

What is Property?

Definition: That which is peculiar/proper to any one person; that which belongs to any one person

2 different ways to view property

- **bundle of sticks**
 - property is a bundle of rights, that can be sold off and held onto
- **toilet paper**
 - property is like a roll of TP, it has perforations for where to divide it, but you can rip it up pretty much any damn way you please

Two Competing Legal views of Property

- **Blackstone**
 - Property is autonomous in its own right (The sole and despotic dominion which one man claims and exercises over the external things of the world, to the total exclusion of the right of any other in the universe
 - Essentially, there will be one person who holds property and will win the case
- **Bentham**
 - Property only exists as it is protected by the law (this is the way most scholars see it)
 - Effect is that property only exists after other rights are examined
- In general, scholars view property through Bentham's viewpoint, but the law many times uses Blackstonian view (if X owns the property, X wins)
 - In general, this creates a circle, property is generally presupposed for torts and contracts, but in theory gets its existence through torts and contracts

Composition

- **Ad Selium Rule**
 - Essentially he who owns the land owns down the hell and up to the heavens
 - allows you to sue people who dig under your land or have a tree branch growing over it in trespass
 - *Ad Solum (air)*: The rights to air above your land are actually limited, they go only as high as you can possible use
 - Hinaman v. Pacific Air: D flies above P's property

- essentially decides that we won't require air rights for air travel, as this would make it nearly impossible
 - So higher boundary for land goes only as high as necessary to protect your interest in the surface
 - *Ad Infernos (hell)*: Your land rights extend all the way under your property to the depths of hell. In effect a straight line goes down from your property boundary to the depths of the earth
 - Edward v. Sims (Great Onyx Cave Case) D runs cave, which crosses under P's property. The court allows a surveyor to go and see the truth
 - dissent demonstrates a position that only useable property counts, this is an untenable position
- In general, things that stay put belong to the owner (for example trees, rocks, etc.)
- Wild animals, however, change hands depending on whose property they are on
 - When selling land, you can separate it out, for example sell everything except the one tree
- Also note that there is no un-owned land in America, if it isn't owned by a private individual, it is the government's

Acquisition of Property

Possession

- Possession is the controlling or holding of personal property with or without a claim of ownership
- 2 elements to possession
 - mental: the intent to possess on the part of the possessor
 - physical: his or her actual control over the property (most important)

Theories of Ownership

- **Blackstonian Ownership**
 - ownership that is good against everything else
 - This can't work in our legal system, since very rarely can we find the absolute, Blackstonian owner of property
 - If you are Blackstonian owner, you will win a case against anyone
- **Relativity of Title (Irving Principal):**
 - Instead of looking for the best claim in the entire world, we look for who has the best claim out of the two in the case
 - In order to get it, don't need to be fastest gun in world, just faster than the other guy

- This doesn't protect you if someone higher up on the chain of title comes along
- In general, if we can't find Blackstonian owner, we look at possession
- **Possession:**
 - Absent a Blackstonian owner, in general, the first one to possess will get the property
 - This follows physical fact, rather than the legal concept of ownership
 - In general, title (a piece of paper) is stronger than possession
 - Bradshaw v. Ashley: D had been in control of the property for years, P tried to take control claiming that D had no title
 - In general, P must recover off of the strength of his own title, rather than the weakness of D's
 - In general, therefore, possessor is presumed to be owner in fee unless there is clear evidence to the contrary

Capture and Conquest:

Wild Animal: Ferae Naturae: historically, you can't own wild animals because they are transient, unlike trees and such on your property

- **Effect of Land Ownership on Wild Animals**
 - Even if you own the land the animal is on, you still don't own the animal
 - You do however, have the only right to kill the animal or capture it, which is the only way to possess it
 - If someone else is capturing in on your land, you can sue them for trespass
 - Pierson v. Post
 - Post is hunting Foxes on unowned land, his dogs are about to kill it when Pierson steps in and kills it
 - Post brings action of ejectment to try and get Fox back
 - Based on Irving Principal, whoever possessed Fox first should win, question is what constitutes possession
 - Pierson argues that reasonable probability of capture or kill should constitute possession
 - Court requires actual possession
 - 2 ways to approach this case
 - doctrinalism: (formalism) Look at old cases and use them. There were no cases on point here
 - Instrumentalism: (realism) look at how decision will effect society. Here dissent argues we want to

encourage fox hunting and therefore should protect hunters

- **Rule of Possession:** One can only claim first possession of a wild animal if he kills, mortally wounds or captures it
 - If we were to use a reasonable prospect of killing, it would make the decision much more difficult
 - For domesticated animals, must prove that they are of the type that will return to their owners
- **Captured Wild Animals that Escape**
 - An animal is considered domesticated if it has a tendency to return (animus revertendi)
 - to demonstrate this, they must either habitually return, or when they are off of your property you keep them leashed, thereby keeping possession
 - But if a truly wild animal escapes, it is presumed wild, since it will not return on its own
 - Hughes v. Reese
 - A silver Fox raised on a farm escapes and is killed
 - Killer wins the case, because court assumes it will not return and therefore, it is wild
 - Issue 1: Whether an owner has any claim of an animal that was in captivity but escapes. Answer is no
 - Minority rule is that if it is clear that the animal was imported for farming, we will not consider it wild
 - Issue 2: Liability of a possessor for wild animals
 - if on a leash, clearly liable, they are in your possession
 - If it has been brought into an area where it is not native, you are strictly liable
 - If it is native, and it escapes, you are only liable for negligence

Wild Minerals: trillion dollar industry is based off of how we treat foxes

- Early Twentieth century realized the value of oil, decided best way to view it was similar to wild animals, since it moves
- Today, common law somewhat irrelevant, since most jurisdictions will have statutes explaining what to do
- **Minerals moving from the capture rule to reality**
 - Hammonds v. Central Kentucky Gas Co.

