Property

Professor Grimmelmann

Final Exam - Spring 2009

This exam wasn't hard in absolute terms, but it was much harder than it looks. As in the sample problems, I tried to give you fact patterns that told simple, memorable stories. Almost every fact was relevant to multiple issues, and not all of the issues were immediately apparent.

I graded each problem using a checklist, giving credit for each item (e.g., "Wallace may have a claim against Andre for breach of fiduciary duty.") you dealt with appropriately. I gave out frequent bonus points for creative thinking, particularly nuanced legal analyses, and good use of facts.

On the whole, I was happy with your exams. Even where they wandered far from correct statements of the law, they were recognizably applying concepts we covered in the course. I feel confident that all of you have learned something about property law and its distinctive ways of thinking over the course of the semester. Some exams were better than others, but every single one got a bonus point somewhere. I understand that there are cases in which your exams didn't fully reflect your understanding of property law or your accomplishments in the course. I'm proud of all of you, no matter what grade you got.

If you'd like to discuss your exam, the course, or anything else, please email me and we'll set up an appointment. If you have exam questions, please read through this memo before getting in touch. It's been a pleasure and a privilege to teach you and learn from you. May you enjoy the best of luck in your future endeavors!

James

	Burial	Masterpiece	Animal	Total
Median	23.5	20.0	22.0	65.5
Average	23.2	20.6	21.8	65.6
Std. Dev.	4.6	3.9	5.0	10.6

(1) **Burial at Sea**

This question primarily tested material from the first month of the course. I designed it to cover familiar subject matter that you'd seen extensively. There were a lot of issues lurking in its seemingly simple facts, enough that stringing them together into an essay was an organizational challenge. (Most of you wrote at greater length on this problem than on the other two, a strategy that wasn't always advisable.) The better answers both spotted more issues and were more precise about them.

I apologize for two mistakes I made in the statement of the problem. The third line of the first paragraph refers to the "Revenge"; that should have been the "Buttercup." The first line of the last paragraph refers to "Robin"; that should have been "Billie." Both of these mistakes crept in when I changed the names partway through writing the problem. Most of you didn't (in your answers, at least) even notice the mistakes. Some of you assumed I meant what I had intended. Some of you made very clever textual analyses of the will based on the ambiguity about the "Revenge." I rewarded the observant and the clever with bonus points.

The Will

Under the terms of Cary's will, Wallace was the residuary beneficiary. Andre as the executor was under a trustee-like duty to distribute Cary's estate to Wallace in accordance with its terms. Wallace never received the (presumably valuable) Buttercup and lamps, however, because Andre set them afire in Lake Guilder. Wallace might therefore argue that Andre is liable to him in damages for breaching his fiduciary duty to preserve the assets of the estate for distribution. (Cf. Rothko.)

Andre's response, however, is that he was merely following out his obligation to carry out Cary's wishes. The principle of testator's intent normally governs disputes over the executor's actions, and here, Cary's will was unequivocal that he wanted the Buttercup burned.

Perhaps someone could have raised an Eyerman issue that Cary's wishes constituted waste and should not have been followed. (This is not a Brokaw issue; Wallace's interest in the estate cannot override the terms of the will that created that interest.) You could attempt to distinguish Eyerman on the basis that houseboats don't have fixed neighbors who'll be harmed by destruction, or to follow it on the basis that setting the Buttercup afire would pollute Lake Guilder. No one did object at the time, though, and the statute of limitations is likely to be less than the twenty-four years it's been since then.

The Buttercup's ruins have now been rediscovered, which raises the question of what the will says should be done with them. The problem here is that the will genuinely seems not to have contemplated the possibility that the Buttercup would survive. This raises a problem of trying to discern the testator's intent in this unanticipated situation. It's not quite *cy pres* (since this isn't a charitable gift), but the general idea is the same.

The first possibility is that the Buttercup *still* belongs to Cary's estate, and that Andre should set fire to it again and complete the destruction. Perhaps that's what Cary wanted, but his will

specified only the one setting-afire. The court should probably interpret Cary's will not to require a second attempt at destruction, and thus avoid the Eyerman issue.

