code: PP = prior possessor; AP = adverse possessor; F = finder; O = owner; B = bailee; L = landlord; T = tenant

I. WHAT IS PROPERTY?

A. DEFINITION: that which is peculiar/proper to any person; that which belongs exclusively to one

-strict legal sense: an aggregate of rights which are guaranteed and protected by the govt

-2 competing legal ideas:

-Blackstone: property is autonomous ("property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other indiv. in the universe.")

→ effect: if X has a property rt, then X wins the case

-Bentham: property is a dep. relation – i.e. prop. & law are born together – before laws were made, there was no prop; take laws away, prop. ceases to exist

→ effect: prop. rt comes after other doctrines of law are examined

-difference: what the law is saying (Bentham) and what the law is doing (Blackstone)

B. COMPOSITION: trad'l CL = **you own everything above and below the land**. (*ad selum* rule)

-'to the heavens' is obviously ltd somewhat (b/c of planes), but generally, ownership of land usually includes stuff on it, stuff below it, and to a degree, things above it.

-basically: owner owns things attached to the land and that are sufficiently stable – tree/rock/etc

-note: no such thing in America as un-owned land

-when selling land, you can sell just part of it (i.e. everything but the tree) as long as you specify that's what you're doing

II. ACQUISITION OF PROPERTY

*Q. to always ask: is it ownership against everyone else, or just against some (relativity of title)?

A. CAPTURE AND CONQUEST

1. Wild Animals

a) owner of the land generally wins

-unless of course you're on public land, or you can prove smthg (animal) is certainly yours

-Blackstonian ownership: you have a better claim than anyone else – highest on chain

-*ferae naturae* = wild animals, not owned by anyone (would be odd to have shifting ownership)

-but if it's on your land, you can do whatever you want to turn it into an object of ownership → this is the right that shifts as the animal moves from 1 prop. to another

**Pierson (D) v. Post (P)*: 1805 – Post hunting a fox w/ his dogs, about to kill it, when Pierson stepping in, killed it, and carried it off for himself; pre-existing family feud, taking place on uninhabited public land. (if fox had been on Post's land, Post would win b/c Pierson would be a trespasser w/ no right to possession)

-Post brings action of ejectment = to push someone off the land – only have to show relativity of title, *not* Blackstonian ownership – Pierson wins – see below

(-quiet title: requires you to prove a lot more than in ejectment – i.e. want everyone else to shut up about a claim to the property in dispute)

b) relativity of title ("Irving principle")

-definition: just have to prove your claim is better than the other guy's. (but cannot just win by saying other guy's claim is bad.

➔ principle: in the absence of a Blackstonian claim (which would resolve a claim for sure) the next concept turned to is that of possession.

-works to the benefit of people who have less than perfect title, but they can at least 'beat' the people below them in the hierarchy of people w/ claims to the land

-**first in time rule** → whoever possessed the fox first should win.

-reasons for the policy: easy to apply; evidentiary

-law distinguishes btw 2 concepts: **ownership v. possession**:

-ownership: legal concept

-possession: physical fact

→ Pierson has a rt of possession and use just as an owner would. Pierson is an owner in a relative sense, but really just has posssession

-*Bradshaw v. Ashley*: for many years, P had been in actual, continuous possession of a lot of land. D trespassed and ousted P off land. rule: P must recover upon the strength of his own title, not the weakness of D's. but if there is no evidence to the contrary that P was the prior possessor, this is sufficient to prove title.

➔ conclusion on *Pierson v. Post* and wild animals:

*Post wanted ct to stretch the rule to say a *rsbl probability* that he would capture the fox was sufficient: 2-1, ct. says NO.

→ 2 doctrines, not mutually exclusive

1) doctrinalism:(formalism) a way to resolve novel legal questions by looking for doctrine = Const., stat & reg., cases, treatises (Roman) = *majority*

-there was no case authority b/c no one had ever brought such a case where neither was the 'blackstonian' landowner.

2) instrumentalism: (realism) legal rules ought to serve the ends = *dissent*: (Livingston) what you're trying to do here is fox hunting, and you wouldn't do it in the first place if you couldn't get the fox – L. thinks if ct is having to reach all the way back to Roman treatise, maybe they should create a new law.

c) rule to claim 'possession': only **kill**, **capture**, or **mortally wound** a wild animal could **constitute first possession** – 'rsbl prospect of killing' would have to look at many more factors, i.e. how good a hunter P/D was, etc. → ∴ the maj. is using some instrumentalism as well

(*remember *Pierson* dispute would not exist if there was a landowner)

-**domesticated animals**" must prove that they are domesticated/ will return to the owner

d) Captured Wild Animals that Escape: test = *will it return?*

-general rules:

(i) what makes an animal domestic is that it has a tendency to return (*animum revertendi*)

-either they habitually return or you have a leash on them – so even if they are on someone else's property, your ownership claim on them remains

(ii) but once a 'truly' wild animal escapes, presumption is that it is wild again, unless you can prove that it's domesticated/ will return

→ *Hughes v. Reese*:

-Facts: P imported 2 silver foxes from Canada for breeding; kept them confined until the male escaped. Reese killed & skinned the fox, which Hughes later saw & id'd as his own. Reese wins

-Issue 1: whether you retain any **claim** over the animal previously in captivity once it is escaped = NO, b/c P cannot prove its domestication.

-**minority rule**: same kind of case in Colo. at time – evident that the fox was not native, fox farming was big, and someone had clearly lost it – in such a situation, the escape of the animal should not deprive the owner of it.

→ *Hughes* remains the standard animal rule at the time

-Issue 2: **liability** as to escaped animals

-if they're on the leash or in your control, you're definitely liable

-if bring smthg into an area where it isn't native, you're strictly liable

-if it *is* native, but it escapes, then you can only be liable for negligence, but P has to prove this

2. Wild Minerals

-when people began to realize oil was useful, they had to start making laws on it → precedent?

-at first turned to *Hughes v. Reese* – if return it to 'wild', then you lose your claim

-once found, co. would stop it up so it wouldn't hit market all at 1x; also, normally gas co. would own all land above reservoir, but you can also sever right to below land from rights to land

-*Hammonds v. Central Ky. Natural Gas Co.*, Ky, 1934:

-Facts: P owns small piece of land over underground reservoir; claims gas co. should pay her for taking gas from under her land (which previously she didn't know about)

-**rule**: *analogize wild minerals to wild animals* – until you claim ownership by extracting it, gas/minerals are in their natural & free state, owned by no one

-gas co. had stored non-native gas in the reservoir, so they argue they 'let it go,' and it's up to anyone to 'capture' it again to claim it → i.e. they weren't trespassing

-damages from 'trespass' was 0 here; but unlike most torts, you *don't have to prove damages in trespass*, so even if no damage, can still get injunction

= why gas co. is so desperate to say it's not theirs anymore

→ Objections: 1) instrumentalism – what law is trying to accomplish & how we can do that – basing law on foxes seems ridiculous

2) even w/in the confines of the wild animal theory, ct should have understood reservoir as a 'leash,' and that gas was never really out of their possession

-*Lone Star Gas Co. v. Murchison*, Tx, 1962:

-Facts: P owned land below which was a reservoir; all 'native' gas had been extracted, but P had bought gas from elsewhere and stored it there. D drills into reservoir from adjacent land to extract and sell P's gas.