- Gas company “captured” natural gas and needed a place to store it, the best and safest place to store it is in empty underground chambers
- gas company put it into an empty chamber, under P’s land, P sued for trespass
- *Rule:* In general, gas is treated like a wild animal, therefore, when you have it captured it is yours, but if you put it back into the ground, you have lost exclusive control over it and therefore, no longer have possession
 - Therefore, there could be no trespass, although Hammond could drill and take the gas out of the reservoir
- *Criticism:*
 - application: in general, the gas companies are not releasing it into the wild, but into a large cage, therefore, it shouldn’t be treated as outside of their possession
 - Principle: ridiculous to treat something so valuable like a wild animal
- Lonestar v. Murchinson
 - Reservoir under L’s land is empty and they pump gas into it. M is able to tap into this on his own land, and takes out the gas. L sues arguing that he is stealing their property
 - Under Hammonds, L would have no right, since it has been released into the wild
 - Difference here is how important it is in Texas that oil companies can do this
 - *Rule:* putting gas back in the ground is like putting it into a giant cage, and therefore, the gas has not been rereleased
- Texas American Energy v. Citizens Fidelity
 - Similar facts to above, the main question being whether oil should be considered a commodity
 - Essentially, Kentucky overrules that Hammond decision, argues that oil is penned up and therefore, can’t be taken by others

Finding Property

- Actions to goods
 - Replevin: Get the item back, has its own statute of limitations
 - Conversion: Get money for someone destroying or damaging your goods
- Actions for Land

- Trespass: Action for physical possession of land, doesn't require any damages
- Nuisance: deals with use rights, requires damages
- Ejectment: get someone without a right off of your land
- Quiet Title Action: Get a declaratory judgment demonstrating that you are the Blackstonian owner

Wild Wallets and Things (found Property)

- General Rule: prior possessor will win against all subsequent possessors
 - loser of item always beats the finder and the property owner
- Exceptions to this rule
 - Abandoned Property: Prior possessor intends never to reclaim item at time he parts with it. If this is the case you can't change your mind later
 - Statutes of Limitations: in general replevin actions will have an SOL and if that passes, you have no legal way of getting the property back
 - Can consider that SOL transfers ownership of something to the finder
 - Ganper v. Capaloff
 - D stamp collector left stamps in a dresser that was sold to P. P tried to argue that as finder he could keep them. Prior possessor wins, since D could demonstrate true ownership
- *Nemo Dat*: General property principal is that you can only transfer an interest that you own. A person can't ever transfer more than he has
 - for example, Finder can transfer his interest, which may be above all but true owner, true owner will be able to win in court against who it is sold to
 - Zu Weimer v. Elicofon: German painting case, Court holds, that following common law, the East German government had a prior possessory right, as the paintings were stolen from it, So a purchase of the paintings, only includes the thieves property rights, which are less than the Germans
- *The Good Faith Purchaser*: There is a UCC exception to nemo dot, where a person who in good faith buys an item from a seller who has voidable title (title that is weak, because a check bounced, etc.) will be considered the rightful owner
 - Hauck v. Crawford: Farmer sells property to man, who tricks farmer into signing over mineral rights. Then this crook sells these rights to another person who purchases them in good faith
 - Under property law, because there was fraud, the original sale never took place, and therefore Hauck still owns mineral rights and Crawford transferred nothing.

- In this case, court used estoppel, allowing good faith purchasers to keep rights, and Hauck to sue Crawford for damages
- General rule is that the first finder has a claim against all who come after him, even if it is stolen
- Multiple cases have demonstrated that first finder can beat all finders after him, if he loses it, and another finds it, he still has a stronger title

Determining the Finder

- **Potential Parties: True Owner, Prior Possessor, Finders, Landowner, Locus Owner**

- In general, finder of lost property has a greater right to property than the enter world, except for the true owner, the prior possessor, or a person holding it for those two categories
- In the absence of a prior possessor or a true owner, there are two possibilities of who should get the property
 - the finder
 - the land owner
- To determine who gets it, must look at motivation of the prior possessor
- For Resolution need two pieces of information
 - Type of property found (mental state of prior possessor)
 - Lost: PP didn't know that he had parted with his possession at time it happened (wallet falls out of pocket)
 - Mislaid: PP intended to part with his property, but forgot about it (didn't mean for it to be permanent)
 - Abandoned: PP knew and meant to part with his possession permanently
 - Treasure Trove: very rarely dealt with, must be currency and left for a long time
 - Place the property is found
 - Public: Place where vast majority of people have a right to be (stores have some question surrounding them)
 - Private: everything else
- Who keeps the property in various situations
 - *Mislaid Property*: The locus owner (property owner) wins over the finder

- This makes logical sense, if a person mislays something, they will likely try and find it on the property. Therefore, this maximizes the chance of the PP getting it back
 - This has been altered by some modern statutes
 - This causes a problem as it incentivizes keeping things you find a secret
 - *Lost Property*: Finder generally wins, with some exceptions
 - If finder is trespasser, he will always lose to the land owner
 - IF it is a private place, locus owner might win
 - This is obvious with a trespasser, becomes more complicated if person is invited onto the property
 - Law is unclear
 - Contract: Many businesses will set up contracts so if an employee finds something while working, the business owns it (think hotel maids)
 - *Abandoned Property*: There is no prior possessor, so the first finder gets to keep it
- In general, it is difficult to prove the mental state of the PP, so it must be inferred by where the property is found
- Benjamin v. Linder Aviation: There is an airplane in a hanger for repair, a mechanic finds 18000 dollars in the wing, question is who should keep it, mechanic, or owner of the airplane?
 - to determine this, ask was property mislaid or lost
 - look at circumstances of loss
 - Hidden in the wing of a plane, seems like it is mislaid, not just lost
 - Therefore, Court decides that it is mislaid and airplane owner should keep it
- Note that many states have completely gotten rid of these statutes and simply require you to turn it over to the police, if no one claims it within a reasonable time, you keep it
- *What does it mean to possess something*
 - For a finder to become a possessor, he must physically control the item
 - If you don't physically take possession, then you have no ownership
 - Possession here is similar to apture, must have physical control over the item, as well as an intent to capture it