The second possibility is that the will meant to give the remains of the Buttercup to Wallace. If so, then Andre could claim the Buttercup in his role as executor, and would then be obligated to turn them over to Wallace. The will is ambiguous on this score, especially insofar as the gift to Wallace really doesn't say with specificity what he was intended to receive. But planning to give someone the burnt fragments of a boat seems pointless and strange enough that this possibility seems unlikely.

More convincing is the third possibility: that the will worked an abandonment. Cary must have known that there would be pieces of driftwood and ash left over, and intended to abandon them to the watery deep. From there to the Buttercup itself isn't too big a leap.

The obstacle here might be MacKenzie; is it the law of Guilder that real property cannot be abandoned? If so, is the Buttercup real property? It's not land, and in its normal state it wasn't permanently attached to land. On the other hand, Cary and Fred have each lived in it, making it more like a house.

The bottom line on the will is that the Buttercup is either abandoned or, per the will, belongs to Wallace. Many of you worked yourselves into a tizzy debating whether it was lost or mislaid, and repeating the analysis as to each new claimant. *It doesn't matter*. The lost/mislaid distinction only comes into play when the true owner can't be found. Since Wallace is present and in court, he beats both finder and landowner, regardless of classification.

The lamps *might* be affected differently than the Buttercup. MacKenzie wouldn't apply to them, and the will might not have intended that they be placed on the Buttercup at all. The former argument makes them more likely to be abandoned; the latter makes them more likely to belong to Wallace.

Adverse Possession

The cleanest way of proceeding is to ask who now owns the old shoreline plot. Mandy owned it, but Fred may have adverse possessed it. His possession was actual; he's lived on the land for fifteen years. It may or may not have been exclusive. The one fact on point you have is that he saw Billie checking out the wreck (on what he might now regard as an extension of his land, on which more in a moment). You can spin that either as him taking pains to exclude others or as him failing to exclude Billie. Fred's lean-to makes his possession open and notorious, since anyone could presumably see it. His possession was continuous for fifteen years—until he left the lean-to to live on the Buttercup. (Whether this interruption matters depends on when the statute runs out, and whether the lakebed is considered part of the shoreline plot.) We have no facts on whether Mandy gave him permission—though there's no reason to think she did—so his possession is hostile. We don't know what the statutory period is, or whether Guilder requires good faith on the adverse possessor's part. The fact that the land was undeveloped may cut in favor of good faith, but then again, Fred should perhaps have guessed that someone owned the plot.

On these facts, he might or might not have successfully adverse possessed the plot. (If his possession wasn't exclusive but he met the other criteria., he might still qualify for a prescriptive easement.) The easiest way to carry forward the analysis from here is to analyze Mandy's rights as a landowner, but note that Fred could make all of "her" claims if he succeeded in taking ownership of the plot.

Fred, by the way, is a trespasser on Mandy's land, so if he loses his adverse possession claim, she can sue him for trespass.

The Lakebed

Before the dam, Mandy (or Fred) owned the nearest patch of land on the lakeside. The lake itself would have been owned by the state of Guilder. (Technically, it would have been state-owned for the public trust and subject to a navigational servitude, but we didn't cover these doctrines.) Thus, the area of the lakebed where the Buttercup came to rest was in Guilder-owned land.

If the lake's drainage constituted avulsion, these borders remain unchanged. Mandy's patch of land is now no longer on the new waterfront. If the drainage constituted accretion (or, more precisely, reliction), then Mandy's land now reaches to the new waterfront, includes a substantial section of former lakebed, and includes the Buttercup's resting site. Which is it? Thirty feet in six weeks is a hard intermediate case, and I accepted answers both ways, provided you made a factual argument.

Perhaps ownership of the lakebed now confers ownership of the Buttercup. The strongest arguments here are to the *ad coelum* doctrine and to Goddard, the aerolite case. One way of distinguishing Goddard would be to say that houseboats aren't naturally occurring. You might also ask how firmly and far the Buttercup is embedded in the muck—apparently not so far that Fred couldn't make it habitable again. Some of you went crazy with accession doctrines here: the principle of accession, fixtures, increase. They all get at the same basic ideas; making all of these arguments gets redundant very quickly.