-in Tx, to own all land above reservoirs would be impossible

-**Rule**: title to gas once having been reduced to possession is not lost by injection of such gas into an underground reservoir for storage purposes.

-*Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co.*, Ky, 1987:

-same facts as above; fox analogy: here, 'fox has only been released into a private confinement zoo.' → adopt *Lone Star* rule.

*all this is now controlled by statute & reg.

3. Wild (and Not-So-Wild) Land – Title And Possession

a. All ownership of land eventually traces back to a grant from a sovereign.

b. *Johnson v. McIntosh* – **ejectment** – don't have to prove Blackstonian ownership, just need to prove that you have a better claim than the other person

B. FINDING PROPERTY:

*Actions for Goods:

1) Conversion: to get damages for goods that are damaged & stolen

2) Replevin: To get goods back – has its own SoL

*Actions for Land:

1) Trespass: Action for injury to physical possession of land

2) Nuisance: Injury to use right

3) Ejectment: get off my land (only need to be possessor, not owner)

4) Quiet title: this land is absolutely mine – need Blackstonian ownership

1. Wild Cash (Found Property)

a) general rule:

*rule still applies: *prior possessor wins against all subsequent possessors* EXCEPT:

i) abandoned property: prior possessor intended at the time of parting never to possess it again (once abandoned, you can't take it back if someone else has claimed it)

-a.k.a. wipes the prior possessor off the chain of title

-"converts the item into a fox"

ii) UCC §2-403: applies only to merchants, very ltd exception

iii) statute of limitations: if you file your action outside the statutory time period, there's nothing you can do

-i.e. taken as a given that prior possessor will win, but he must go to court, i.e. to eject someone who has settled on his land before the SoL has run. then he can only get it back if AP doesn't satisfy AP req's

iv) possible claimants:

-True Owner (TO) -Prior Possessor (PP)

-landowner/ locus owner (LO)

-Finder (F1)/ Subsequent Finders (F2, etc)

v) in the absence of a prior possessor, there's 2 potential claimants:

i) **finder**

ii) **locus owner**

*note if these 2 pp are same person, there's no dispute

vi) 2 classifications req'd for resolution:

a) **Type of property found**: (classifications have to do w/ mental state of PP)

(i) lost: PP didn't know at time he parted w/ possession that was what happened – i.e. smthg fell out of his pocket

(ii) mislaid: PP did know he was parting w/ possession, but just forgot about it

-i.e. didn't mean for parting to be permanent

(iii) abandoned: PP knew, meant to part w/ possession permanently

b) **Place Found**:

(i) public: place where a non-trivial segment of pp are invited onto prop.

(ii) private: everything else

*categories are not entirely crisp (ex: living room: private, but if you have a party, maybe public)

b) Resolution:

i) <u>mislaid</u> <u>prop</u>: <u>locus owner wins over finder</u>

-reason: if PP mislaid smthg, he intended to come back for it, and so by allowing the locus owner to prevail, you maximize the chances of the prior possessor eventually getting it back – or at least that's what the law thinks

-many modern statutes alter this rule though

ii) <u>lost</u> <u>prop</u>: <u>finder wins, subject to</u> <u>exceptions</u>:

a. if finder is a trespasser, finder loses; locus owner wins = *Favorite v. Miller*

-but if only a technical trespass (i.e. reach over the prop line for smthg), might not be sufficient trespass for this rule

b. if place is private, locus owner *might* win

-but often if place is private, finder is a trespasser anyways; except in cases when you are invited onto prop. – law is unclear here

c. contract

– ex: person who finds the prop. is at the place to clean the swimming pool → not a trespasser; not nec'ly a private place: homeowners might be able to say pool guy was brought in for specific purpose and finding stuff exceeded the scope of his K/ parties might say there is an implied K to give it back

-parties are free to write K provisions against finding & keeping things, i.e. hotel housekeepers

iii) <u>abandoned</u> <u>prop</u>: no PP, so unowned (like fox) → but not treated like the fox

-*treated like lost prop*, so finder wins unless it falls into 1 of exceptions.

****how to classify mislaid/lost/abandoned**: ***<u>mental state</u>*** ***<u>of prior possessor</u>***, but hard to prove → often have to infer mental state from circumstances & character of item = <u>jury Q</u>

-*<u>Benjamin v. Linder Aviation,</u>* <u>1995</u>: airplane in for repairs and $18k found in wing

-Q: finder (mechanic) or owner of airplane (locus owner) gets to keep it?

= *issue of mislaid v. abandoned*

→ recreate circumstances of loss:

-lower ct found it was mislaid & not reclaimed

-dissent implies $ had to do w/ some sort of exchange – if small plane, pp of $18k doesn't show up – probably a drug deal = abandoned

-prof: $ dated from depression – pp were hiding $ in weird places = mislaid = **ex. of discretion in statute**

-*<u>Kieron v. Cashman</u>*, 1896: kids pick up sock off ground, throwing it around, wad of cash falls out.

-they did not intend to possess the $ when 1 kid picked up sock, only when it fell out; ct says they were in *joint enterprise* of the sock, since $ fell out in mid air

-∴ they split the $ → **<u>analyze intent @ time of *actual* possession</u>**

*but essentially this is the <u>law of salvage</u> coming into property law

*note: many states have eliminated distinctions

c) what does it mean to possess an item?

= <u>Act</u>: <u>physically holding</u> – does anything less count?

-*Eads v. Brazelton*: P finds <u>sunken ship</u>, marks it w/ a buoy to come back later; D finds it and gets profits. P was not considered a finder.

-*Ghen v. Rich*: <u>whalers</u> used to mark their 'captured' whales w/ their harpoons & then come find them later when they had died

-other <u>shipwreck</u> case (more recent): group using highest tech invented themselves finds valuable shipwreck. placed decoys all over b/c many others trying to reap benefits of their tech. find it, took pictures, and able to get injunction against all other claimants

= **seeing isn't finding**

-other ex: Barry Bonds homerun ball

d) finder's obligations: if you become a finder there are consequences:

i) in every state, there is an obligation to make <u>rsbl efforts to locate the PP</u>. Failure to do so can be larceny. What constitutes rsbl efforts depends on the indiv. situation

ii) finder's level of care req'd for conviction is gross negligence

iii) rights of a finder are the same as a bailee – you can protect your rts against anyone who's down the 'chain of claims,' but if the PP shows up, the finder has to turn over the $/damages gained.

2. Bailments

= not a K, b/c no consideration – only temporary and no conditions

-Obligation of bailee: take care of what you're given AND give back on demand

a) definition: voluntary entrusting of property from 1 party (bailor) to another (bailee)

b) if there's no contact to rely on, the essential Q is: *who will bear the risk of loss*?

(i) if bailee won't give it back – PP wins

(ii) if bailee can't give it back as is, then… (see c)

c) damage (conversion):

-*Peet v. Roth Hotel Co.*: ring left at hotel for jeweler to pick up. desk clerk sets it on desk and negligently loses it; clerk tries to make argument that he thought the ring was a fake, so he should only be liable for its apparent value, not its real value → NO.

