or Quentin individually or both as TC would succeed to Talia's entire estate.

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Answer-to-Question- \_1d\_\_

**1D:**

Illinois uses the **riparian rights regime** for governing water rights. Thus, Sam's rights to the water in the creek only cover natural uses. This would likely include drinking water for his cattle, but not artificial irrigation ditches for his hayfield (*Merriweather*). Ellen may argue that water for cattle is not essential use, especially because beyond the one milk cow, the other cows were purchased for the home school. The court's response to that argument will depend on how much the law has developed in seeing cattle farming as essential versus non-essential commercial use. Sam might attempt to argue that the irrigation is used for naturally growing the hay, but natural growth wouldn't require irrigation and riparian rights is largely hostile to artificial irrigation.

It is important to note that Ellen's use is also artificial and may be enjoined by a court if other downstream users bring suit, as a swimming pool is certainly not a natural use.

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Answer-to-Question- 2

2:

Introduction

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The inequities and inefficiencies present in contemporary systems of property are often rooted in their basis in a single, dominant theoretical approach to property rights. When we focus on developing systems based solely on a single theoretical approach, we might maximize the benefits of that approach, but we also maximize its detrimental effects. Robust, future-focused changes to property rights across resources may combat this detrimental impact by applying the teachings of a variety of theories, thus mitigating one theory's limits with another's possibilities. In particular, changes to property rights in wild animals and traditional knowledge should recognize the value in fairness and welfare approaches, but not at the expense of much-overdue corrective and distributive justice. This essay will explore how new legal regimes in the areas of wild animals and traditional knowledge can maintain labor-based fairness and maximize general welfare while still correcting for past wrongs and recognizing how equity can shape what rights individuals and communities deserve.

Wild Animals

Traditional and modern approaches to property rights in wild animals highlight the issues inherent in a solely labor-based approach. Overfishing is the direct result of a system that rewards individual labor without considering how the aggregate effect of that labor may be detrimental. Similarly, utilitarian approaches that attempt to maximize efficiency by creating a market for licenses or permits also end up pricing out those communities who have traditionally relied on wild animals. This is evinced by Native Alaskans, who now have to choose which of their children (often the oldest) will get the family's single license. Thus, relying on a single theory fails to take into account the environmental impact of individual labor or the susceptibility of utilitarian systems to exploitation of unequal bargaining and economic power. This is not to say that a system should be solely focused on corrective or distributive justice either, as such a system may lead to economic inefficiencies that make it no longer sustainable even for local, native, or traditional communities. There needs to be a balance between justice and economics in a way that both considerations may be mutually maximized.

Such a regime will likely differ according to the characteristic of the geography in which the wild animals are found, but many lessons can be universally applied. First, new regimes should give much more attention to the rights of Native communities and their relationship to the wild animal populations in question. Since America's founding, property rights have been predicated on an offensive characterization of Native communities as unable to make productive use of land or resources (*see Johnson*). New legal regimes must correct for this longstanding misdeed by prioritizing Native access in a way that allows for the maintenance of traditional customs and culture and sustains the

communities' economic needs. New regimes should then be built upon the local custom in each area/with regard to each wild animal, as local customs often develop out of the most efficient approach absent a formal legal regime. For example, lobster gangs in Maine developed in the absence of a formal legal system and helped regulate access to and impact on the local lobster population. Just as in Maine, formal legal regimes should build on top of these local customs to give them more enforcement bite and to add in helpful scientific knowledge. For example, Maine's legal system has added in formal size limits and reproduction protections. Systems that build upon local custom gain the benefit of respecting local communities, often a key step in distributive justice. They also gain the naturally developed economic efficiencies desired by welfare theory.

If there are no local customs for a particular animals or area, legal regimes may consider a number of possibilities, including ceilings on hunting/catching to maintain population viability, geographic territories that promote equity among hunters/fishermen, and licensing/permitting regimes that respect individual labor but place a ceiling on the overall impact it can have. Legal regimes around rights to wild animals should avoid over-legalization, as custom is often a better promoter of utilitarian goals than governmentally-imposed legal regimes. New legal rules should also focus on distributive justice by giving preferred rights to local and disadvantaged communities and providing legal protections to ensure that Native and local communities are not taken advantage of by groups with greater bargaining and economic power. Relying solely on any one of these theoretical approaches could spell economic, environmental, or traditional disaster, but together they can power a robust new legal system around wild animals.

### Traditional Knowledge

A new legal approach to traditional knowledge may similarly benefit from a multifaceted theoretical basis. This section will largely consider traditional knowledge that is “closely held” or more protected. While more widely held or diffused traditional knowledge may present opportunities for corrective and distributive justice, there exists limited resources, energy, and political capital available to protecting traditional knowledge. That energy should be more focused on robust protections for that traditional knowledge that can be most efficiently protected, a category unlikely to include already widely disseminated knowledge that would be difficult to substantively “reclaim.”