Ownership of the Buttercup (whether by the lakebed owner or by Wallace) might also confer ownership of the antique lamps as fixtures. The problem is that they probably aren't fixtures, since they're *tabletop* lamps. That Billie was able to take them with her also suggests that they weren't permanently attached. (A clever counter-argument was that on a boat, lamps need to be attached to keep them from falling over in heavy weather.)

Possessors

Enter Billie. She may be trespassing on someone's lakebed. Perhaps she could make a McConico-style argument that she has a right to wander and collect samples, but I'm not sure that there's any general custom in favor of marine biologists. Note that when she crosses into the Buttercup, she may be crossing from one person's property into another's, so these may be distinct trespasses. (Here, the status of the Buttercup as personal or real property pops up again!)

Billie takes possession of the lamps. If they were unowned, that makes her a first possessor, and thus an owner. If they were owned (by Wallace or by the lakebed owner), she has only the rights of a finder. As against the true owner, she's liable for conversion and will be required to return the lamps. She's probably not guilty of larceny, since she may quite honestly believe that the lamps are unowned.

She doesn't take possession of the Buttercup, which she leaves behind once she's taken the lamps. (It's either that or she abandons it, since she leaves behind no trace of any claim on it.) Fred can claim the Buttercup (though not the lamps, which are gone by the time he arrives) as a finder. He really does take possession of it.

Fred might also claim that he's a good-faith improver of the Buttercup (if real property) or acquired it through accession (if personal). (He probably doesn't have a good-faith improvement claim against Mandy for the lean-to, since it's not much of an "improvement.") He's put a lot of effort into it and increased its value, though he hasn't physically transformed it much. His efforts might justify either awarding him restitution, or awarding him ownership of the Buttercup and requiring him to pay the previous owner restitution. (The former sounds more likely, since he's an impoverished beachcomber.)

(2) **When I Paint My Masterpiece**

This was the most straightforward question. The main legal issues all arise from the same nexus of operative facts (everyone hates the mural), but turn out to be mostly separable. If you ran through the problem and grouped your discussion by party, you stood a good chance of picking up on many of the issues. The better answers here tended to be not the ones that were longer, but the ones that thought through the implications of various parties' potential moves more clearly.

State of the Title

This was not meant to be tricky. Alice and Gertrude owns a life estate in the house; Henri owns a remainder in fee simple. Alice and Gertrude are tenants in common.

(There's one slight ambiguity here: which falls into the "we did not cover this in class" category: whose life measures the life estate? One interpretation of Pablo's deed is that on the death of the first sister, both "life estates" terminate and Henri's interest matures into a fee simple. Another is that on the death of the first sister, that sister's life estate terminates and Henri becomes a tenant in common with the other for the rest of her life. A third is that Henri's interest doesn't become possessory at all until both sisters have passed away. None of these three possibilities quite squares with the rules as I taught you them. Fortunately, nothing else in the problem turns on the differences.)

Alice

The richest set of issues—so rich that no one in the class noticed them all—have to do with the claims that Alice could potentially bring as a tenant in common. Since tenants in common both have a right to possession, Alice has no legal right to evict Gertrude or to sue Gertrude for trespass. Similarly, since either tenant in common can allow others to enter, Alice can't sue Salvador for trespass. He had a legitimate license from Gertrude to act as he did.

On the other hand, Alice might try to argue that Getrude has excluded *her*. After all, Alice did move out in horror. I gave credit for some creative arguments that the ugliness itself is a kind of harassment tantamount to eviction. This argument is probably a loser; Gertrude has not physically obstructed Alice's use of the house. Indeed, Alice's most effective threat, should she realize it, is simply to come back to the house and paint over the mural! As a tenant in common, she'd be within her rights to do so.

Alice's departure is probably also not an abandonment of her interest. The problem says it was "temporary"; you'd need a more unequivocal expression of her intent not to return.

Could Alice successfully sue Gertrude for waste? It's unlikely. Courts strongly disfavor suits for waste between tenants in common.