(i) rule of case: where the *nature* of the object is apparent, mistakes in *value* don't matter – must pay

-compared to - hypo: but if there had been an expensive microchip in the ring, Roth would not be liable for the value of that too, b/c he *didn't agree* to be a bailee for the microchip → exceeding the terms of agreement

*see other cases below

(ii) no general law to say who bears risk

(iii) must ask: *who benefits from the voluntary transfer*? → bailee has duty to exercise care acc. to the following

a. bailor ("can you watch my laptop while I get food?") = bailee liable only for gross negligence

b. bailee ("can I borrow your laptop?) – bailee liable for slight negligence

c. everyone ("can you watch my laptop while I get food?" "sure, if you get me food too") – law holds bailee liable for regular due care/negligence = rsbl test

d. exceptions:

*parties who contract for bailment can contract around distinctions

*some jurs do away w/ these distinctions b/c figuring out neg. is hard enough – don't need diff. "shades" of neg.

(iv) bailee cannot be held strictly liable w/o a K

(v) measure of damages for conversion = fair market value at time of conversion

(vi) other cases as to measure of damages:

a. *Ellish v. Airport Parking Co. of America*: O parks his car on the common airport parking lot, where he pays when he leaves. O never actually delivers the car to an attendant. Ticket she rec'd said there were no guards and airport wasn't resp. for car. = ***no bailment*, b/c B has not assumed control** over the car.

b. *Samples v. Geary*: expensive fur piece left inside a coat at coat check; fur is missing, but coat checkers not resp. (like ring w/ microchip scenario above)

c. *Solari Parking*: O's belongings are in trunk of a car parked in tourist district of New Orleans in a paid parking lot. car stolen. held that parking lot co. were liable for both car and stuff in it b/c one would expect that a tourist's car would have a lot of stuff in the trunk.

***all based essentially on circumstances**

d) rights of bailee:

(i) if something's stolen/destroyed and bailor is not around, the bailee can bring action to recover in either replevin or conversion. as far as the subsequent actor is concerned, the bailee is the prior possessor and anyone down the chain is answerable to the bailee

a. whatever the bailee gets, the bailor can then come along and claim since the bailor is a PP to the bailee

(ii) bailments work on assumption that there is a voluntary transfer. if there's an entrusting situation that's not voluntary, it's a finder's situation

3. Accessions: adding value to someone else's goods

a) can you split the original item from improvements?

-hypo: find ring, put it in new setting, such that it cant' be separated – is the setting improving the stone or stone improving the setting?

*note issue of 'what is separation' = reasonable separation; good/bad faith also plays in

b) if not, then options =

(i) must determine the principle good – any time you've mixed items so that they can't be separated, the **ownership of the item goes w/ the principle good**

-usually this is determined by relative value → highly fact-specific
-if principle good belongs to PP, then:
a. undo improvements
b. give back improved ring; PP pays for improvements
c. keep new ring; PP pays for FMV *w/o* improvements
d. *when improvement is made by sheer **labor** (i.e. polishing gem) – usually goes back to original owner. but problem arises when sheer labor has improved smthg 30x its original value (turn wood into house)

(ii) if finder gets to keep the item, does the PP get anything?
a. yes, taking of the item & failure to return is <u>conversion</u> – if F gets ownership, then PP gets paid value of the original good
-measured by fair market value
-but sometimes cts award FMV + value PP was going to get from us

c) <u>innocent improver doctrine</u>: (i.e. bldg smthg on someone else's land)
-often improver has to buy land from the landowner providing the bldg was innocent
-but if landowner watches the improver build, this can affect the suit
= a type of estoppel in law of remedies
-<u>laches</u>: judge-made statute of limitations, diff. from legislature's – created in cases where landowner actually induce the innocent improver to build.

*note much of CL doctrine has been replaced or supplemented by statute

4. <u>Purchase</u>:
a) When a finder of a ring sells it, when the owner comes back there are entitled to the FMV of the ring even if sold for less than the FMV.
b) The owner may sue the person the ring has been sold to. That person is liable even if they paid good money for the ring (*Ganter*).

C. TIME (ADVERSE POSSESSION)
➔ <u>statute of limitations</u> makes the passage of TIME a method for acquiring property
= <u>adverse possession</u>: possess the land until the statute of limitations for ejectment has run out
-if owner fails to bring an action against you for a certain amt of time, then the prop. is yours
1. <u>General principle</u>: cts require more for the passage of time to transfer land as opposed to other objects (where ct simply has to say, "A waited too long; it now belongs to B.")
-doctrine originates from when land, unlike other forms of wealth, was a msr of status
-until the claim for adverse possession is satisfied (i.e all factors are met), the possessor is really a tortfeasor/ trespasser
-in order to acquire property from adverse possession, you have to pay the prop. tax

*<u>Other Factors</u> = ENCROACH
**only when statute of limitations has run out, do you then have to prove other factors*.
-sif statute is still running, then you're immediately ejected and prior possessor can stake his claim
➔ D's occupation has to be **E**xclusive, **N**otorious, under a **C**laim of **R**ight, **O**pen, **A**ctual, **C**ontinuous, **H**ostile

2. <u>Actual (use)</u>:
a) standard: AP has to act toward land in Q as would an average owner, taking into acct the geophysical nature of the land
→ *what would reasonable owner of the land have done*? = jury Q
b) need to be engaging in use as long as the SoL runs

-<u>*Jarvis v. Gillespie*, 587 A.2d 981</u>:
-to transfer land, you need a *deed* – 2 kinds:
a) **warranty deed**: promise by the seller that he actually owns the land (is a Blackstonian owner) = *seller assuming the ris*
b) **quitclaim deed**: seller is not making any promises about his claim on the property – *buyer assuming the risk*
-what kind of deed is normally used depends on the state
-<u>Facts</u>: P claims he adversely possessed land before town gave the quitclaim deed to D for the land → Q: whether P has adequately made out the claim to adverse possession
-<u>ejectment action</u>: against someone in possession
-<u>quiet title possession</u>: if you're already in possession = this case
-**Q:** Was <u>use</u> of land by P sufficient for *actual* possession – all he did was put up fence, raise cows, and tap maple trees for 39 yrs – but this is Vt; often don't do much else

*usually person actually has to be on the land for adverse possession; P was not
→ law is trying to juggle 3 issues:
1) trying to maintain the status of existing title holder – esp. solicitous of true owners in a way it does not try to protect the owners of other objects
2) to award owners for use of the land
3) concern about the operation of the legal system – you only let a wrong (trespass) turn into a right (ownership) when the evidence has become sufficiently blurred over time
= diff. goals pulling against each other; adverse possession reflects the pro-production/use bias
→ but was what P did enough to satisfy reqs?
→ "the ultimate fact to be proved is that the claimant has acted toward the land in Q as would the avg. owner" a.k.a., "it depends" on the land, location, etc.
➔ trial judge said what P did was enough, so app. ct. affirmed, but really *could've gone either way* = a deferential standard of review – basically whatever the trier of fact found was going to be unreviewable

