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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**500**	**2803**	**3347**
Section 2	**500**	**2378**	**2904**
Section 3	**500**	**2668**	**3200**
Section 4	**599**	**3306**	**3948**
Section 5	**1497**	**7708**	**9274**
Total	**3596**	**18863**	**22673**

Answer-to-Question-_1_

Neighbors' Arguments

Common Law

The neighbors can file a private **intentional nuisance per accidens** claim, arguing that the activity is "unreasonable under all the circumstances". (*Middlesex*). (The neighbors could argue nuisance per se after the Mayor's ordinance in Question 3, as Teresa's activity violates the ordinance). Liability for nuisance per accidens balances the following factors:

Nature of the Act. Neighbors will argue that maintenance is an easy and expected activity of a homeowner who lives around other people.

Kind of Harm. Neighbors will argue this pocket of wilderness breeds dangerous animals to have near children, is a wildfire hazard, and could claim it impacts their property values. (*Arkansas*)

Degree of Harm. While no one has yet been bitten and no fires have broken out, neighbors will argue the *risk* is significant. Further, they may be able to prove *real* property value reduction. (*Arkansas*)

Expediency (Economic Efficiency). Teresa is the least cost avoider. To avoid the nuisance, she must only fix up the house and irrigate, but neighbors would have to move.

Usage (Local Custom). This neighborhood is known to be assiduous in caring for their lawns.

Priority. Some neighbors are likely holdovers from before Teresa stopped caring

for the property; therefore, there is no coming to the nuisance issue here. (*Spur*)

Damages: Courts would assign entitlement to neighbors, as Teresa is the least cost avoider. Neighbors can argue for a property right to enjoin Teresa's conduct.

Ordinances/Agreements

The Neighbors can look for a local aesthetic zoning ordinance. Preventing rattlesnakes would constitute relation to "general welfare". Since 20th Century, courts have mostly upheld aesthetic zoning.

The Neighbors can check for an equitable servitude, real covenant, or contract via a HOA. (53% of Americans have one) These often include clauses requiring property maintenance. If present, would be enforceable via injunction (servitude), damages (covenant), or damages/specific performance (contract).

Teresa's Defenses

Common Law

Teresa can combat nuisance by arguing that during a drought, cutting off water use for irrigation is common, cutting against Usage and Nature of the Act.

If her objection is primarily to the *use* of water for irrigation during a drought, she can argue for a liability rule (*Boomer*) and pay neighbors instead of irrigating.

Teresa can argue she lacks a right to water. California uses the prior appropriation riparian scheme. When Teresa stopped irrigating, she ceased productive use of water, voiding her rights (unless the water was consistently used for other productive purposes). Given the "deep drought", Teresa can argue she *cannot* get a right to use water for irrigation. (Neighbors will argue she can purchase that right).

Ordinances/Agreements

Teresa could contest an aesthetic zoning ordinance for vagueness. (*Anderson*). This likely fails, as she lacks the notice dispute present in *Anderson*.

Teresa could contest an HOA agreement via procedural arguments. (*See* class discussion on *Shelley*.

Result

The neighbors will succeed on their nuisance claim, likely achieving a property rule and injunction. Alternatively, they would also succeed via HOA/aesthetic zoning. Teresa would be required to purchase rights to water for irrigation.

Answer-to-Question-_2_

Paul holds a future interest in the property, so he can compel Teresa to stop using the doctrine of waste.

Future Interest

Community Property

California is a CP state. CP has no right of survivorship, so Teresa does not automatically get the house in FS, unlike TE. The will, discussed below, only transfers Sam's 50% interest from the CP. Given they were married before moving, this answer assumes Teresa did not own the house as SP, which would give her full control.

The Will

Sam created three interests in his will, assuming the will was written, signed by Sam, and witnessed by two disinterested witnesses. It created a LE in Teresa. It created a CRM in Paul and David, provided they *both* graduate from college. If they *both* graduate before Teresa's death, the CRM becomes a VRM. It created a RV in Sam's heirs. The CRM is subject to the RAP but does not violate it because the interest vests or voids at

Teresa's death, a life in being at the creation of the interest.

Paul might hold a future interest in the property via CRM. Paul's CRM does not become a VRM until David also graduates from college. Now, he lacks the VRM necessary to bring a waste suit, but that could change later.

Paul still has a future interest through the RV in Sam's heirs. If the CRM does not vest before Teresa dies, the house passes to Sam's heirs. Assuming California applies similar intestate succession as Massachusetts, that interest would pass to Paul and David per capita at each generation. If Teresa leaves a will, she will not have interest in the house in FS before she dies, so Sam's 50% cannot be passed by her will. Paul's CRM and RV combine to a full remainder, permitting a waste suit.