- Eads v. Brazelton: Man found shipwreck and marked it with buoys, another person came along and raised it
 - court holds that P needed to be making some action towards raising it for it to be considered possession
- Home Run Baseballs provide another example
 - Bonds home run ball is caught by one person who loses it after being attacked by a mob
 - Court uses Solomonic decision, splits proceeds
- Note that all finders do have an obligation to make reasonable efforts to locate a prior possessor
 - failure to do so can be a larceny

Bailments:

- A bailment arises when the owner of property temporarily transfers that property to another person
 - This is not a contract, because there is no consideration
 - Obligations of Bailment: take care of the property and give it back when asked
 - Note bailor is the one who owns the property, bailee is the one who watches it
- *Common Law Rules*: Baseline is that Bailee needs to care for the property and return the item on bailor's request
 - Where Bailor is primary beneficiary, bailee only liable for gross negligence (must use slight diligence)
 - Where bailee is primary benefactor, bailee liable for slight negligence (must use great diligence)
 - Where the bailment is beneficial to both sides, bailee liable for ordinary negligence, must use due care
 - *Exceptions*: Parties can contract around this
 - Today, we look at the reasonableness of the situation
 - Bailee will not be held strictly liable without a contract
 - Many courts simply argue that we should have a negligence standard for all bailees

Measuring Damages:

- In general we simply force the bailee to return the item through replevin, however, if this is not possible, it is possible to sue the bailee for damages done to the item, or for the loss of the item

- In general, Courts are stricter about people who misdeliver an item than those who lose or destroy the good
- Peet v. Roth Hotel: Woman leaves a ring at hotel for a jeweler to pick it up later, the ring is stolen. It is clear that the hotel is the bailee, it is unclear what we should have for damages, since the ring was extremely valuable and the clerk didn't know this
 - *Rule*: Whenever the nature of the object is apparent and that is the source of the value, we will hold liable for damages. If it is hidden we won't. (ex. microchip in ring that makes it valuable or \$1000000 in the back of a car)
- Allen v. Hyatt Regency: guy parks in this hotel's parking garage, and his car is stolen, argues that he had given the car to the attendant as a bailor and therefore, he was responsible
 - In general, courts will rule that if a person has complete control over another's property it is a bailment
 - here, garage had complete control, and is therefore, liable
 - Dissent argues that this is absurd

Rights of Bailee: Following Irving principle, Bailee has a right to the property that is above everyone else's except for the bailor

- therefore, if someone damages the property, the bailee can sue them for it
- Bailee can also bring action against a thief, note however, that he must either return the property or the money gained to the bailor
- Assumption with bailments is that it is voluntary on both sides, if it is not, then it is a finders situation, not a bailment

Accessions:

(Personal Property)

- This deals with the question of what happens when someone adds value to another person's property
- General remedy is replevin (give item back) if this doesn't work, you sue for conversion (damages for the item) which is a strict liability tort
 - Conversion generally means that the item's value has been lost or damaged
 - accession is when the item's value is increased
 - the prior possessor wants to get this increased value, the later possessor wants to keep it
- Major question to ask is whether you can split the original item from the investment made by the subsequent possessor
 - IF you can, then the case is simple
 - PP gets his item back, SP keeps his

- What is separation is also tricky
 - can't harm the original item
 - Good or bad faith can make a difference, bad faith improvers will usually be screwed
 - Bank of America v. JS Auto Repairs: Bank owns a junk car and auto shop puts new engine into it
 - demonstrates that sometimes courts will rule that things that appear separable won't be
 - Here court argues that engine is integral part of car and can't be separated
 - Thus bank gets entire car with new engine
-
- Many times you can't separate
- If you can't, first you must determine the principle good
 - Usually this is determined based on value, it is fact specific
 - In general, the ownership of the item will go to the person who owns the principle good
 - If principle good belongs to prior possessor, Then we can either
 - undo the improvements
 - give back the improved item and make PP pay for the improvements
 - Allow the improver to keep the new thing, while forcing him to pay the PP fair market value of the unimproved item
 - If improvement is made by sheer labor, the improver is usually screwed, and we will simply give it back to the PP
 - Note that if improver gets to keep the item, PP can always sue under the tort of conversion to get the money for the item
- Wetherbee v. Green: Weatherbee goes onto Green's land in good faith and chops down trees. He is actually a trespasser. Green wants the wood back, but Weatherbee has turned them into barrel hoops. Question is what is the principle item, the wood or the hoops
 - Court rules that the hoops are principle good because the value of hoops is thirty times that of the wood (this case may have come out differently if it was only a 3 times increase in value)
 - Therefore, Wetherbee gets to keep the hoops, but must pay Green for conversion

- Demonstrates a question for law, when determining principle good should it be based on physical transformation, or economic transformation, law is unclear on this

(Land)

- Land will always be considered the principle good
- In general, landowner will get to keep the building, as people improve at their own risk
 - There is a minority rule that says landowners must pay the improver for the building, or sell the land
 - Good faith mistakes, the improver may be able to collect money for the materials
 - Once again, if it is simply labor, you are screwed
- Remedies:
 - Ejectment (essentially replevin in land)
 - Quiet Title: allows you to attempt to demonstrate Blackstonian ownership
- Innocent Improver Doctrine
 - Minority of modern courts hold that an innocent improver of land should not be screwed
 - Therefore, they give two options
 - PP can either pay Improver for the improvements on his land
 - Improver can buy the land from PP
 - Note that this requires that the improvement be done in good faith
 - Producers Lumber v. Olney: Guy innocently built house on another's land, then got pissed that it wasn't his land so he tore it down
 - he is liable for the damage done, because once he built it the value had been added to the other land
 - If he had not torn it down, the court would have either had the owner pay the value, auctioned it off, or had improver buy the land
- *Restitution*: A separate branch of law that attempts to avoid giving out windfalls
 - It is thus possible that the PP will be stuck with the bill for the improvements made by the improver
 - We use this sometimes to force the selling of a property one way or another, in general, we don't want innocent people to get screwed
 - Note some states won't do this

Cherokee Doctrine: Comes from Cherokee cases which demonstrated a legal right, but no remedy. Essentially, you could have the strongest claim in the world, but if you don't have some legal remedy, it means nothing.