3. Continuity:
a) jury Q - what constitutes a reasonable **continuous use varies depending on prop type**
→ can you leave for periods of time? (standard is 6 mos)
(i) *Jarvis:* relaxed standard (11 mos)
"to constitute the continuous possession of lands, the law does not require the occupant to be present on the site at all times. the kind and frequency of the acts of occupancy nec. to constitute continuing possession are dep. on the nature and condition of the premises as well as the uses to which it is adapted." a.k.a. "it depends"
-*Jarvis* held that P's 'on and off for 39 yrs' was sufficient – again, deferential.
-*Jarvis* stretches the continuity req
(ii) *Mendonca*: (p.185) strict standard (3 wks)
-gas station is on strip of land in Ma, where there is a 20 yr statute of limitations; put up fence, but boundary line was beyond that. Mendonca (P) was adjacent and used strip of land for 15 yrs; construction on gas station, tear down fence, store stuff on strip for 3 wks, put fence back up, P uses it for another 17 yrs. P sues for adverse possession when try to build on strip, but ct holds that 3 wk break in possession of 32 yrs broke the continuity. → a little strict.
(iii) seasonal use: land in upstate Vt used for logging, except from Dec-Mar. when snowed in. → Q: if you are a would-be adverse possessor and you are faithfully possessing that land seasonally, can you claim adv. poss.? jur's split.
b) continuous by whom: can several diff. actors combine their time to claim adverse, continuous possession? → *sometimes*
= **tacking**: linking 1 person's adv. poss. time to another's = when successive occupants are in **privity**: any kind of *voluntary* hand-off or transfer of possession
-transfer by: agreement; will; sale = can actually transfer your 'trespasser' status b/c of *relativity of title* – still a legit. possessory interest
-exception: if you 'hop' off for a few mo. and someone else comes on, they can't benefit from your time there b/c rel. btw you & them isn't voluntary

4. Open & Notorious:
→ i.e. someone can see you. (fairly obvious, b/c how can you be in actual & continuous possession if it's not open & notorious)
a) AP has to put true owner on notice that there is a person on the land – not hard
b) exception where actual & continuous are satisfied, but not O & N:
(i) where actual & continuous is not visible b/c underground
-*Marengo Cave v. Ross*: cave goes under Ross's prop. entrance to cave is on adjacent prop. where owner charges pp to go in. it's not open & notorious that they're uner Ross's land; but it's open & notorious that they're entering cave on adjacent prop. and that they will *end up* on Ross's land.
→ ct. holds *not* open & notorious: what if pp. had used cave long enough that it was open & notorious. does *ad selum* rule work in reverse? i.e. if they satisfied a claim to the underground, could they ∴ satisfy claim to Ross's land? ct didn't want to deal w/ this issue, so held not O&N
(ii) slight discrepancies in property line
-*Manillo v. Gorski*: Neighbor 1 builds dog house slightly onto neighbor 2's land, which is detected during a survey for sale. N1 claims adverse possession for 4 inches that dog house took up on N2's land. it seems O&N, but don't know it's crossing the prop. line.
→ to say it's O&N would place the burden on N2 (D) to know exactly where her prop. line is. ct was willing to take the 'innocent improver' doctrine & let P buy 4 inches from D (minority rule)

5. Exclusive:

→ covered by a lot of other req's like continuous or O&N
-doesn't mean just 1 person; law recognized joint ownership to be exclusive too
-hypo: you own beach-front prop. and pp trespass to go to beach, but not same pp. every day – *can't* say 'public as an entity' could claim your land. = how exclusivity works

6. Hostile:

→ statute of limitations has to run, have to pay taxes, & must have all other req's so far
a) based on objectivity of whether you had permission to be there (obviously if you had permission to be there, you didn't intend to be adverse possessor)-
b) did he act as if he owned it; beliefs as to true ownership is necessary
c) where user has acted without permission of owner in manner inconsistent with true owner's rights these acts alone may e sufficient to put true owner on notice of non-permissive use

Minority view: have subjective good faith belief that the land is actually yours

7. Claim of Right:

→ about state of mind of trespasser
a) Iowa Rule: (innocent wrongdoer) technically a trespasser but good at heart: requires them to think that they are actually not trespassing to get it = *Carpenter v. Ruperto*
b) Maine Rule: Bad people win only: requires that you do something wrong; it facilitate land use
c) Modern Rule: Don't care what mental state is = *Manillo*
d) complications: -have to know what jur you're in

-how do you know what the intent of the adverse possessor was? (subjective)
= easy to mold testimony, ∴ tough to overrule

e) Helmholz effect:

-nevertheless, in jur's where the express rule is that they don't care about state of mind, pp that know they're wrongdoers lose a lot more than the good pp., so jur's do still care somewhat about state of mind = has acquired the effect of 'common courtesy.'

➔ much room for discretion amongst these rules

8. Exceptions:

a) Fed Govt. Land Exception: If the federal government owns the land then you can never get it through adverse possession
b) Local Govt. Land Exception: depends on local law but usually you won't be able to get it
c) Exceptions to when the SOL can start running: they are in jail, if they are a minor, if they are incompetent (these are based on jurisdiction)

9. Other Aspects:

a) Burden of Proof: on adverse possessor
b) Trespass Action Against Adverse Possessor (who got your land): (B/c statute goes further than adverse possession): doesn't work because once you end your adverse possession that is it
c) Color of Title:

- (deed/will/etc) or a judgment/decree which, unknown to the claimant, is defective and invalid. in this case, the grantee takes possession *under color of title*, and no further claim of title or proof of adversity is req'd. the claimant is deemed to be in adverse possession of the entire property described in the instrument provided the tract of land described in the deed is recognized in the community as one defined parcel of land. = constructive adverse possession.
*if no color of title, the adverse possessor is only in possession of the land she actually occupied or controlled in a manner consistent w/ ownership of the premises.

d) what if you build a structure partially on someone else's land and you lose? Potential options:

-Remove it
-Keep it but pay true owner for the land
-Remove it, but true owner pays for the move
-If you can separate, do it, but if you can't then too bad for the improver.
-innocent improver doctrine applies**:**

→ *Somerville v. Jacobs* (minority rule) – mistakenly built warehouse on someone else's land; innocent landowner gets to keep the structure, but has to pay for it or allow the loser AP to buy the land = forced sale
-majority rule: trespasser has done things at his own risk, so true owner gets land and house
-other options: if trespasser can take back the structure "with him" then do that

-or land owner can pay trespasser for improvements

e) note: One thing you don't get by virtue of getting property by adverse possession: piece of paper saying it's yours; you'd have to convert the judgment into paper title.

D. PURCHASE:

1. Normally you cannot transfer more than you have. You can only transfer Blackstonian ownership if you have it BUT there is one EXCEPTION where the purchaser of an item for value can defender it even from Blackstonian owner if the purchaser has bought from a merchant from whom the Blackstonian owner or prior possessor has entrusted it to. This is the voluntary entrusting exception, stated in UCC §2-403 (p. 139).

2. So if have Owner----Merchant----Purchaser relationship, Purchaser may obtain Blackstonian ownership.

3. Statutory estoppel: Any entrusting of possessions of goods to a merchant who deals in goods of that kind gives him the power to transfer all rights of the entruster to a buyer in the ordinary course of business.

4. Equitable estoppel: An owner may be estopped from asserting his title against a bona fide purchaser for value where the owner has clothed the vender with possession and other indicia of title. → may apply to stop O from asserting rights.

Porter v. Wertz (N.Y. App. Div. 1979): Wertz had nothing to transfer because the Utrillo painting was consigned to him for display purposes, not business purposes, so owner gets it back.

