

Section 5
Fall 2021

Civil Procedure: Final Exam

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Available for download: Friday, December 17, 2021,
starting at **9 a.m. EST**

Must be electronically submitted: Friday, December 17, 2021,
within **3 hours** from download
or by **12:30 p.m. EST**, whichever is earlier

The exam mode is TAKEHOME. This exam is 8 pages long. Please check to see that you have all 8 pages.

MATERIALS

The exam is completely open-book and open-note. While taking this examination you may consult any digital or paper materials you find helpful. That said, you are instructed not to consult anyone else or to do new research on the Internet during the exam. *Your exam must be entirely your own work.*

By submitting your exam answer(s), you acknowledge the above instructions, and certify that the work you are submitting is your own, that you have not received unauthorized assistance on the exam, and that you have followed applicable rules, including rules for accessing reference and other materials during the exam.

ANONYMITY

Exam4 will automatically print your Anonymous ID and word count on the exam. Because the exam may be administered to some students at different times, you may not discuss its contents with anyone until after the exam period ends, or until I've notified you that all exams have been submitted.

To assist with the anonymous grading of separate questions, *please use the "Answer Separator" function* to distinguish one question from another.

Harvard prohibits student contact with faculty in regard to the scheduling or administration of an exam for that student in particular before, during, and after the exam, until the student's grade is posted. Such contact is prohibited even if the anonymity of the student's exam is preserved; this policy extends to communications to the full class. As a result, I'm not allowed to communicate with you in any way, including through email or the course website, while the exam is in progress or until the posting of final grades. (I will, however, be thinking about you guys!) In case of emergencies, *contact the Registrar's Office instead.*

CONTENTS

This exam consists of **three essay or short-answer questions**. Your answers are limited to **2500 words** in total. This is a strict limit; additional words will not be read. (This isn't a penalty, but a uniform way of ensuring fairness across different answers.)

Brevity is appreciated, and you are not required to write that much. Make sure to watch your word count, so that you don't find yourself making substantial cuts in the last few minutes.

Each question is accompanied by a point value, a recommended time allocation, and a recommended word limit. These are only recommendations! Allocate your time and words in whichever way seems best to you.

SUGGESTIONS

In general, please follow the advice given in John H. Langbein's *Writing Law Examinations*, available on the website. A few specific recommendations:

- (1) *Make sure that you read each question carefully.* Pay attention to the point values: they signal how important each question will be. I suggest that you reserve twenty minutes at the beginning for reading the whole thing, as well as ten minutes at the end for proofreading. (The recommended time allocations assume that you do this.) Separately, I'd encourage you to spend up to one-third of your time just sketching out the answers with pencil and paper before starting to type. If you just dive in, you'll get lost halfway.
- (2) *Organize your answers clearly.* You don't need to follow any particular format with rigor (IRAC, etc.), but it greatly helps to identify an applicable legal standard before applying it. Stating your conclusions clearly will also be helpful to me when grading. Mentioning individual rules, statutes, or cases can sometimes serve as useful shorthand, but chapter-and-verse citations are a waste of time. In the words of the now-repealed Rule 84, the model exams available on the course website "illustrate the simplicity and brevity that these [instructions] contemplate."
- (3) *State the substance accurately.* If a particular legal standard hasn't received any substantial attention either in the book or in my lectures, it's unlikely to be tested. That said, the exam is open-book and could require close parsing of a provision we haven't addressed at length—or, indeed, at all.
- (4) *Apply the law as it stands today.* As noted on the syllabus, the exam doesn't ask things like "how would this case have been decided in 1872?" It only tests on the law as it stands on the date of the exam, including any newly effective amendments to the Federal Rules.
- (5) *Unless you're given specific details to the contrary, you may assume:* that every party is properly served; that every pleading is properly pleaded; that all filings are timely; that every motion, brief, or response presents the best available arguments for its position; and so on. Don't try to invent new and helpful facts or law not mentioned in the exam.
- (6) *If there are issues that seem inconclusive or that require more information, you should say so.* Some of them may be intentional. Likewise, not every issue suggested by the fact pattern is actually relevant to the question asked; discussing irrelevancies will only cost you time.
- (7) **This one is very important:** *When listing reasons why a particular result would be legally correct, don't give just one; give as many as are correct, even if just one of them would be enough to win or lose on that issue. Don't assume that I'll know you know the basics; show me that you do!*

GRADING

Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Individual questions will be curved, to reward those who do well on harder questions, and then the exam as a whole will be curved. Final grades will be calculated in compliance with the syllabus and with Harvard's grading policies.

* * *

Good luck!

— START OF EXAM —

Q.1: “Impostor!” (58 pts, ≈ 1 hr 30 min, up to ≈ 1450 words)

For years Prince Dmitri Ivanovich, the exiled Ruritanian aristocrat and naturalist, had insisted that the Massachusetts woods still sheltered a small tuskless species of mammoth (*Mammothus flooficus*). Ebenezer Wilkes Smith, his Harvard colleague, scoffed that the tracks and bits of lost fur belonged merely to the common eastern snuffleupagus (*Snuffleupagus aloysii*). Matters came to a head with an angry exchange of papers in *Mammothology Today*, after which Prince Dmitri announced his departure for Saint-Tropez (to continue his searches on the French Riviera) and Smith set off on an exploration of the Savoy Mountain State Forest, never to be seen again.