Waste

The doctrine of waste limits the extent to which the owner of the present estate can deprive a future holder of value in the property. (*Melms*). While Teresa owns 50% of the property in FS, she does not own *all* the property, so waste still applies.

Voluntary Waste

Life tenants have a duty to not "milk the property" where they reside. (*Melms*) Paul could argue that stopping landscaping and permitting wild animals depletes the natural resources of the land. This argument is weak and likely fails.

Permissive Waste

Life tenants have an affirmative duty to prevent decay of the property. Here, both allowing the lawn to become overgrown and refusing to repair the window frames, causing leaks and damage, are enjoinable via waste. Paul can use this doctrine to compel Teresa to change her ways.

Ameliorative Waste

Teresa may claim that she is improving the lawn by making it natural. This likely doesn't increase property value, but if it does, she failed to obtain Paul's consent, so he can try to obtain damages via Ameliorative Waste. "Change of conditions" is not applicable. (*Melms*). Recently, however, US landowners struggle to recover damages unless property value was decreased.

Answer-to-Question-_3_

5th Amendment

Teresa can challenge both halves of the ordinance as a regulatory takings under the 5th Amendment, which is expanded to states (14th Amendment) and expanded to cities as administrative arms of states (Dillon Rule).

Landscaping Practices

The statute requires adhering to landscaping practices that do not pose undue risks to surrounding properties. This does not constitute a "complete economic wipeout", (*Lucas*), nor does it deprive Teresa of a "discrete property interest".

The government can argue the action forbids a "noxious use" of the property. (*Euclid*). In *Euclid*, the court found commercial activity in residential areas "noxious", so upheld regulation. Similarly, Government can argue that not posing "undue risks" to neighbors prevents noxious use, so the regulation is constitutional. If still good law, Teresa likely loses this challenge.

If the above inquiry is invalid, or a court disagrees with the Government, it will apply the *Penn Central* balancing test. The factors are: (1) magnitude of net economic impact, (2) interference with "discrete investment-backed expectations", and (3) the

strength of the governmental reason. Here, the net economic impact is low, and Teresa has not backed her lack of irrigation with investments. (*Kaiser*). The government has a strong public health and safety purpose, so a court will find constitutionality. (*Penn Central*)

Trespass Authorization

The statute authorizes an official to enter private land once per year to ensure compliance. This does not constitute a "complete economic wipeout", (*Lucas*), but it does deprive Teresa of the right to exclude, a "discrete property interest".

Courts then ask whether the deprivation is sharper than common law trespass. The government may attempt to apply *Shack*, where a NJ court found a requirement to let government workers onto property was *not* trespass. Teresa can rebut, pointing out the special nature of migrant farmworkers, and the lack of an equivalent public interest worthy of abrogating her private right. *Shack* is also old and only holds persuasive value in California. She can also point to *Cedar Point* (2021), which found that restricting the right to exclude others is a per se regulatory taking. Given *Cedar Point*, this statute limits more sharply than common law trespass.

Courts then ask if the invasion is "isolated" or based on a "granted right of access"? While only once a year, this is a granted right, not solvable via tort.

Courts then ask if Teresa agreed to the invasion in order to obtain a governmental benefit. She did not, as she does not want any part of the statute enforced against her. Others would argue the statute is beneficial, but Teresa would not. Therefore, the statue is unconstitutional.

Other Constitutional Challenges

Teresa can challenge the statute as a violation of freedom of expression under the 1st Am., enforceable via 14th and Dillon Rule. (*Stoyanoff*). This argument likely fails given the purpose of the action.

Teresa can challenge under the EPC (14th Amendment). This ordinance does not classify in a way that require strict or intermediate scrutiny, and the action will pass rational basis review.

Answer-to-Question-_4_

Dear Karl and Joan ("Defendants"),

Mendel intends to sue you for copyright infringement. To succeed on his claim, Mendel must prove (1) he owns the copyright, which he does, (2) Defendants violated of one of his exclusive rights, and (3) Defendants are unable to assert a valid defense. (*Rentmeester*, *Warhol*)

Defendants violated an exclusive right

Mendel will sue for invalid copying 106(1), preparation of derivative works 106(2), and public display 106(3).

Copying

Mendel must prove (1) Defendants actually copied his work, and (2) substantial similarity exists between Defendant's work and the *protectible elements* of Mendel's work. (*Manning*).

Actual copying can be proven through direct evidence or by proof of access and probative similarities. (*Manning*). If Defendants respond to the lawsuit, they can be

deposed to show direct evidence of copying -- the picture posted on the wall. Regardless, Mendel can use the public access to the photo and clear probative similarities to constructively prove actual copying.