E. GIFTS (not in a will):

→ *Gruen v. Gruen*

1. Promises that the law will not recognize: promise to do something upon death, promises to put someone in a will are not enforceable; expectancy – one who expects to become a beneficiary of a will, but is excluded from the will. In both of these areas, driving force is to affect the intentions of the party transferring the property.

2. Sometimes people want to give away property at a time other than at their death. But if you give legal force to promises to give property away, there are problems with lack of consideration and the lack of formality that the law requires. We want to allow people the opportunity to change their mind when they make a promise of a gift. But, **if you actually transfer the good, a valid gift is effectuated**: **intent, delivery, acceptance. = criteria to make a gift enforceable**. Also, may let you take it back.

3. Interesting questions: what counts as delivery? (i.e., you don't actually deliver a house, giving the money held in a bank account). There are instances where actual physical delivery is impossible. Law creates constructive delivery – but how far is the law willing to stretch this idea?

4. *Foster v. Reiss – gift causa mortis* - Someone makes a promise to make a future gift expecting to be dead in a week. Separate category of gifts: no time to write the will or get consideration, but it's obvious that it was the dying person's intent.

5. Rule: **must actually deliver. Very strict**

III. SYSTEM OF ESTATES IN LAND

*might go back to beginning of PROP11 for summary chart

A. INTRO TO ESTATES:

1. Two things in a grant:
- **a.** an identification (who's the recipient) – **words of purchase** - "To X"
- **b.** specification of how long you get the land for – **words of limitation -** "and his heirs"

2. The Concept of a **Fee** – effectuate intent of grantor

→ Two important principles:
- **a.** Potential of the property interest to possess to infinity
- **b.** Freely transferable

3. future interest=the carving up of ownership rights of personal property over time.

4. Mathematics of Estates: The sum of the quantities of all estates/ interests existing in the same land simultaneously must equal a fee simple absolute—that is, they must sum to infinity.

-Example: LE to A and R to O=FSA.

5. Transference

a. Inter vivos: transfer during life.

b. Otherwise: After death, through will. If not will, then law of intestacy. If no one to give to (no heirs), then goes to state.

6. Origins:

a. control of future "uses" really means control of future **users**

b. system originates in feudalism, originating w/ William the Conqueror giving our parcels of land to get pp to fight for him; and same type of land grants cont. to be subdivided down the feudal chain

= ownership originated from service, not possession

= also shows that all land rts has to be traced back to a grant from a sovereign

c. 2 main aspects imported to our system:

i. life of grantee = measure

ii. incidents (personal relationships created by oaths sworn to each other)

-ex: escheat, wardship, marriage, relief (inheritance tax)

d. note there are no heirs until the possessor dies; while possessor is living, heirs-to-be are called beneficiaries

e. ways that made land more transferable/ have bias against restricting transferability:

i. abolish transfer tax

ii. "to X and his heirs" system = rights can go to infinity/ future interests are legally cognizable rights

iii. no longer owe services/ incidents to pp from whom you get land

iv. timeline of property can have different "lifetime measurements" when A transfers to B.

v. can sell part of land rather than all = more marketable

-also, pp that get subunits owe service only to original grantor (king) = more efficient system

vi. also can't transfer on the condition that there will be some legal act performed or that there will be no other transfer

7. 3 ways to carve up timeline/ words of temporal duration:

a. fee simple: potentially infinite interest

b. life estates: ownership measured by someone's life (not nec'ly possessor's life, just a finite lifetime, so it will definitely end at some point)

c. tenancy (covered in a diff. §) = ranking for when there's been a reversion

8. Tensions in Law:

= Btw intentions of grantor v. policy law wants to pursue:

9. modern law errs in favor of the grantor

-at least so far as "magic words" no longer absolutely necessary to effect a certain type of grant – but still often used anyways

-ex: old rule = "to A" means just for life

new rule = "to A" is presumed a fee simple (for infinity)

10. Labeling:

**temporal* interest will always be a present interest name (fee simple/ life estate)

-ex: "reversion *in fee simple*"

*future interest as 2 parts: 1st part = future interest label (1 of 5)

-2nd part = present interest label (1 of 2 labels)

B. FEE SIMPLE (FS) – an interest in property that is **potentially infinite** ("fee") and **freely transferable** ("simple"). Hierarchy of present interests: fee simple → life estate → tenancy

= uses "and his heirs" language

*note – if you start w/ a FSA and you convey away a DFS, you have a reversion

*A has an FSA; conveys B an FSD – A retains a possibility of reverter as an FI

*A has an FSA; conveys B an FSSCS – A retains right of entry (ROE)/ power of termination (POT) as an FI

1. Reversion – a reversion is a future interest left in the *grantor* after the grantor coveys a vested estate of a *lesser* quantum than he has

-ex: A divides his fee simple and conveys a life interest to B; A's future interest is a reversion; when B dies, A's interest becomes a present interest in fee simple
-ex: A only has a life estate from a grantor (finite interest) – if A leases to B for 5 years = "lease to B; reversion to A in life estate;" but if A dies tomorrow, B's lease ends b/c if A's interest falls, so does B's
*will see later – you can keep a reversion, even in a 2000 year tenancy

2. Different kinds of fee simples with differing degrees of 'potential infinite' ownership:

a) fee simple absolute (FSA) – *actually infinite/ absolute ownership*

i. *White v Brown* (TN) – "my home to live in & not to be sold." → what is it?
-formality of saying "and his heirs" no longer needed to make FS (used to need it, otherwise, only LE). Presumption is that if there's no mention of any restriction, you give up everything → determined to be an FSA.
*note S.Car. still requires magic words "and his heirs"; ME – not clear.

b) defeasible fee simple (DFS) – *potentially infinite/ possession is contingent*

-goes back to grantor (reverter) or someone else (remainder or executory interest) upon the happening of some event. i.e. can be terminated if condition is set and failed. it is still an FS though b/c it has the *potential of infinite duration*.

i. *limits on conditions:
-law disfavors preventing transferability of land
-conditions involving criminal/ wrongful activity will also usually be read out
-it IS possible to have a limitation on the use of land however, even if it has a substantial effect on the value of the land & future possibility of transfer

ii. 3 types of Fee Simple Defeasibles:
*Difference between FSD and FSSCS: if condition is breached, **FSD** ends **automatically**, while **FSSCS** gives an **option** to owner to end it.
*Ambiguity:
-"To A & his heirs so long as no booze is sold on the property" = FSD
-"To A & his heirs, but if booze is sole on the prop, then you're out" = FSSCS
*every PI has a corresponding FI; when the PI ends, the FI will turn into a PI
ex: A has a FSD, O (grantor) has a POR in FSA, if the FI (POR) becomes a PI, it will be an FSA.
ex: If A gives B an LE, A has a R in FSD and O still has a POR in FSA.