- Remedies don't enforce themselves, need the power of the executive behind it

Note that originally, the only way to ensure that you had the Blackstonian ownership over property was to trace it back until you got to a sovereign

- Today this has been replaced by recording acts, if you have a title that is legally recorded, you are Blackstonian owner
- Other way to get around this is Adverse possession

Time (Adverse Possession)

- This is the process through which a wrongdoer acquires title to land by using it for a statutorily set amount of time
 - essentially you are possessing the land until the statute of limitations for ejectment runs out, thereby giving you the title to the land
- *General Principles Behind Adverse Possession (AP)*
 - Blackstonian owner may have highest claim, but if you wait too long, you may lose that claim
 - For AP, expiration of Statute of limitations is necessary but not sufficient
 - This is different from other cases, where if statute of limitations runs out, there is no other inquiry
 - Courts require more than this to transfer land to a squatter
 - this comes from historical status significance of land
 - Until claim for AP is satisfied, the possessor is a tortfeasor (trespasser)
 - You must also satisfy ENCROACH elements (see below)
 - In general, you will only get the land you are actually occupying
 - exception is if you have a shitty title, and think it is all yours
 - Burden of proof is on the wrongful possessor, not on the landowner
 - If you win AP, you are now the Blackstonian owner of the estate
 - Also there are statutory limitations
 - Western states generally require that you be paying taxes on land
 - Many states require that you have some form of title, even if it is a piece of shit
- More important are Common Law Requirements. Must have statute of limitations run out and satisfy ENCROACH
 - AP's occupations of land must be **Exclusive, Notorious, Under a Claim of Right, Open, Actual, Continuous, and Hostile**

- *Actual*: You must use the land as an average owner would, given the property's characteristics
 - Question to ask is how a reasonable owner would have used the land
 - Trespasser must also have actual possession over the land, be using it
 - must use it in an affirmative and productive fashion
 - Jarvis v. Gillespie: P bought property from the city, but D has been using property for 30 years. Question is whether D has taken the land from city through AP
 - Problem is that D was not living on land, but using it occasionally, grazing animals, parking cars, etc.
 - Court rules that because this is a forest in Vermont, this is a reasonable use of the land
 - Color of title: allows for constructive possession of part of land you are not using if you actually think you own it
- *Continuous*: Were you continuously on the land as an ordinary person would use it
 - this allows for continuous to include 6 months out of a year for vacation homes (some jurisdictions don't accept this)
 - Leaving the land for errands or short trips obviously won't destroy continuity but it becomes an important question if someone takes a 3 month trip to Europe
 - Essentially this is a question of fact for the jury or trial judge to determine
 - Note if there were any breaks in time that destroy continuity, then the SOL starts over after those breaks
 - Jarvis: if land is only useable seasonally, then as long as it is used every season, generally we will regard it as continuous
 - Another question that must be asked is whether two different actors can combine their time to get AP
 - Tacking: Linking one person's AP to another's to reach necessary time
 - Can only be allowed when two people are in privity, in other words, they have voluntarily transferred the property to new people
 - must be an agreement, if you leave and someone else comes in, tacking not allowed
 - ex. I hold onto property for 18 years, then sell it to a guy who keeps it for another 10, SOL is 25. Usually, AP will be granted, because we were in privity

- *Open and Notorious*: The trespassers occupancy must be open and obvious to the landowners or others
 - In general, this will be satisfied by actual, if you are using someones land, it will almost always be open and notorious
 - If true owner would not be on notice, then the SOL will not run (for example if you snuck in every night)
 - Two different situations where this is difficult
 - Caves: If someone is wrongfully occupying your land 2000 feet below the surface, difficult to argue that it is open and notorious
 - Small Property Line Encroachments:
 - In general, these wont be open and notorious, because it is impossible to know exactly where your property line is
 - Two ways states deal with this
 - anything over your property line is open and notorious, you should know where it is
 - Or no one knows where property line is, so we wont consider this open and notorious
 - *Exclusive*: One person or an identifiable group of people must have possession of the land to the exclusion of the true owner
 - Generally means a use not shared by the general public
 - For example randos going through your property to get to a beach
 - *Hostile*: Does not mean the subjective intent of the possessor, has nothing to do with his mental state
 - Based on objective question of whether you had permission to be there
 - If you are there with permission from land owner, then you cant get the land through AP
 - Question to ask is whether person is a wrongdoer or not, whether landowner could eject them
 - Sometimes, entering land with permission can become hostile, but only if you give landowner that info, or the landowner should know it based on your actions
 - *Claim of Right*: This actually looks into the state of mind of the trespasser
 - This questions whether bad faith trespasser should be able to get the property
 - Many jurisdictions don't care at all

- 3 different ways to approach this
 - Iowa(minority viepoint)
 - Only allow land to transfer to good faith trespassers, those who think they have a claim to the land
 - Maine:
 - Only allow people who are possessing in bad faith, those that know it is not their land
 - this encourages property owners to take care of their land
 - Modern Majority Rule: It makes no difference what your mental state is, we only look as to whether you had landowners permission
 - most courts use this
 - It allows us to avoid trying to get into a person's head and avoids incentivising perjury
 - Helmholtz Effect: even in states that say they don't care about a possessor's mental state, good faith possessors often will win, while bad faith ones lose
 - This is because jury can decide based on whether they think guy is a douche or not
- *Exceptions:*
 - You can never get land from the federal government through AP
 - Most of the time, statute will also prevent you from taking land owned by local government
 - There are also times when SOL won't start running
 - if one is incarcerated, it won't start running based on legal disability
 - this is statute based, not in common law
 - Also if a person is incarcerated in the middle of the running, the SOL will stop until he is out
 - Also tend to protect minors

The System of Estates in Land

- In general, land can be seen as an infinite possession, therefore, the law needs to figure out a way to determine who keeps the land
- We do this through a very small tool kit that allows us many different combinations
- Every ownership interest and thus grant will contain the following