Mendel must prove "substantial similarity" to the *protectible* elements of his photograph. Photographs have three relevant dimensions: Rendition, Timing, Composition. Mendel has protection in his rendition. Mendel has a thin copyright for timing. Finally, Mendel has minimal copyright for composition, as Mandela and his surroundings are facts. (*Manning*). His copyright extends only to exact use of the image in the photo.

Given that the photograph has both protectable (composition, timing, rendition) and unprotectable (Mandela's likeness) elements, the court will apply the more discerning observer test. The court will "squint" at the work and look for differences. The court will note that that tattoo changes Mandela's proportions, the angle, background, pattern on his shirt, wrinkles, and removes the context to change the feel and meaning from the original image. The court will find that these images are not substantially similar. Mendel might attempt to use *Koons I* to prove infringement, but notably, this is an outlier, potentially because the court found Koons distasteful. (Fisher) Mendel will fail to prove actual copying.

Derivative Works

The U.S. Copyright act defines derivative works as "any form in which a work may be recast, transformed, or adapted." As the tattoo is a transformation/adaptation of the photograph, Mendel can make a prima facie case.

Public Display

Public display, requires display of "the copyrighted work" publicly. The tattoo is not substantially similar to the photograph, (supra Copying), so display of the tattoo is not infringement.

Defendants' Defenses

Defendants can defend against the derivative works claim using fair use. (*Warhol*). Fair use considers four factors: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used; and (4) the effect of the use on the potential market. 17 U.S.C. 107.

Purpose and Character: Defendants will argue the tattoo serves a different purpose: Documentary photography (Mendell); protesting foreign policies (Joan). Unlike *Warhol*, where the art and photography had the same use, the tattoo does not currently occupy the same use case as Mendel's photo.

Nature of the Work: The work is creative (for Mendel) but published (for Defendants).

Amount: Defendants did not use the entire photograph (quantitative), but did adapt the central figure (qualitative).

Effect on the Market: Loss of fee Defendants would have paid and impact on Mendel' other works are not a cognizable "harms". Mendel's claims do not amount to a significant financial effect.

Defendants' argument for fair use will succeed.

Recommendation

If Defendants ignore the case, a court will find you liable for copyright infringement under derivative works. However, if you respond and raise a fair use defense, you will win. You should respond to the suit.

Best,

Student

Answer-to-Question-_5_

The Landlord/Tenant Shift

In the 1960s, landlord/tenant law was overhauled. A system that had once systematically favored landlords over tenants was turned on its head. “I didn’t like what I saw, and I did what I could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation’s capital.” Judge Skelly Wright. The issue that Judge Wright identified was not merely a class distinction, it was racial: “most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white.” By adjusting this system, Judge Wright and others sought to remedy this disparity, as best they could.

One could view the assignment of property interests in the new landlord/tenant system as a move from the labor theory to the welfare theory. Under the old system, landlords provided premises, and tenants had a responsibility to maintain them. A tenant put his own labor into his home and was rewarded by enjoyment of it. This system resembles the natural intuition of property proposed by Locke. Under Locke’s basic theory, a tenant ought to repair his home, as only he will benefit from the results. This also echoes with the equity theory: a subset of labor theory reflecting the moral intuition that rights should be proportional to your contribution. A tenant has the majority of rights to his home, so therefore he should bear the majority of contribution to it.

The new system, contrarily, aligns significantly more with the welfare theory. During the 1960s, society had evolved enough that the costs of changing and enforcing these new rights were outweighed by the benefits of having them. (Demsetz, Toward a Theory of Property Rights) These changes seek to minimize transaction costs, thereby facilitating optimal private transactions and achieving pareto efficient outcomes. (Coase Theorem). This can be seen by placing all the rights in the hands of the tenant. In a vacuum landlord/tenant transaction, the landlord has greater bargaining power due to the scarcity of their resource. (Housing Crisis). If all the rights were also concentrated in the landlord, as they used to be, then unequal bargaining power raises transaction costs, requiring government intervention to reach optimal outcomes. By placing these rights in the tenant instead, the system facilitates private transactions.

Additionally, Judges created clear, alienable, and absolute rights in property. These factors enable efficient planning between the parties, as they know who has what at the outset, and can make deals to allocate them. Without these factors, private transactions would be inefficient or entirely worthless.

The Implied Warranty of Habitability

The Implied Warranty of Habitability (IWH), (*Javins*, *Hilder*), is the notable exception to this scheme. It requires that a dwelling must be safe, clean, and fit for human habitation. Violations of the IWH can result in restitution damages for tenant's repair costs, expectation damages for the value of the residence promised minus the actual value, tort damages for pain and suffering, and punitive damages when landlord's conduct is egregious. This right allows tenants to withhold rent when a property is unfit,

and an assertion of this right halts a summery eviction proceeding. The IWH is powerful and important, and invoked far too rarely.