a. Fee simple subject to executory interests (see below re: future interests)

b. Fee simple determinable (FSD)
1. "To A and his heirs so long as no booze is sold on the land."
2. **Possibility of reverter (POR)** = corresponding FI: the instant the condition is violated, grantee's PI vanishes, meaning the FI (POR) becomes a PI *automatically*; doesn't matter if / when grantor knows about it
3. "as long as no booze is sold"; grammatically, the condition ***flows***; condition is part of the same natural exception.
→ "until", "unless", "so long", "while" – these sorts of transitional words that grammatically speaking smoothly carry the thought

c. Fee simple subject to condition subsequent (FSSCS)
1. "To A and his heirs[,] but if booze is sold on the land, then you're out."
2. **Right of entry (ROE)/** Power of Termination (POT) – when condition is violated, holder of the FI (usually grantor) can, *if they want*, end the PI (FSSCS). otherwise, the grantee's interest continues
3."but if booze is sold on the land, that's it"; grammatically (comma, pause, but) condition is phrased like a second thought; condition is a subsequent thought
→ "but", "provided that", "on condition that" – suggests a break in the thought
4. to exercise that right, grantor can
-sue in ejectment – most common
-letter signed by lawyer saying to get off, threatening suit – probably
-best way to tell is to put it in grant

*note valuation problem w/ PORs and ROEs – if someone wants to buy the whole "timeline" of the prop, they have to deal w/ 2 pp, estimate conditions/ lifetimes

d. Instances where there's a difference between a FSD and a FSSCS:

1. Transferability of Interests
    a. Present interests are generally transferable
    b. Reversions are transferable by will or intestacy, also by sale.
    c. POR can be sold, transferred by will/intestacy in all states except one, Illinois.
    d. ROE in a significant # of jurisdictions cannot be sold, but can pass by will/intestacy.
    e. But in Illinois, by statute, there are only 2 ways to pass PoR or RoE – dying (can't sell during lifetime), but you can sell/give to holder of the present interest (i.e, create a fee simple absolute – the defeasible condition vanishes)
2. Statute of Limitations Issues and Fee Simple Determinables
    a. With a FSD, when the condition is broken, the SOL on adverse possession beings to run immediately. (i.e. so grantee could try to reclaim from grantor if grantor doesn't make a claim w/in SoL)
    b. With a FSSCS, the SOL on adverse possession begins to run ONLY after the grantor has began to exercise his ROE
3. Govt exercises power of eminent domain:
    -Qs can arise over who's entitled to compensation award. in an FSD, if defeasibility event occurs and 2 mos after that the govt condemns the land, the person who held the PI is out of luck and the person who holds the FI, now the PI, wins. but w/ an FSSCS, it doesn't seem to matter
4. *Mahrenholz* – FSD or FSSCS? Depends on how condition for use of school was written. Depends when owner can say he can use ROE.
    -decide it was an FSD b/c condition "flowed" w/ the grant

vi. Many jurisdictions have a fairly strong presumption of FSSC/ROE since it's a less drastic type of grant and more flexible to the holder of the FI.

C. LIFE ESTATE (LE)

1. When you carve a life estate out of a FS, grantor retains a reversion (R)

2. Construction – "To A for [A's] life." Presumption is to measure by A's life, but it's conceivable that it was supposed to be the grantor's life (EX "To A for life, then to my kids and their heirs") Always a good idea to say who's life.

a. *can* be someone else's life; and for more than 1 person's life
b. if measured by more than 1 life, must be rsbl #; otherwise, grant is invalid
c. must be a human's life
d. if measured by beneficiary's life, when he dies, the LE ceases to exist
e. Person doesn't have to know that their life is being used as the measure.
→ **ex**: O grants land to A for life; A grants to B for B's life. If A dies before B, B's interest is terminated. If B dies before A, then A has a reversion even though it is not technically a reversion b/c A has a life estate and not a fee simple.
→ **ex**: "to A for A and B's life" – seems to mean that A's interest only last so long as *both* A and B are alive; but could also mean A's interest lasted until both were dead = matter of interpretation

3. All of the **defeasibility doctrines** that work in fee simples **also work in life estates *and* tenancies**. (can have an "LED" and "LESCS")

a. ex: "To A for A's life so long as no booze is sold." = **LED** (life estate determinable)
= Grantor has kept a reversion in FSA in granting the LE.
= But the condition also lets the grantor keep a POR in FSA
→ but law only says the grantor has a R in FSA
=The grantor can have more than one future interest created in the same grant/ FI becomes possessory on either of 2 events
*note: tenancies: almost always defeasible (condition = pay rent)

b. All the interpretations, definitions are same in grants of defeasible life estates and defeasible fee simples.
i. When the grantor keeps an R and POR, since they both work the same way, no need to mention POR, just say reversion even though they would happen at different times.
ii. But if the grantor keeps an R and ROE, then you have to mention both the reversion and the ROE, since ROE needs action to happen.

4. The future interest in a life estate of another carved out of a life estate of my life is a reversion. (counter-intuitive to the idea that you don't call a fee simple carved out of another fees simple a reversion, i.e. PoE, RoE)

5. Interests can change their names by way of conditions happening or not happening, but they do not change their names by being sold, given away, inherited.

6. LAW OF WASTE - How does the future right of possession have an impact on the present?

a. holding an FI allows you to control **uses**

b. If there are no future interests, the only restraint on the present possessor is just the general tort law.

c. Usually, the parties try to deal with issues of land use at time of creating the grant, but if they don't, look to the law of waste. = "backup/default provision"

d. Basic principle of law of waste: controls must be reasonable; Depends on different things: kind of land, kind of use involved, also the kind of present and future interests involved.

-note, however, that a specification of uses does not make the law of waste go away – only if you specifically say so

e. Possible Remedies:

i. Damages – If it's something simple like a LE in A w/ a R to O, court will make an actuarial guess about A's lifespan and will take difference between what the reversion would have been worth had A acted reasonably for his estimated life and what it's worth after A destroyed the land.

ii. Injunction – chances of getting an inj are directly proportional to the likelihood of future possession. = discretionary remedy

iii. Third possible remedy – **forfeiture** - awarding the reversion of the land back to the grantor (not really followed in American law, **but mention anyway**)

f. Different ways to commit waste on the property. No legal consequence to the 1st two different labels.

i. voluntary waste - Doing something terrible to the property: drain the wells,

ii. permissible waste - failing to do something good to the land, like maintenance Also, failing to pay property tax (government takes the land and sells it as a fee simple absolute)

iii. ameliorative waste – if present interest holder improves the value of the land. Never caught on - increasing the value of the land is not waste in America.

7. "To A and his heirs, but if A dies, then I retain a ROE." or "To A and his heirs so long as A is alive." Law calls this a life estate with a reversion in FSA, even though form is a DFS (which would give the grantor a POR or ROE, depending on the form of the grant). Matters because the grantor's FI comes out different.

D. FUTURE INTERESTS IN ANOTHER PARTY

→ **Remainders** (RM) **and Executory Interests** (EI)

= Any FI that a grantor creates in a 3rd party

*note: FIs take their names at the moment they are created and don not change simply b/c they are transferred

-ex: if grantor gives grantee a RM, but grantee gives it back, grantor has a RM

*type of FI may change, *but only b/c of events in the world,* not b/c it was transferred

-executory interest: any FI created in a 3rd party that *isn't a remainder* = residual category

*see more info below → *1st must determine if it's a remainder or not*

1. Remainder criteria: (doesn't meet these, then it's an EI)

a. Capable (i.e. can't be impossible) for the FI to become a possessory interest as soon as the PI ends

i. ok - "To A for A's life, then to B and his heirs."

ii. NOT ok - "To A for A's life, then one week later, to B and his heirs."

iii. ok – "to A for A's life, then if B ever gets married, to B and her heirs" – possibility for immediate possession is all that matters

b. Cannot divest any prior interest (other than the interest retained by the grantor) – has to wait patiently for the PI to run its natural course, rather than "snatching" PI away

= *purely grammatical distinction*

i. NOT ok: "To A for A's life, but when B gets married, then to B & her heirs."