- Identification of the recipient (*words of purchase*)
- Definition of the physical space (blackacre)
- Time limit (how long you get the land) *words of limitation*
 - For some items time limits mean nothing (ice cream cone in July)
 - Others, the item will outlast the person
 - Land and money have infinite life spans
- Note that the whole point of the estate system is to create a market in land, therefore, there is always a goal of transferability that must be balanced with intent of grantor
- Note that when you own land, you actually own an estate in land, which is the chance to have a possessory interest in the land
- This can either be a present possessory interest or a future interest
- *Origins of Estates*
 - This all comes out of feudal law, when King owned everything
 - best way to get support of nobles was to give them land, but in general, the land would come back to king after the noble died
 - Therefore, nobles wanted a way to hold onto property within their family, and to be able to transfer it
 - Therefore, we create system of estates
- *3 Ways to carve up timeline. measure it (words of temporal duration)*
 - Fee Simple: Potentially infinite ownership (generally use to X and his heirs)
 - Life Estate: a human life determines when the possessory interest will end (does not have to be possessor's life) (use to X for his life)
 - Tenancy: in general under landlord tenant law. Allows a present possessory interest for a certain duration agreed upon between tenant and landlord
- *Note that there is a tension in estate law, the law wants to honor grantors intent, but also wants to ensure transferability of land, sometimes these don't go together*
- Modern law will also err in favor of grantor
 - originally to get fee simple needed words to X and his heirs
 - Today if it looks like they wanted to give out a fee simple, we give them a fee simple
- *Reversion*: if you carve a lesser property interest out of your property interest, you will generally keep a reversion
 - when you have a fee simple absolute, and you grant to X for X's life, you have a reversion

Present Possessory Interests

Fee Simple

- An interest that is potentially infinite (fee) and freely transferrable (simple)
- A fee simple is one which has a duration of one of three kinds
 - potentially infinite (meaning there is one timeline where line of succession from present interest holder lasts forever)
 - Terminable upon an event which is certain to happen, but not within a fixed period of time
 - Something else
 - Essential that this also be freely transferrable

Different Types of Fee Simple

- Fee Simple absolute: Actually infinite
 - there are no future interests in this property
 - Ways to get Fee simple absolute
 - have it transferred from someone else who has a fee simple absolute
 - adverse possession
 - combine life present possessory interest with future interest
 - To give a fee simple absolute
 - traditionally required to X and his heirs
 - we no longer require this, but good drafters still use it
 - Today simply require anything that expresses intent of grantor
 - If grantor is silent we assume that it is a fee simple absolute
- *Fee Simple Defeasible*: Generally, grantor includes a condition that could possibly end the otherwise infinite possession of the property
 - Limitations on defeasibility conditions
 - Can't make the property defeasible upon transfer
 - Conditions that are against public policy won't be enforced (requiring criminal activity, refusing to allow marriage)
 - Some jurisdictions won't allow ridiculous conditions (if a monster ever eats the moon)
- Three Kinds of Fee Simple Defeasible
 - Fee Simple Determinable
 - Fee Simple Subject to a Condition subsequent
 - Fee Simple Subject to an executory interest
 -
 - *Fee Simple Determinable* If Condition is breached, the fee simple ends automatically; returned to the grantor immediately
 - “To A and his heirs so long as no booze is sold on the land”

- Corresponds to the future interest of possibility of reverter, the second the condition is breached, the future interest holder becomes the present possessory interest holder
 - Grammatically, must flow with the grant, generally, you won't see many commas, key words are until, so long as, unless, while
 - Note that some jurisdictions have gotten rid of fee simple determinable, they require all of them to be fee simple subject to a condition subsequent
- Fee Simple Subject to a Condition Subsequent IF the condition is breached, grantor has the option to enter the land, ending the possessory interest
 - Lawson thinks a better thing to call this is power of termination, the present interest doesn't end until the future interest enters the property
 - "To A and his heirs, but if booze is sold on the land, then you are out"
 - Corresponds to Future Interest Right of Entry
 - Many jurisdictions favor this as it is less severe
 - Grammatically note the pause, there isn't the flow you find in a fee simple determinable
 - Look for but, provided that, on condition that, and commas that make a big pause
- Fee Simple Subject to Executory Interest: The grantor creates the future interest in a third party rather than keeping it for himself
 - The interest will automatically be cut short following the happening of the event regardless of the language used
 - language doesn't matter
 - Can have multiple future interest titles
- Major Differences between FSD and FSSCP
 - Transferrability of interests:
 - Future Interests are generally transferrable
 - Reversions are transferrable by will, intestacy or sale
 - Possibility of Reverter can be sold or transferred in all states except Illinois
 - Right of entry can't be sold in a lot of jurisdictions, but can pass by will intestacy
 - Illinois weird rule, only way to transfer POR or ROE is by dying or selling it to the present interest holder
 - Statute of Limitations

- FSD: SOL for adverse possession starts the moment condition is breached
 - FSSCS: SOL for AP starts after grantor has reentered property
 - *Ways to determine what kind of fee simple determinable*
 - Abolish distinction completely some states have gotten rid of FSD, so now all of them are FSSCS
 - Create presumption to fill gaps, usually creates FSSCS
 - Read the original grant closely based on grammar
 - Marenholz: Sutton grants land to school for school purposes only, the question is whether it is a fee simple determinable, or a FSSCS. Other question, what exactly does school purposes mean
 - 2 ways to write grant
 - FSD To school so long as it is used for school purposes
 - FSSCS To school, but if land is used for anything other than school purposes, you are out

Life Estates:

- Granted to someone for the duration of a human life, does not have to be the life of the person the present interest is granted to
- Life estates can be subject to the same future interests as above
- Construction: To X for X's life or to X for Y's Life
 - The general presumption is that it is for the grantee's life
 - so To X for life, will be considered based on X's life (this is a shitty way to do it)
 - Note that if you try and create this in an animal, it is a fee simple, not a life estate
 - Life estate Per Autre Vie is the correct term for a life estate measured by someone else's life besides the grantees
 - Can be granted based on more than one life to B and L for their lives
 - it is unclear though whether we wait for both of them to die or one
 - So we construct this, if you use the word and, it usually means until the last one dies, if you use or, the first one to die terminates the grant
 - Defeasibility Conditions
 - Same as with fee simple, same construction, etc.
 - To A for A's life so long as no booze is sold