Where Alice does have some legal muscle available is in a potential suit for a partition. Alice has an absolute right to demand one. Should she do so, the court will need to decide whether to grant partition in kind or partition by sale. Partition in kind struck me as nearly impossible, given

that the property is a house. Some of you made decent arguments that it could be partitioned vertically (into a duplex) or front-back, or by floor. Perhaps, though that probably requires assuming facts about the house. I still think that partition in kind would effectively require the sisters to share access to many parts of the house, making it ineffective as a remedy and too similar to the status quo.

Partition by sale has its own problems, though. Alice and Gertrude don't own the house as tenants in common; they own a *life estate* as tenants in common. Thus, the property available for sale is their shared life estate, which is not likely to fetch much at a sale. The only natural buyer would be Henri, who could merge the life estate with his remainder and walk off with a genuinely valuable fee simple. This fact suggests that Alice and Henri, by working together, have a plausible shot at using a partition to oust Gertude. From Gertrude's perspective, she needs desperately to avoid a partition by sale—but if partition in kind is impracticable, partition by sale it may well have to be.

In the event of a partition, the court will also need to order an accounting. Obviously, the amount of any owelty or other payment can't be determined in the abstract without knowing how the house would be divided. One can, however, ask if there are any costs or revenues that should be included. Gertrude's living in the house does not make her liable in an accounting. since that's just considered normal occupancy by a co-tenant. Since she neither paid Salvador to paint the house, nor was paid by him, his entry doesn't affect the balance of payments, either. Should Salvador be awarded the mural or restitution (both extremely unlikely), that damage to the house or the money owing to him would need to be factored in.

Henri

Since Henri holds only a future interest—a remainder—he has no present possessory rights. He cannot enter the house or exclude anyone from it. His sole available legal angle is a suit against Alice for waste, as in Brokaw. It does seem that the mural would sharply depress the market value of the house (and possibly its neighbors, as well), but the damage is not permanent. The mural can always be painted over. (A counter to this idea was to point out that the house before was unpainted brick, such that it may now be quite difficult to restore it to its natural state.) He might well be able to win an injunction against the mural if his suit for waste succeeds.

Claude

Claude, the neighbor, certainly can't complain of a trespass. Can he sue for nuisance? The salient fact here is that this is a purely aesthetic nuisance, much like rotting cars up on blocks in the yard. There is no invasion of anything physical onto Claude's land; there's no actual damage to his property; there's no direct interference (ala strong vibrations) with his ability to do anything there. Courts have split over whether to recognize nuisance suits for purely aesthetic harms. This one seems rather extreme ("unneighborly," as some of you pointed out), though, and definitely out of keeping with the neighborhood.

The nuisance *per se* tests were interestingly manipulable here. Some of you argued that the mural is always a problem since it's always there; some of you argued that it's not a problem at night. On the violation-of-law side, though, the zoning ordinance might give Claude some ammunition.

If Claude wins the nuisance case, I'm pretty confident he'll get an injunction. This is not a cement plant the court is reluctant to close down; this is not a case in which the huge number of plaintiffs makes bargaining impossible. Once the court is convinced the mural is a nuisance, that's pretty much it for Gertrude.

Turnersville

The town of Turnersville and the homeowner's association for Whistler's Brook are two different entities. The town is a government that can make and enforce laws. The HOA is a private institution that depends on deed covenants for its rulemaking power. It was best not to conflate the two.

Turnersville has a zoning ordinance describing the permissible colors of paint. Assuming that the mural is not in fact painted solely in Ocean Spray, Springtime Meadow, and Warm Tapioca, the mural is fairly obviously in violation. (Some of you cleverly suggested that Gertrude could repaint it in those three colors; perhaps Salvador would be horrified, but it would certainly end-run one of the problems she faces.) Zoning is generally constitutional, so Turnersville is within its rights to make and enforce the ordinance. They can probably issue orders with enough teeth in them to make her give up the mural.

Is there an Anderson vagueness problem? Probably not, since the three colors of paint are presumably specific shades you could find down at the hardware store. The names are capitalized, indicating that they're proper nouns, rather than referring to the actual (and possibly ambiguous) colors of the ocean, meadows, and tapioca.