= "snatches;" grammatically attached to B's grant (like a LESCS)

ii. ok – "To A for A's life so long as B does not get married during that time, otherwise to B and her heirs."

-condition flows as part of the same thought of the grant

iii. ok -"To A for A's life, *then* if B ever gets married, to B and her heirs."

-does not "snatch" b/c B has to wait for A's life to expire
-might actually revert back to grantor 1st, but if B "snatches" it away from him, that's ok

c. cannot follow a FS. (Follow" means "take possession following a FS", not simply that the language comes at some point after a FS in a grant.)

i. "To A and his heirs so long as no booze is sold, then to B and her heirs"

-**full analysis**: a) B's interest <u>can</u> become possessory immediately after A's interest ends; b) condition *flows* – A's interest is an FSD; if booze is sold, it's not b/c B divests/ snatches it. c) B's interest comes after a possessory FS, so is an **EI**.

➔ if doesn't meet these criteria, it's an EI

*<u>operational difference</u> btw EI & RM is NOTHING – both become possessory interests *automatically* when their time is due/ when the events happen – nothing like a ROE here

*note however that a grantor can create an FSCSS w/ an ROE in himself, and then transfer that to a 3rd party – grants don't change names when they're transferred

*<u>legal difference</u>: whether you can create them at all, acc. to the Rule against Perpetuities

d. two kinds of remainders: determine if vested first

i. <u>vested</u>: must satisfy 2 more conditions

a) beneficiary of the future interest must be ascertainable/ identifiable

-ok: "to A for A's life, then to B <u>and his heirs</u>."

-maybe: "to A for A's life, then to B's children & their heirs."

-if B doesn't have kids when grant is made, then not vested

b) cannot be subject to any condition precedent other than the expiration of the prior estates

→ Q: does anything have to happen in the world other than PI running out in order for the FI to become a PI?

c) 3 types of vested remainders:

1. **<u>Indefeasibly</u>** <u>vested</u> – if it becomes a PI, there are no other FIs out there that can take away the interest.

-"To A for A's life, then to B for B's life."

-not that much a problem w/ valuation

2. <u>Vested remainder</u> **<u>subject to divestment</u>** - there's an external condition that can take away the PI (condition subsequent)

-"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."

1. If C passes the bar, C is going to snatch the property away from B. There's a potential that C is going to come along and take B's property.
2. This is not condition precedent, but condition antecedent.

* no legal difference between indefeasible and subject to divestment

3. <u>vested remainder</u> **<u>subject to open</u>** <u>(subject to partial divestment)</u> – the number of people in who the FI will vest has the potential to increase

-"To A for A's life, then to B's children and their heirs."

→ Assume that there is a child at the time the grant takes affect, there's a vested remainder. Two years after grant takes affect, A's LE is still running and B has another child. Now there are 2 people with a vested remainder. Each time a new person is added to the class, each member's share goes down. – poses problem of <u>valuation</u> – who to buy the land from?

-<u>When does the class close</u>?

→ when mother dies – **biological (or physiological) closing**

→ **rule of convenience** – presumption that as soon as it's possible for the R to become a PI, at that moment in time, the class closes. Anyone who comes along later, like a child born

after the R becomes a PI is out of luck (but the grantor can draft around).

i. <u>contingent</u>: <u>residual category</u> if don't meet above criteria

-ex. vested - "To A for A's life, then to B and his heirs."

-ex. contingent - "To A for A's, then to B and his heirs if B has passed the bar." = B's interest depends on something else in the world happening (B passing the bar) other than A's estate running out (contingent).

a) pose <u>problems of valuation</u> b/c you can't (either) ascertain the beneficiary or there's an uncertainty caused by a condition

b) <u>definitively failing to vest</u> – "fizzling out" - when certain events happen that make it impossible for a FI to ever become a PI

→ "To A for life and 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" according to law and "fizzled out" according to Lawson

c) common law: contingent R ends if condition not met in time – someone always has to be able to take possession. Now, grantor is default, so there is always someone.

2. Executory Interests:

→ 2 different types of executory interests (no legal distinction): shifting or springing

*function like a POR

a. shifting – <u>snatches</u> property away from someone other than the original grantor

b. springing – smthg that can't be a remainder b/c of a <u>gap</u>

-"To A for A's life, then one week later, to B and his heirs." = can't be a remainder (there's a necessary gap), what happens to the property when A's life ends for that week? Grantor kept the week – has a reversion. One week after the reversion, B's FI springs out of the grantor's possession and becomes a PI. Another ex: To A and his heirs ten years from now.

➔ "<u>State the title</u>" – identify every PI and FI that are possible, FI kept by grantors are not always explicitly stated in the grant. think about all the <u>*possible* interests</u> there are

-ex: "To A for A's life, then to B and his heirs if B ever passes the bar."

-LE in A for A's life

-CRM in FSA in B

-If B is alive, but hasn't passed the bar when A's LE terminates, grantor keeps the timeline that B would have got → R in FSA in O

-Also, grantor keeps time between time when A's LE ends and B does eventually pass the bar. Either B will never pass the bar or at some point B will pass the bar → R in FSSEI in O

-Combine them and call the grantors future interest - R in FS.

-ex: "To A for A's life, then one day later to B and his heirs."

-**<u>Shortcut</u>**: If the grantor starts with a FS, the grantor will keep a R in FS unless one of these two things has happened:

-The grant creates a present possessory FS

-The grantor conveys away a vested remainder in FS

E. RULE AGAINST PERPETUITIES (RAP)

→ law has preference for marketability of land. RAP tries to promote this.

**APPLIES ONLY TO FUTURE INTERESTS IN 3RD PARTIES (NOT GRANTOR).

1. RAP applies *only* to **CRM**, **VRMSTO**, and **EI**, but not to POR or ROE.

*these are the ones whose nature makes them hard to put a value on in certain situations → RAP then tried to "outlaw" those situations

2. Q: will it "vest"? = will it make the uncertainties that we are worried about go away w/in a given time (specified by law); vesting can happen in 3 different ways:

a. The FI becomes **possessory**.

b. The FI becomes a **different FI not on the "hit list"** (CRM, VRMSTO, EI)

c. The FI definitively fails to vest ("**fizzles out**") – becomes impossible for it to become a PPI, then there are no uncertainties; it's off the timeline

3. traditional rule: judge validty at time grant is created

a. FI has to vest "not later than **21 years** after some life in being at the creation of the interest"

b. Problem w/ the rule is that it determines if the grant *might* not vest w/in the allotted time *when the grant is made*, and invalidates them right away, rather than waiting & seeing.

