

EXAMPLE ANSWER
COMPILED FROM STUDENT ANSWERS
FOR
POLICY QUESTION
FROM THE
PROPERTY FINAL EXAMINATION
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NOTES:

The example answers given below are compiled from unmodified student answer(s).

The answer(s) below were selected because they were among the highest point-obtaining answer(s) for the relevant portion of the examination. They are provided directly as written by the student, without any spelling or any other type of correction or editing.

These answers do not necessarily touch upon all point-obtaining issues, nor do they necessarily state all points of law and fact correctly. Moreover, they may discuss issues that are not point-obtaining. They are provided as a point of comparison, not as a suggestion that they are a perfect answer.

A. *Doctrine-Application "IRAC" Section*

{_no example answer given; that portion of the exam has not been released_}

B. Policy

Pros and Cons

The traditional approach to adverse possession has adopted a property rule. That is, prior to the elements being satisfied, no one can take the property of the true owner without his consent (or trespass on that property). But, once the statute of limitations runs, the adverse possessor gains the property. He does not need to pay the (once) true owner anything; he simply gains legal possession of it.

A liability rule would impose the additional requirement that a true owner must be paid fair market value before any adverse possession is successful. So, if a person adversely possesses the property, meeting all the elements of it, a liability rule would require the AP to pay the TO before he gained any legal interest.

The proposal maintains the core AP rules by requiring all the elements, so it maintains the property rule that protects TOs before the AP satisfies all the elements. However, the proposal adds additional protection for the TO, because now he is protected by a liability rule even AFTER the elements for AP are satisfied.

The liability rule approach has several benefits. To start with, it seems extremely unfair that a person might be dispossessed of his property without receiving any compensation for it. We respect property, and property means nothing if it can be taken away. For an owner to simply lose it without being paid ANYTHING completely demeans his interest in that property.

This has two implications. First, the inherent unfairness is an argument for imposing the liability rule in and of itself. Second, and more importantly, is that the seeming inherent unfairness has led to a situation whereby courts prevent bad faith adverse possessors from taking hold of the property. They manipulate the other elements so that "coincidentally," bad faith possessors almost never seem to gain adverse possession. This is what Merrill calls the hidden sixth element of Adverse Possession: A good (or not bad) state of mind.

Furthermore, there are severe consequences of imposing liability based on the state of mind. It creates a vast amount of uncertainty because APs can never be sure whether they're actually APing. It adds to the risk. And, it simply does not jive with the rest of the justifications for AP: to reward those who've earned the land, to punish TOs who've been sleeping on the land, and because evidence tends to get lost over time. State of mind is relevant to none of these concerns, so the fact that as a practical matter Courts are imposing this hidden sixth element carries severe consequences, and prevents many of the advantages of Adverse Possession from being realized in all their contexts.

Against this background, the proposal looks especially attractive. The first component of the proposal operates to impose a liability rule for any real property, as described above. Imposing a liability rule makes it seem much more intuitively fair - a person is not being dispossessed of their property without due compensation. As a practical matter, Courts will not seek to punish bad faith possessors because they know that the TO will still be compensated according to the fair market value of his land. Therefore, the uncertainty in the application of the law is eliminated. APs don't have to fear a court will find them a "Bad Faith" possessor and take away their land. As such, the economic incentive of APs to develop the land is increased.

Moreover, it allows Courts to realize many of the values of Adverse Possession. The sleeping owner is still punished, but he's also somewhat compensated for his loss. And, the AP must complete the final step of "earning" the land -- to actually pay for it. Taken together, these seem like powerful arguments in favor of (i).

The analysis of (ii) does not substantially differ. It imposes a liability rule for prescriptive easements, but only if the trespasser was engaged in bad faith. In a sense, it is more narrowly tailored to the problems described above. That is, if there's a risk in (i), it's that it's somewhat overbroad. It requires ALL AP's to pay for the market value of the land, even those acting in good faith. But, as discussed above, the problem is largely limited to bad faith possessor's. So, (ii) limits it just to them, solving the problems above in a much more narrow way.

Proponents of the proposal, though, will argue that the distinction makes a great deal of sense. (i) is dealing with real property: land. Since the beginning of the human species, land has always been seen as the paradigmatic representation of "property." When we think property, we think "land," we do not think "Professor Vetter's awesome flat screen TV." Thus, it makes sense that there would be much harsher requirements for land - i.e., that a liability rule exists in all instances, because AP seems much harsher since someone is being dispossessed of their ENTIRE INTEREST in the land, as opposed to merely a right of way.