Fig. 1. *Snuffleupagus aloysii* in its ordinary suburban habitat.

Also never seen again was \$8.3 million belonging to the Harvard biology department. Suspicion immediately fell on Prince Dmitri, given his notorious spending habits and his recent withdrawal of \$8.3 million in unmarked bills. When Harvard’s lawyers realized that no one in Saint-Tropez had heard of either Prince Dmitri or the nation of Ruritania, which appears not to exist, the spotlight then turned to Ebenezer. Colleagues recalled that Ebenezer was precisely the same height as Prince Dmitri, that he looked a great deal like Prince Dmitri (minus the latter’s pointy mustache and beard), and that the two had never been seen together in the same room.

Making matters worse, other biologists soon expressed doubts that the tuskless mammoth or the common eastern snuffleupagus exist either. Unable to locate “Prince Dmitri,” Harvard sued his wholly-owned Massachusetts corporation, Pseudodemetrius Enterprises, seeking the return of a further \$10 million in federal research grants that the false Dmitri and Ebenezer had received. (Federal law provides that such grants belong to the university if misused by faculty, but it provides no cause of action for their recovery.) The Massachusetts trial court denied relief, finding insufficient evidence that the two researchers were the same person, or that Pseudodemetrius Enterprises was liable for any debts of its sole shareholder.

Recently the University learned of the existence of one John Doppelgänger of Bennington County, Vt., who lives just across the border from the Savoy Mountain State Forest, who bears a striking resemblance to Ebenezer Wilkes Smith, and who has contributed articles to local newspapers on the eastern snuffleupagi he keeps as pets. Leaving himself nearly penniless, Doppelgänger recently donated \$18.3 million to the Snuffleupagus Research Foundation, a Massachusetts corporation that is headquartered in his own home and of which he is the president, owner, and sole employee.

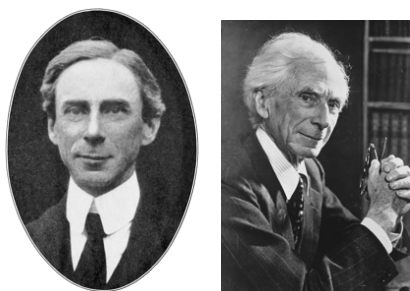


Fig. 2. A young Ebenezer Wilkes Smith (left) and the current John Doppelgänger (right). Sources: <https://bit.ly/3ozNdqq> , <https://bit.ly/33dgQpx> .

The University wants its \$18.3 million back. It wishes to sue Doppelgänger and the Foundation for the torts of conversion (that is, putting money that isn't yours to your own use) and fraudulent conveyance (that is, transferring money to hide it from creditors). Harvard may sue in state or federal court, either in Vermont or in Massachusetts, recognizing the

possibility that the defendants might attempt removal. Harvard’s complaint will recite the above facts, including the above photographs, and will assert that, “on information and belief, Doppelgänger, Smith, and Ivanovich are all the same person.”

To prove its case, the University plans to present the testimony of the biology department colleagues, to seek DNA testing of Doppelgänger and of Smith’s sister Irene (who still lives in Cambridge), and also to demand that Pseudodemetrius Enterprises turn over for testing the prized lock of its founder’s hair kept on display in the company’s Boston headquarters. Neither Vermont nor Massachusetts permits such discovery in its own courts.

Both states generally follow federal pleading standards and joinder rules, though each adheres to the “scintilla” rule on summary judgment and judgment as a matter of law. Only Vermont recognizes offensive non-mutual collateral estoppel. Harvard would like to avoid a jury trial, but the defendants are expected to maintain their innocence under oath and to seek summary judgment if they can, on preclusion among other grounds.

Assess the University’s chances of success if it files suit in each of the four courts, and discuss the considerations relevant to each. (Discuss state courts before federal ones, and within each category, discuss Vermont before Massachusetts.)

Q.2: “Things We Have Not Studied” (14 pts, ≈20 min, up to ≈350 words)

Below are listed several provisions that we never discussed at any length in class. Read them again. Then explain, based on what you’ve already learned, why they might exist and what you think they’re for. Remember that you are not permitted to conduct new research on the Internet.

- (a) 28 U.S.C. § 1712(a).
- (b) Rule 22(a)(2).
- (c) Fed. R. App. P. 4(a)(3).

Q.3: “Subcommittee Work” (28 pts, ≈40 min, up to ≈700 words)

Surprise! You have been named to the Civil Rules Advisory Committee, which is planning a general revision of the Rules. Every committee member will be assigned to two of the following subcommittees, tasked with revising the following Rules:

- Subcommittee A: Rules 7–12
- Subcommittee B: Rules 13–15, 17–25
- Subcommittee C: Rules 16, 26–37
- Subcommittee D: Rules 50–62
- Subcommittee E: Rules not listed above

Fortunately, you will have your choice of assignments. **For each of the two subcommittees on which you choose to serve, describe one change you would like to propose to the other members.** Give reasons in support of each proposal. (A general description is fine; specific rule text is quite unnecessary.)

(Reminder: Your answers, in total, should not exceed 2500 words.)

— END OF EXAM —