Gertude will lose any potential nonconforming use argument, since the ordinance appears to predate the mural. (I wasn't quite definite about this, and some of you rightly pointed out that the possibility is open that the mural came first.) She could try to apply for a variance, but that's a futile road to travel, since the local board of zoning appeals is extremely unlikely to grant her one, given the universal hatred of the mural.

Whistler's Brook Homeowner's Association

I didn't expect you to decide between the Nahrstedt rule and the Pullman business judgment rule, only to cite one or the other. The key point is that the HOA will receive some deference from the court. On Nahrstedt-style reasoning, the rule against the mural is new, so it probably gets less deference than one written into the deeds of the association. If it's enforceable, the rule is probably going to suffice to force Gertrude to give up the mural.

One attack on the rule is that it's too vague: "harmful to the good vibes of our peaceful neighborhood" is not exactly a standard that inspires confidence in one's ability to predict how it will apply. On the other hand, there is no real vagueness problem in this specific case; the HOA is

quite explicit that Gertrude's mural is unacceptable. Another, perhaps more promising, line of attack is that the specific application here is precisely the problem: Gertrude is being singled out for unequal treatment without justification. I didn't expect you to reach a conclusion on these issues, merely to capture some of the back-and-forth.

One further avenue to explore with both the town and HOA is to ask whether public policy counsels a court to refuse to enforce the anti-mural rules. We got into some of these discussions in class with Nahrstedt; there are, for example, free expression values at stake in the mural. I doubt that these are strong enough for Gertrude to win—the mural does genuinely sound hideous, which provides a reason to dislike it even without disagreeing with the message it sends—but they're worth at least noting.

Salvador

Salvador can argue that he is entitled to the wall on the accession principle, as a good-faith improver. He will lose. He is *not* a good-faith improver, since he knew all along that the house didn't belong to him. End of story. You might also point out that removing the wall to award him the mural would be hugely destructive to the house. Treating the mural as a gift also works, although the analysis is messy and doesn't quite seem to get at what's really at stake.

Bottom Line

Gertrude can't keep the mural. This result is overdetermined, given the other parties with strong arguments against it, most especially the town. If she presses on, she risks losing the house as well, to a partition request by Alice. Thus, as counsel to Gertrude, your best advice to her is probably to patch things up with her sister by offering to get rid of the mural.

(3) **Animal House**

This was a pure landlord-tenant problem. It required you to think about the interaction between different clusters of facts; the analysis of earlier events affects the analysis of later ones. It also called for a little strategic thinking; you're told what Felix wants, but you need to be careful to recognize that some of his desires are in tension with each other.

Your answers to this problem were plagued by terminological confusion. Some of you wrote about tenants in common; others looked at the requirements for covenants to run with the land. Both these categories are inappropriate. Landlord-tenant law uses the words "tenant" and "covenant," but the words don't mean the same thing they do as in the other areas of law we discussed.

The Lease

I didn't say much about the lease. There are, however, at least two things one would want to know about it. First, what's the term of the lease? The problem specifies the monthly rent, but nothing more. (Some of you got at this by asking whether it's a periodic tenancy, term of years, etc.) The term matters because many of Felix's rights and obligations going forward stem from being in an ongoing lease. But if the lease is month-to-month, either Felix or Leo could end it just by giving proper notice. That's strategically important as an option for Felix, as a threat Leo could make, and in figuring out just what the state of the lease is now. (Should Leo choose not to renew the lease, there might be a retaliatory eviction argument available to Felix.)

The second thing to ask is what the lease says about Felix's liability for Zvi's share of the rent. There is no way to reason yourself to a fully convincing answer using just the property law concepts we discussed in this course; we simply didn't discuss leases with multiple tenants. This point was really testing your ability to recognize the contractual nature of leases. To get full credit here, you needed to say either, "We need to know X; look at the lease, because it will provide an answer" or "If the lease says X, then . . .; whereas if the lease says Z, then . . . ." The key question is whether Felix and Zvi are individually liable for proportionate shares of the rent, or jointly and severally liable for the whole of the rent. (In any landlord-drafted lease, it's very likely the latter, but you can't say for certain without seeing the lease.)