The analysis of (iii) would impact only the analysis of (ii), since it deals only with prescriptions. (iii) allows a person to demonstrate personhood in order to prevent a prescriptive easement from existing. Proponents of the proposal will argue that this makes sense. A personhood interest recognizes that human dignity exists in the land. Yet, someone would be interfering with that personhood. So, by preventing an easement in the land, that personhood interest is maintained. One of the primary functions of private property is to preserve human dignity, so the impact of this cannot be trivialized.

Despite the forceful arguments in favor of the bill, critics of it have their fair share of counter points. Indeed, one problem of the proposal's analysis is that it seems to propose the kind of widespread, urban, non-personal interactions of cities.

However, one complicating factor is that all of this is occurring against the backdrop of a very rural town. In this rural town, the residents strongly prefer not to use the law. In fact, the population is tiny. The residents interact with each other on a regular basis. Rather than the law shaping their lives, they control their own destinies. Norms have developed, and those social, cultural norms govern their way of life. Perhaps, if a dispute escalates far enough, they'll go to the law. But those instances are few and very far between.

This social situation casts doubt on the relevance of the proposal's strongest arguments. Indeed, it casts doubt on the need for adverse possession. In Ellickson's piece, he describes the self-help means used to deal with the non-conformists. Those include negative truthful gossip, and potentially violent self-help. Perhaps those work in the adverse possession context. If someone is trespassing and eliciting using a right of way, or adversely possessing land, complaining about them to get them off the land might be successful.

Furthermore, the residents are very reluctant to go to the law, so a liability rule will do little good. After all, a liability rule, by its nature, requires them to go the Court system. Instead, they're likely to keep track of liability or trespasses by counting in their hands, rather than in some formal legal recording system. Because they won't, as a practical matter, it's not clear how much of the results could be actualized.

There are more generic problems with the rule as well. First, it seems to discriminate against poor adverse possessors. Coase's theorem tells us that the poor are likely to be among the most common adverse possessors. After all, regardless of legal liability, people will bargain to pareto efficiency. In real life,

transaction costs get in the way. But, the rich are uniquely capable of dealing with those transaction costs, given that they have the resources to find people and the flexibility to negotiate to overcome psychological costs. So, it's highly likely that the poor will be the ones who do the adverse possessing, since the rich can buy the land.

Punishing the poor seems problematic. A TO doesn't sleep on his interest any less or more because the AP is poor. And, a poor person doesn't earn his interest any less than a rich one if he's been occupying the land for 20 years. Evidence gets lost regardless. So, it is deeply troublesome that the liability rule - which requires payment - would help the rich.

But, as a practical matter, I would endorse most of the proposal. The residents here might not find much use for the law, but in those instances when they must resort to it, this proposal will come in handy. It will enable a much smoother functioning of the system because Courts will not require a hidden state of mind element. And, on the whole, imposing a liability rule in more instances for AP of land is intuitively fair, because land is so much more important. As such, the benefits of the proposal outweigh its drawbacks.

Proposed Alteration

However, I would entirely eliminate (iii) from the proposal. Undoubtedly, there's a personhood interest in property. But, the fundamental assumption of (iii) is that the true owner has more of a personhood interest than any prescriptive AP-er. This assumption is not based on any empirical evidence. If I use a right of way every day for 50 years to cross another person's backyard to get to my grandkid's house, and I'm an old man so it's hard for me to drive or walk around the street, I have a personhood interest in that property. But, (iii) allows the personhood interest of the TO to trump any personhood interest of the prescriptive easement earner. Because this trump card is too powerful, I would jettison it.

Moreover, determining what a "personhood" interest constitutes will be a trip into the darkest depths of the legal regime. It would require answering fundamental questions about life and property. As Radin pointed out, there is a high risk of error in making these decisions: What a personhood interest is to Posner might be different from what it is to Marx. Really, there's a continuum of personhood interest and fungibility, and there's no way to nail that down with any definitivity. Thus, this would introduce extreme uncertainty into the law. It would open the door for a judge to manipulate the rules, to declare some interests more important than others, and to engage in the kind of ex post wanton oppression that the law seeks to avoid. As such, it would be better jettisoned from the proposal.

Finally, the rural nature of the town makes (iii) unnecessary. Because norms control, norms are likely to be strongest where personhood interests are at stake. People care most about their interests, and human empathy can invoke the kind of respect needed in order to protect those interests. A court doesn't need to impose its will in determining what that interest is. People can deal with it on their own, one on one, as a community. They can operate beyond the shadow of the law in deciding what matters most.

No legal decision is easy, but other than (iii), this proposal would benefit and improve the system of property rules in Chamois.