- this is life estate determinable
 - Grantor keeps a reversion in fee simple absolute by granting the life estate in general
 - But because of the defeasibility condition, the grantor also keeps a possibility of reverter
- A person can also carve a life estate out of their own life estate, here they will keep a reversion
 - this is a bit counter intuitive, since usually you only have a reversion when you carve a lesser estate out of your own

Law of Waste

- Describes set of actions that a present possessory interest holder can't do because someone else has a future interest over the property
- The general test for waste is whether a person is reasonably using the property
- We assume that a grantor intended for present possessors to behave reasonably on the property
 - If there is no future interest, then there really can't be any law of waste
- We do allow use in present that will reduce future value, we generally just demand that the use be reasonable
- Categories of waste
 - Affirmative Waste (Malfeasance): Present interest takes an affirmative action on the property that is unreasonable and causes damage to the future interest
 - Permissive Waste (nonfeasance): Present Interest fails to take some action with regard to the property and the failure to act is unreasonable and causes damage to a future interest
 - baseline is considered normal behavior
 - Amerloriative Waste (more Controversial) Affirmative act by Present increase that significantly changes the character, but increases the value
 - In England Law of waste very strict, tenants couldn't change the character
 - In US, some jurisdictions allow it, others don't
- Circumstances of Waste
 - First look for unreasonable and permanent damage to the future interest holder
 - Wood: cutting timber to maintain current standard is acceptable, cutting for timber, when that is not the main reasonable use of property may not be
 - Earth and minerals: life tenant may not remove minerals unless
 - the property was used for mining prior to grant

- Mining is only way of accomplishing purpose of lease
- Brokaw v. Fairchild: Present interest holder wants to tear down house and put in much more valuable condos
 - Although condos would increase value, it would drastically alter the character of the property, and therefore, it would be ameliorative waste
 - Law focuses on maintaining character of land, not just on economic value
 - note that law of waste applies only to future interest holders, heirs do not count, because they do not have a future interest and are not even heirs until the owner dies
- Remedies:
 - forfeiture: early common law would dispossess present interest holder of land (this doesn't happen today)
 - Damages: Court will give the difference between the value of land after the waste and before the waste
 - To sue for damages, the future interest holder must have a reversion, court wants to know for certain that the future interest holder will eventually be present interest holder
 - To get the actual damages, must take an actuarial guess, about how long life estate will last, and what damages will thus be
 - Injunction: Chance of getting this depends on how likely you are to get the property back
 - Usually this only works with ameliorative waste, allows you to stop some major change, where you wouldn't get any damages
 - this is up to discretion of the court

Future Interests

- All Future Interests have two names
 - First name is the type of future interest
 - second name is what the future interest will be once it becomes a present interest
- Five kinds of future interest
 - Grantor can keep: reversion, Possibility of reverter, Right of entry
 - Or he can give away future interests: Remainder, or executory interest

Future Interests Kept by the Grantor

- *Reversion*: A future interest left in the grantor after the grantor conveys a vested interest of a lesser quality than what he has

- Note Nemo Dat here, you can't give what you don't have whatever interest you give is parasitic to what you have
 - So if you have a life estate and give it to someone else, if you die before them, their interest ends too
 - A has Fee Simple Absolute, conveys a life estate to B, A has a reversion, once B dies, A has a fee simple again
- If you have a fee simple and give a life estate or tenancy you keep a reversion
- If you have a life estate and give a tenancy, you keep a reversion
- A fee simple carved out of a future interest is not a reversion, a reversion must be a lesser interest
- However, a life estate carved out of a life estate is always a reversion
- *Possibility of Reversion and Right of entry*
 - If you start with a fee simple of any kind and carve out a fee simple of any kind, then you keep either a POR or an ROE
 - Difference between the two of them
 - Possibility of reversion, follows a fee simple determinable
 - the instant condition is violated, the present possessory right vanishes and the future interest vests
 - Right of entry: Connected to a fee simple subject to a condition subsequent
 - Once condition is violated, then the holder of the future interest has a right to enter the property, but it does not immediately vest, it only vests after future interest holder enters the property

Future Interests Created in someone other than the grantor

- Grantor can create a lesser interest for the present interest holder and essentially give what is left to another person
- Note that future interests take their names at the time they are created, so if a grant is created and then the grantor transfers his reversion, it is still a reversion
- 2 types of these interests, remainders, and executory interests
 - Note that any time you have an interest like this that is not a remainder, it is an executory interest
- *Remainder Requirements (if it doesn't meet all of these, it is executory interest)*
 - Must be created in someone other than the original grantee
 - this must be done at creation of grant
 - Note that remainders always happen automatically, never a right of entry issue

- Must be able to take possession as present possessory interest the second that the prior interest expires
 - To L for her life, then to B and her heirs (works)
 - To L for her life, then one day later to B (does not work)
 - To a for as life, then if B ever get married to B (this works, because it is possible)
- Must wait patiently for the prior possessory interest to expire, can't divest a prior interest, or come in and snatch it away
 - There is a grammatical question of whether the future interest can swoop in and take control
 - To A for A's life, but when B gets married, to B and heirs (this doesn't work, it snatches before the end of As life)
 - To A for A's Life, then if B ever gets married to B and heirs (OK, doesn't steal it before As grant expires)
- Can't follow a fee simple (meaning take possession after a FS) this means it can only follow a life estate, or a tenancy
 - To A and his heirs so long as no booze is sold, then to B and heirs (doesn't work, is executory interest)
- IF it doesn't satisfy all requirements, it is an executory interest
- there is no operational difference between tehse two things
- There is a slight legal difference, only has to do with Rule against Perpetuities
- *2 kinds of Remainders*
- Vested Remainder: Must Satisfy two more conditions
 - Beneficiary of the future interest must be ascertainable or identifiable at time fo grant
 - To A for A's Life then to B and his heirs works
 - To A for A's life, then to B's kids and their heirs, doesn't work if B doesn't have kids yet
 - There can't be any other necessary condition precedent besides the expiration of the prior estate
 - running out of prior estate must be sufficient to take control of land
 - to A for life, then to B and her heirs works
 - To A for life, tehn to B and her heirs if B becomes a nun doesn't work
 - *3 Types of vested Remainders*
 - Vested Remainder Indefeasibly