There wasn't really a privity issue here. If you went into privity of estate and privity of contract, you were wasting your time. Felix has almost certainly signed the lease, giving him the usual obligations and rights of a tenant. He must pay (at least his own share of) the rent, he's entitled to quiet enjoyment, etc. There's no need to ask about privity of estate, as he's on the original lease, renting directly from Leo. There's also no need to ask about anyone else being in privity. Should Felix make (or be required to make) payments on Zvi's behalf, Zvi will be liable to Felix—but the basis of Zvi's liability is contribution (among joint tortfeasors) or restitution (for payments made on one's behalf), not anything rooted in privity.

The Alligator

The lease doesn't prohibit pets, so the alligator is not, in and of itself, a breach of the lease. Leases are contracts, so Leo can't simply add terms without Felix's consent. It really is that simple. (Covenants running with the land and homeowner-association rules are concepts from other parts of the course that don't apply here.) You might reasonably ask whether the alligator is violating local animal-control laws (which would probably be incorporated in the tenant's promise to use the premises legally, or whether the fact that it chewed through the wiring is itself the breach of the lease that Leo is looking for. Those aren't the grounds that Leo made his stand on, though.

When the alligator chewed through the wiring (I intended the punctuation in the relevant sentence to indicate that the broken refrigerator and the flickering lights were consequences of the chewing), that was damage to the apartment for which the tenants will be liable. Definitely Zvi—it was his alligator—and possibly Felix also, since he likely promised in the lease to keep the apartment in good condition. A deduction from the security deposit is likely. (Perhaps Zvi left his half behind?)

One could argue that the damage is a breach of the implied warranty of habitability. Yes, the housing code probably requires a working refrigerator. But here the relevant violation is directly the fault of the tenants. Even if Leo can be required to make the repairs, he can just turn around and bill Felix and Zvi for the cost.

Zvi Moves Out

Leo's threat to kill the alligator is wrongful. Not only is it not based on a violation of the lease, violent self-help would be wrongful even if the tenant is had been in breach. Killing a pet is unambiguously a breach of the peace, almost certainly tortious, and quite possibly criminal. I hoped you'd note that the threat is not just unjustified but an independent wrong.

This leads into the question of whether Zvi was justified in moving out. You could treat Leo's threats as being an eviction, such that when Zvi left, he essentially accepted Leo's offer to terminate the lease. This theory has difficulty with the fact that Leo only demanded that the alligator be out, not Zvi. Here's where the wrongfulness of Leo's threats comes in; Zvi may well reasonably have felt that his alligator's safety (and his own) were at risk and been compelled to vacate. If so, then Zvi's liability is at an end and the lease is over with respect to him. This theory, however, is undercut by Zvi's note, which suggests that starting the reptile farm was his reason for leaving, rather than Leo's actions. If Zvi wasn't evicted, than he gave up possession but (at least initially) remained liable for his share of the rent.

(Contracts review: "Changing the terms of the lease" is not an action that can constitute breach of contract. In the first place, Leo *can't* change the terms of the lease by himself; that's the whole point of the mutual agreement requirement in contract law. Moreover, whatever Leo says about the contract is immaterial; the real question is whether his actions violate a duty placed on him by the contract. Here, Leo's principal duty is to deliver quiet possession, and *that's* where he may have gone wrong by threatening Zvi.)

Robin

Did Leo have the right to reject Robin? The lease does forbid subleases and assignments without Leo's permission. It doesn't matter which it would have been. Nothing in the problem turns on the distinction. It is, however, definitely one of the two. Some of your answers went through some mental gymnastics trying to prove that Robin could somehow legitimately be a tenant in the apartment without Leo's consent and without an assignment or sublease taking place. She can't.

Per Kendall, that clause is likely subject to a commercial reasonableness test (depending on the jurisdiction, your mileage may vary). Refusing Robin purely because she's a vet seems unreasonable, since it's not directly related to her own characteristics or behavior. Since this is a residential lease, Leo may have more leeway, though.