The IWH is inalienable and cannot be waived even through contract. If judges wanted to create a true welfare theory system, they would have ensured that this important right is waivable: after all, many tenants still attempt to waive it by contract today. Arguments for permissive waiver of the IWH misunderstand the purpose of its inalienabilty. The IWH (1) encourages anti-spoilage use of real property and (2) uses its inalienability to balance inherent disparate bargaining power and overcome transaction costs ignored by the welfare theory. That is why judges made the IWH inalienable, and that is why it should stay that way.

(1) <u>The IWH encourages anti-spoilage use of real property</u>.

A major theme across most theories of property is a version of the anti-spoilage principle. Whether rooted in morality and logic (Locke) or economic efficiency (Demsetz, Coase), most can agree that property should not go to waste.

Given that, there is a public dislike for "milking a property", (*See Also Melms*, Waste), and the inalienability of IWH seeks to remedy that. A landlord who wants to make the most profit out of his building sees a point at which the costs of maintenance are too high relative to returns, so he can make more by letting his building decay faster and not paying upkeep costs. One side effect of this is that affordable housing is more likely to be left in disrepair, and to be useable for significantly less time. (Kennedy model)

Initial proponents for the IWH argued first that it would force tenants to improve

housing for poor tenants, but after rounds of debate, settled on a position that it would prevent "milking" the property during its last few years of disrepair. While empirical evidence is inconclusive on this, most of the failures can be explained by evidence outside of IWH's control. Foremost among them being lack of legal representation. As mentioned above, many people do not know that IWH is inalienable, and landlords, as repeat players, take advantage of that. When a tenant is faced with a contract that purports to waive IWH, they do not pause to consult Westlaw and see if that is valid. They sign the contract and assume their rights are gone.

The IWH solves this problem, the mechanisms around it undermine its effect.

(2) The IWH remedies inherent disparate bargaining power.

The Farmer-Rancher Problem proposes a farmer living adjacent to a rancher. Society may give the farmer the right to grow his corn without the cattle eating or stepping on it, or it may give the rancher the right to let his cattle stray. If the farmer is given the right, he breaks even, as he can recover from the rancher for lost corn. If the rancher is given the right; however, the farmer's corn will be destroyed, preventing him from making enough to pay the rancher to stop. (Demsetz, Footnote 2)

Coase and the welfare theory propose that initial assignment of property rights does not matter, as in situations of low transaction costs, economic influences will cause rights to flow to those who value them most. The Farmer-Rancher problem undermines that philosophy. It imagines a system where initial assignment of property rights make subsequent reallocation impossible, systematically favoring one group over another. While its relation to landlord/tenant law may not be initially obvious, one need only look

to history to see its impact. America developed alongside a system of slavery, where white landowners were given property rights to African slaves. Years down the line, we have a system that systematically favors whites. While many efforts have been undertaken to address this disparity, it is still present in our world today.

Judge Skelley Wright remarked how a motivating factor for the overhaul of landlord/tenant rights was the racial lines upon which those relations existed. A pure welfare system would not have the balancing effect that Judge Wright (and others) wanted. A major flaw of that theory, and the Coase theorem in general, is its assumption that transaction costs *can* be minimized. The theory fails to understand the psychological and sociological context upon which transactions occur. (Supra Farmer-Rancher Problem; See Also Offer-Asking Problem; "loss aversion" (Hume))

The judges who built this system knew that difficulty, so in order to achieve their desired results, they pulled on the distributive justice theory. The distributive justice theory focuses on themes of fairness and corrective justice. It accounts for a history of unfairness, recognizing that members of a system do not start at the same place, and balancing accordingly. (*See* Affirmative Action). This contextual, structural, analysis goes deeper than the welfare theory. Where the welfare theory understands a vacuum tenant to have less power than a vacuum landlord, the distributive justice theory takes into account Judge Wrights observation of tenants being poor and black and landlords being rich and white. Judges knew landlords could enforce adhesion contracts, simply taking the rights they wanted instead of privately transacting over them. For most people, IWH likely won't come up in their tenancy, but for those it does matter to, Judges wanted to ensure that they are not forced to contract it away.

By making IWH inalienable, it takes the potential to give it up off of the

bargaining table.

The Solution

The IWH should not be waived, yet it is clearly not doing everything it ought to. Tenants who lack knowledge of their rights don't know not to waive IWH away, that they can withhold rent, or that they can assert it in court. Judges have created an ingenious system, drawing on many theories of property, designed to help tenants. Instead of allowing IWH to be waived, a better change is educating tenants so they can put the IWH's inalienability, and the rest of the system, to use.