- If it becomes a present interest, there are no other future interests that can take it away
 - To A for A's life, then to B and his heirs
 - Vested Remainder Subject to Divestment: there is an external condition that can take away the possessory interest
 - To A for A's life, then to B and B's heirs, but if C passes the bar, then to C and his heirs
 - If C passes the bar, he will snatch it away from B. there is potential that the property will be snatched
 - This is called a contingent antecedent, not a contingent precedent
 - Vested Remainder Subject to Open
 - The class of beneficiaries is not closed
 - This generally happens when it is left to children
 - For example
 - to A for A's life, then to B's children and their heirs
 - IF B has one kid at time of grant, then it is a vested remainder, but he could have more kids, so it is subject to open
 - Generally this class will close as soon as the life estate ends and B's kids get a present possessory interest
- Contingent Remainder
 - If it is a remainder, but not a vested one, it will be contingent
 - These create problems of valuation, because we don't always know who will have the land
 - Definitively failing to vest (fizzling out) where certain events happen that make it impossible for the future interest holder ever to get the property
 - To A for life, then upon A's death to B and his heirs if B attains the age of 21
 - If B is not 21 at time of A's death, the future interest has definitively failed to vest
 - If this happen, grantor will get possession by default
- *Executory Interest: any time you don't have a remainder*
 - 2 types no real legal distinction between

- Shifting: snatches property away from someone other than original grantor
- Springing: cant be a remainder, because there is a gap
 - note that if there is a gap, grantor will have it during that gap period
- For exam
 - state the title, identify every PI and FI possible, reading from left to right.

Make sure to consider all possible interest

Rule Against Perpetuities

- This is used by the law to encourage and ensure the marketability of land
- Only applies to executory interest, contingent remainders, or vested remainders subject to open
- Major question we ask in RAP is will it vest (basically, will it make our concerns go away)
 - Vesting for RAP can happen in three ways
 - the future interest becomes a present one
 - the future interest becomes a different future interest that we don't care about
 - the future interest definitively fails to vest (fizzles out)
 - if it becomes impossible for it to become a present possessory interest, we don't care
 - Generally, we measure things for RAP based on time that the grant is created
 - Future interest must vest not later than 21 years after some life in being at creation of grant
 - Problem with the rule is that it judges something immediately and makes it an illegitimate grant, we generally don't wait and see
 - *Measuring Life*: Someone who is alive at time of grant and can be used to measure whether it takes effect within their lifespan and 21 years
 - Beneficiaries, we can always use the beneficiaries for the grant
 - unascertainable beneficiaries don't count (kids not had yet)
 - Must be alive at time grant is made
 - People who can effect the identity of beneficiaries
 - Parents of kids who may become beneficiaries
 - People who can affect conditions of grant
 - Limited identifiable groups of people who can directly affect the conditions of the grant

- ex. to B for B's life if X gets married (X can affect the grant)
 - *Validating Life*: Someone whose life span plus 21 years, absolutely, positively, guarantees that one of the three types of vesting we care about will happen
 - To A for A's life, then to B if T ever marries
 - Life estate in A, B has a contingent remainder in FSA
 - A and B are beneficiaries
 - nobody affects identities
 - T can effect condition though
 - Out of these lives, will we know what has happened within 21 years of death
 - B no, possessory interest
 - A not, if A dies and T hasn't married, we aren't sure
 - T yes, when T dies, she is either married or not, therefore, it has either fizzled out,
 - Thus T is validating life
 - Blow them up theory: if you blow up all of the measuring lives and add 21 years, has the future interest vested?
 - If yes, then we are good to go
- *Rules of Thumb*
 - If the interest is tied to the lifetime of a beneficiary, you are good to go
 - Be suspicious when conditions are not tied to action of specific person
 - Make sure to imagine every theoretical possibility
 - Anytime you see grandchildren be careful

Cotenancies

- We are only concerned with joint tenancy and tenancies in common
 - major difference between these and others is that you can't decide whether you want the property in these forms of tenancies or not, if you want to keep the property you have to be either a joint tenant or a tenant in common
 - In general, tenancy in common will be the default, but joint tenancy may be easier
- *under Both forms, owners have an absolute 100 percent right to possess the property*
 - Both forms have the same legal result, as long as both tenants are alive
 - All co-owners have a 100 percent right to use the property as they see fit, regardless of amount of money they have put into the property

- Obviously this can cause huge issues, what if one person wants a forest, the other wants a building
- *Major Differences*
 - If land is sold
 - tenancy in common, co-owners get financial share based on the amount they have put in
 - Joint Tenancy: All get equal shares, regardless of how much they individually put into the property
 - When a cotenant dies
 - Tenancy in Common: The person who dies can leave their shares in will, or to their heirs
 - Joint Tenancy: The person who dies has their stake implode or disappear, it simply no longer exists
 - so if A and B are Joint tenants and A dies, B now has 100 percent ownership of the property
 - Profits on land:
 - Tenancy in Common: each gets the percentage that they own
 - Joint Tenancy: get equal percentage, regardless of how much you put in
 - *6 Things Required to Create a Joint Tenancy*
 - Must be in a state that allows joint tenancy, many have abolished it
 - Must demonstrate intent to create it in the grant
 - “I want to create a joint tenancy” may not be enough
 - Best way “I want to create a joint tenancy with right of survivorship and not a tenancy in common”
 - then must have 4 unities
 - unity of time: All cotenants must get their interest in the land at the same time
 - unity of title: all tenants must be named in a single document
 - Unity of financial interest: must have same financial share in the property
 - Unity of Possession: must have same type of interest (life estate, etc. couldn't have one person with a fee simple and another with a life estate)
 - *Transfer of Joint Tenancies*
 - Severance is when a joint tenancy becomes a tenancy in common