It's also possible to characterize the situation as Leo trying to fill a vacancy in the apartment. (This is one logical consequence of treating Zvi's departure as an eviction, for example.) In such a situation, landlords have almost unlimited discretion to pick and choose among possible tenants. The Fair Housing Act puts some limits on landlords' discretion, but occupational status is not a protected category (race, color, religion, sex, handicap, familial status, and national origin are). Some kinds of racial discrimination in housing are directly unconstitutional, per Shelley, but discrimination against veterinary students isn't racial—and under the reasoning of Shelley, a landlord's choice of tenants isn't itself state action.

Whether Leo's rejection of Robin was justified or not, Felix can make a good argument that her arrival on the scene terminates Zvi's liability (and thus possibly his own). The reasoning is straight-up mitigation of damages. Leo had a duty to mitigate any damages caused by Zvi's breach of the lease. When Robin arrived, Leo had a potential tenant ready and able to cover the lost rent. He can no longer pursue Zvi for the rent, since his continuing inability to collect it is now the result of Leo's refusal of Robin. This is exactly the reasoning of Sommer.

(Contracts review: The duty to mitigate damages is not a free-standing duty to do something. No one can sue you for failing to mitigate damages. You just end up forfeiting your *own* right to collect damages from the breaching party.)

Fawn

If Leo's refusal to rent to Robin doesn't terminate Zvi's liability, Leo's installation of Fawn definitely does. Now Leo has actually mitigated his damages; he has no right to a double recovery (rent payments from Fawn and from Zvi). Alternatively, Leo has accepted Zvi's surrender and relet the apartment (Fawn's rent is not mentioned, but one might surmise that it's $800 or should have been).

From Felix's perspective, there's a good argument that Leo has no right to put Fawn in possession. Unless the lease cleanly separates Zvi's and Felix's interests, Zvi's departure leaves Felix in possession of the apartment. Leo is not in possession; that's the essence of the property interest transfer inherent in a lease. Thus, Leo's installation of Fawn is wrongful. You could call it unauthorized self-help, as in Berg. (Even if Leo has the legal right to retake the apartment and

rent it to Fawn, he has to go through proper eviction procedures, rather than resorting to self-help.) You could call it a trespass. Or you could say that Leo has actually evicted Felix from the second bedroom.

Any which way, Felix probably wins as against Leo. It may be a more difficult struggle to get Fawn out, now that she's a tenant in possession, given how much solicitude courts show for protecting tenants in possession. (Here, Berg comes back to bite Felix.) This isn't to say that Felix can't prevail as against Fawn, just that he can't necessarily get her out quickly.

Strategy

There's a lot to note here. Generally, these points were less important in themselves and more important in helping you understand how to think through the other issues the problem raises.

First, it seems worthwhile noting that some of Leo's demands are in tension with each other. First he drives Zvi out, then tries to collect the rent Zvi would have paid. Then he reverses course again by refusing Robin, which undermines his claim for Zvi's rent. Bringing Fawn in is yet another reverse, since he's now wiling to rent to a tenant other than Robin. Good answers used some of Leo's own actions to refute his potential arguments.

Second, Felix may need to pick and choose among his own claims. Treating Zvi's interest in the lease as severable from his own may help him avoid paying Zvi's share of the rent, but makes it harder for him to control who shares the apartment with him. Good answers recognized that staying in the apartment alone while paying only half rent is probably not a legally sustainable position.

Third, it's probably easier for Felix to veto Fawn than it is to overcome Leo's veto of Robin. Felix and Leo may be in something of a stalemate when it comes to roommates. Leo arguably has the upper hand here, since Felix can't afford the full $1600 a month.

Fourth, yes Felix wants to stay, but he should at least consider the option of moving out. Leo is displaying some real warning signs of serious trouble: violent threats and inconsistent behavior from day-to-day. Felix's relationship with Leo is probably shot and is likely to be antagonistic from here on out. And that's not even mentioning Fawn. Felix may well have legal grounds to vacate (e.g. constructive eviction, end of a month-to-month lease, etc.), and it's worth suggesting that he and Robin could look for a different, comparable apartment.