New legal regimes should balance labor and welfare concerns with corrective and distributive justice by creating two general rules for traditional knowledge: a property rule for genetic or biological traditional knowledge (expanding the Nagoya Protocol) and a liability rule for traditional cultural expressions (TCEs). The property rule for genetic/biological material balances the desire for promoting maximum general welfare and rewarding those who “usefully” develop property with the need for correcting for the traditionally colonialist manner in which genetic and biological material has been taken from local communities without their consent. For example, with Quassia Amara, a French company took the Quassia Amara plant from French Guiana (an overseas territory that France holds as the result of colonization in South America). While the company has paid some unknown amount of money to the indigenous populations that discovered the plant’s anti-malarial uses, this form of economic neocolonialism allows the Global North to take advantage of genetic and biological materials of indigenous communities by

means of superior economic power. The Nagoya Protocol should be expanded to include biological materials in addition to genetic ones because of the often extremely close connection between such biological materials and the communities themselves.

While such a regime definitively prioritizes corrective and distributive justice over promoting global welfare in the abstract, it is really based on a reorganization of how we think about efficient use (welfare theory) and non-wasteful labor (labor theory). Historical senses of welfare theory often exclude less powerful communities from senses of economic efficiency, or deprioritize their economic “needs” in the larger economic pie. Similarly the labor in which native and indigenous communities engage in when utilizing genetic and biological resources is often seen as wasteful simply because it does not comport with the traditional sense of “use” as defined by the Global North. Thus, new legal regimes for traditional knowledge must not only correct for past wrongs and promote a more equitable sense of distributive justice, but also must redefine how we think about labor and welfare theory in the context of property. While the stricter property rule might stunt higher-tech development of genetic and biological materials, it will be a first step in correcting for centuries of exploitative injustice.

While these same lessons apply to TCEs, a liability rule is more appropriate for those kinds of traditional knowledge because they are often not as closely tied to senses of self as is biological or genetic material. Thus, a new legal regime should seek to highlight the labor required for TCEs and qualify senses of utilitarian welfare-maximization with respect for the communities themselves. For example, the Mayan communities in Guatemala are today often receiving no compensation from designers or

manufacturers that copy their distinctive weaving style. A new approach should empower these communities with recognition and economic compensation for their designs being promoted and sold globally by creating an international agreement that gives liability rule protection by means of intellectual property rights. Implementing legislation could take many forms. For example, there could be copyright protection given to the TCEs themselves, with the amount of compensation due to those that use the TCEs varying with the uniqueness of an individual TCE and the ability for consumers to differentiate between similar work based on that TCE. Such legislation could also include patent protection for the process by which TCEs are made, if such processes are unique to those TCEs. Individuals who violated the patent would have to pay the patent holders (likely communities or collectives) for utilizing the unique process. Legislation could also include trademark protection for particular TCE names that could then be given special recognition as the “official” version of that TCE. For example, the name “Traditional Mayan Pattern” could be a trademark given only to the local Mayan community in Guatemala, enforceable through the implementing legislation in all countries party to the agreement. A liability rule for TCEs assigns value to the labor inherent in producing such forms of traditional knowledge, allows the benefit of such TCEs to be maximized throughout a global community, and gives recognition to the inherent value in these communities, correcting (at least in part) for past exploitation.

New legal regimes for traditional knowledge in both genetic/biological and TCE categories should be augmented by a robust labeling process. Such a process can take inspiration from the EU origin labels for items such as champagne and Parmigiano-Reggiano cheese. Such labels would certify that any item produced through the use of

traditional knowledge has not violated the property or liability rule protections for such knowledge. For those items that use genetic or biological materials, such labels would indicate that the originators of the traditional knowledge approved of its use, while for TCEs, the labels would indicate that the item's producers have paid the originators the required compensation. International agreements could be augmented to require such labels for any products that are based on traditional knowledge, preventing non-complying products from being sold on the market. Such a labeling requirement would augment recognition and knowledge of originators of traditional knowledge. This would allow for promoting corrective and distributive justice without any substantial detrimental impact on general welfare. By balancing newly construed senses of welfare and labor theory with much-overdue corrective and distributive justice needs, we can create a system of property rights in traditional knowledge that is truly universally beneficial.

### Conclusion

As evidenced by the current systems in place for property rights in much of wild animals and traditional knowledge, it is impossible to create a system of rights that maximizes all theories of justice. By focusing on a single theory, however, we allow for its detrimental impact to become most acute. Instead, a system of property rights that reimagines what welfare theory and labor theory should truly include and balances them with the long-overdue need for corrective and distributive justice will promote the most universal benefits with the least exploitative costs. Contemporary needs for true justice indicate that one-theory approaches simply will no longer suffice.