- Any time there is a transfer of title, it will end the joint tenancy, because it will upset one of the four unities
- If one joint tenant sells to another person, they then are tenants in common
 - If there is a three person scenario, and one person sells, the other two are joint tenants with each other and tenants in common with the person who bought
- Selling land to self is one way to get out of joint tenancy
- Leasing joint tenancy
 - Some states allow leasing to go on without severing the joint tenancy, other jurisdictions hold that a lease will sever the joint tenancy and turn it into a tenancy in common
 - The lessee will have same rights as person she is leasing from, therefore, 100 percent right to possess
 - In general, we require profits made by leasing property to be split equally
- *Mortgages on Joint Tenancies*
 - for tenancies in common, not a problem, the mortgage simply goes to whoever the land is transferred to
 - For Joint Tenancy, however, the land right has imploded, so logically this means the mortgage implodes with it
 - Can look at mortgages two different ways
 - Title Theory: In half the states, a mortgage means you have sold the property to the bank and are buying it back, therefore, they have the title, and a Joint tenancy is not a problem
 - Lien Theory: In other states, you still own the land, but lender has a financial interest in it, this is a problem for Joint tenancy, as this interest can be destroyed by the implosion
 - Banks can either not give out loans unless joint tenants all sign on
 - some states have created statutes, where the mortgage goes to the other tenant
- *Rights of Cotenants:* Regardless of Financial stake, both Joint tenants and tenants in common have a 100 percent right to use possess property

- This can cause major issues
- Swartzbaugh v. Sampson: A married couple has a joint tenancy over 60 acres in CA, on which sits a walnut grove, Mrs. S enjoys looking at the grove, Mr. S allows friend Sampson to put up boxing ring on land destroying grove
- Mrs. Loses in this case, All coowners have a right to use land as they see fit, and can transfer to a third party, which is what Mr. did. Mrs. has no right to cancel the lease or take possession of it
- Law has no way of choosing one persons right to the property over anothers, so if there are irreconcilable differences, there are a few things we can do
 - Partition: Cotenants will carve up the property, creating individual pieces for themselves
 - can be used for both JC's and TIC's
 - This can be very difficult, hard to determine what is equitable, and sometimes, the value of property is based on the whole, like the walnut grove
 - Owerty: one person is getting the more valuable property during a split, and therefore, makes a side payment to the cotenant
 - This can cause huge litigation costs
 - Accounting: A settling up, or trying to figure out who owes who on the property
 - takes into account all increases in value to the property as well as decreases, based on a person's activities on the property
 - Things taken into account:
 - Carrying charges: only includes those necessary for maintaining rights, like taxes
 - You can get these without accounting
 - repairs: not necessary for maintaining title, but do need it to maintain value
 - will get credit for these, paid for expenditures, but only at accounting, not before
 - Improvements: will get credit for increase in value, but not expenditures but only at accounting
 - Ouster: when one tenant has made it so the other can't enjoy their rights to the property, this is considered an ouster, a tenant can sue for the reasonable value of their property rights in rent
 - This is about all Mrs. Schwartzbaugh Could do

- Must involve affirmative assertion of rights by oustee, and an affirmative denial by ouster
 - usually results in partition, but the oustee can simply request rent
 - Finally, one can simply wait for death of the joint tenant
 - In some states, when a joint tenant dies, all of his obligations die with him, so Mrs Schwarzbaugh could just end the lease
 - Most states, however, would state that a lease would sever a joint tenancy and turn it into a tenancy in common
- Issue of Waste: Co-owners owning land together, law of waste does not apply
 - there are some doctrines that stem from law of waste, however
 - If a cotenant is destroying the value of the land, many times you can sue, this won't be under waste doctrine, but rather under your rights as a possessor of the land
- Statute of Anne: old English law, that you were required to pay cotenant profits made off of property, but not required to pay expenses
 - If however, the one making the profit insists on an accounting, they will often get this back
 - If one is living on the property, however, no rent is required

Landlord Tenant Law

- Nature of Leashold Estates
 - Landlord Tenant relationship is one of both future and present interests. A landlord conveys a tenancy, which is a present interest,
 - Everything we have gone over so far applies, law of waste, RAP, etc.
 - Tenancies in general are defeasible upon the non-payment of rent, and landlords many times will keep the future interest
- For Tenancy, two things happen
 - convey a present possessory interest and keep or convey a future interest
 - Execute a contract
 - The lease generally will come under both property and contract laws, to resolve disputes:

- First read the lease, if it is obvious what the resolution is, follow it in contract
- Otherwise, go for the common law approach, which uses both contract and property law
- Check if there are statutes that govern

Three Different Kinds of Tenancies

- Note that we will never find a tenancy that is not defeasible
- Technically you should distinguish defeasible, but it isn't important since they are always defeasible
- Things that distinguish the type of tenancy is what brings it to an end
- Term of Years:
 - Any property interest with a fixed end date or time
 - The lease will say " this lease ends on November 4"
 - When a grantor creates a term of years, he keeps a reversion
 - The term will end automatically on date specified, grantor doesn't need to do anything
- Periodic Tenancy:
 - At the end of a given term, the lease automatically renews itself (could be every month, every year, etc.)
 - The term is viewed not as one that ends the lease, but one that restarts it
 - We use this to avoid unnecessary transaction costs
 - Ends either with a defeasibility condition, or more often with notice
 - *How to give Notice:*
 - The form of notice will be specified in the lease, or by statute
 - The amount of time required can either be by statute or in the lease
 - Common law generally required the amount of time on the lease, so monthly renewal, required a month notice
 - There was a limit of six months at common law

- Receipt: question of when notice starts, in property law, we require the person to receive the notice, before we start counting down the period
- Tenancy at Will:
 - Tenancy exists until one party decides they don't want to participate anymore
 - No notice required at all to end the lease at common law
 - Some states require notice, as do some leases
 - Generally can't be transferred
 - This is a very rare case
- Additional Considerations:
 - Statute of Frauds always applies, generally need to be in writing
 - must have notice to terminate a lease, leaving premise, or death are not good enough (unless it says so in the lease)
- *Transfer of Leases:*

4/22/2009 3:13:00 PM

4/22/2009 3:13:00 PM