*note – w/ a 21 yr limit, even "to A & his heirs in 25 years" would be invalid even though there's no uncertainty

c. Measuring life – any person who is alive at the time that the FI is created who might conceivably be the lifespan that gets added to 21 years to see if the FI is valid; these always exist for FIs → possibilities:

i. Beneficiaries of the grant: including all PI and FI in the grant
- -unascertainable beneficiaries *don't* count
- -must be alive at time grant is made

ii. People who can affect the identity of beneficiaries
- -i.e. if kids are beneficiaries, then parent is a measuring life (VRMSTO)
- -but if it's "to B's children," even B's spouse *doesn't count*

iii. PP who can affect conditions in the grant
- -limited, identifiable group of people whose actions that can directly affect conditions in the grant; need to be identifiable, can't be general
- -ex: "to B for life if T gets married" → T can affect condition

➔ Q: If in 21 yrs after the last of these pp die, under all possible scenarios, will the FI we're worried about have resolved it's uncertainties? if yes, then valid

d. Validating life –someone whose life span + 21 years absolutely, positively guarantees that one of the 3 things will happen for the relevant FI to vest

-ex: "To B for B's life, then to A if T gets married."

= LE in B for B's life; A has CRM in FSA → evaluate:

1) A & B = beneficiaries
2) nobody affects their identities
3) pp who can affect the conditions = T
4) anyone w/in 21 yrs after they die will make FI be resolved?
   - -B? no (he has the PI, not FI)
   - -A? no: if A dies and T hasn't married yet, then unresolved
   - -T? yes. when T is dead, either she is married or not. if she dies w/o getting married, then A or whoever succeeds A's interest is out of luck → either the FI will become a PI or it will fizzle out.
   - ➔ ∴ T is a validating life

e. Blow up theory: if you blow up all measuring lives, will any of the 3 things happen/ will FI vest w/in 21 years later? if yes, then valid FI.

f. Rules of thumb:

i. If the interest is tied to a lifetime of a beneficiary, then you know it's a valid FI since you get the time of the life, with 21 years to spare.
- -but if not tied to lifespan, not nec'ly invalid; just be suspicious

ii. Where the condition is not dependent on the action/inaction of a specific person, those are the ones to be suspicious about, even if the condition seems like it will cause the grant to definitively fail or vest within the time period.

iii. RAP calls for you to indulge yourself in imagining every theoretical possibility. ("next Presidential election" might not happen)

iv. Anytime you see grandchildren or great-grandchildren in a grant, be on guard for the RAP.

a) But not all GC fail RAP: Remember the **rule of convenience**: if there's a FI that looks like it's ready to take possession and there's at least one person ready to take possession, the class gets closed - any GC alive at that time are in, any future one's are out

*But the grantor can draft around this and explicitly say that he wanted all GC in, regardless of when they are born; in that case, the class remains open and the RAP invalidates the FI

IV. COTENANCIES

A. JOINT TENANCIES (JT); TENANCIES IN COMMON (TIC)

= forms of co-ownership; both must be entered into voluntarily
= Law of Concurrent Interests - deals with situations where ownership is carved up between persons at the same time.

1. Both 100 % Right to Possession:

a. both have same legal result *as long as co-tenants are alive*
b. all co-owners have absolute 100% right to possess and use property, regardless of % of financial stakes in the prop
c. this can come into conflict though: *Schwartzbaugh v. Sampson* – wife wants her walnut tree; husband wants a boxing pavilion (get divorce)

2. Differences

a. if land is sold:

TIC: shares are apportioned acc. to financial stakes
JT: pp get equal shares

b. when at least 1 cotenant dies:

-if 2 co-owners, A & B; A dies:
TIC: A's (financial) stake goes to A's heirs
= TICs are inheritable & descendable
JT: A's stake "implodes"/ disappears into legal black hole
-JTs not inheritable
-when a co-tenant dies, his interest vanishes, & remaining co-tenants' interests expand to fill the void
*if 2 JTs die simultaneously, the estate of each gets half
-practical difference: for JT, if there were ever any encumbrances on A's property, then they're gone - ∴ a mortgage lender would never lend to a JT
-but for a JT, A has no control over what happens to prop when he dies
-but TIC can complicate estate-planning

c. Profits on the land:

TIC: gets % the he owns (unless K says otherwise)
-i.e., what you put in is what you get out
JT: gets equal % of profits as all other co-tenants

*modern presumption is that TIC is preferable

3. TIC is default category

4. 6 things required for a JT:

a. must be in a state where JTs exist
b. manifest intent to be in a JT
-just saying "I want to create a JT may not be good enough
-best way: "I mean to create a JT w/ right of survivorship and not a tenancy in common."
-*Hoover v. Smith*: "I want a JT and *not* a TIC" – not good enough b/c left off "right of survivorship"

(4 unities)
c. Unity of time: all co-tenants have to get their interest in land at same time; if 1 today, then 1 tomorrow, not good enough
d. Unity of title: same piece of paper
e. Unity of interest: financial interest: must all have same financial stake/share
f. Unity of possession: same present interest label ("same slice of the timeline")
-can't have 1 person w/ an FS and another w/ an LE

*note: many jur's have changed these req's by statute
-4 unities must be in effect throughout lifetime of JT – if not = severance
*under modern law, only need unity of interest and explicit intent to create (#1 above).

5. Transfer of JTs:
= **severance** = when JT becomes a TIC

a. happens thru sale, gift, etc – anything w/ transfer of the title (upsets unities of time & title)

b. Sale of Land To another person-If you have joint tenancy and one of the tenants sold their stake in the property then they become tenants in common

→ Ex: A & B are JTs in a plot of land. A sells to D. ∴ no longer a part of join tenancy if they wan to or not

→ Ex: (3 person scenario): ABC = JT in Land A sells to D so D = TIC w/ respect to B &C but B & C are still JT between themselves

-If B dies remaining JT interest of B goes to C and C then has 2/3 financial stake & D has 1/3

c. Sale of Land to Self: If A and B JT and A conveys land to himself then he breaks the JT in TIC

d. Leasing out Your JT:

i. in CA if you lease out your JT there is no severing of the JT (*tenant v. Boswell*); in Mo, lease severs the JT, making it a TIC (*alexander v. boyar*)

-∴ if Mr. Sc dies during the lease it would seem that would seem to give Mr. Sch the user of the land and full land to fill in Black hole in CA; (this probably doesn't go along with their intention but goes along with four unities)

ii. lessee would have the same rights as the co-tenant whom she is leasing from (in possession rights)

iii. the one party may collect rent from a third party who is leasing the land from them but you can't collect rent from a co-tenant

iv. the profits that a third party makes also go to the parties equally

e. Mortgages:

→ 2 Theories if you have mortgaged your interest in a joint tenancy:

i. Title Theory: in about half the states you are basically selling the property to bank and buying it back from the bank (therefore you are giving title to them) – therefore the JT will be severed

ii. Lien theory: still own land but lender has a financial interest

iii, note: if you are a person who lends out on mortgages you are not going to lease out to mortgage to a joint tenant unless:

a. you get the other joint tenants to sign onto the lease (or)

b. a law is created that says even if joint tenants mortgage survives (mortgage is rescued from black hole) – mortgage is of equal proportions so you get that

B. RIGHTS OF COTENANTS:

1. . *Swartzbaugh v. Sampson* – duty not to interfere with other person's enjoyment. Must be really intrusive.

2. Options for when co-tenants who both have 100% right to use & possess want to do different things:

a. partition – Co-tenants literally physically carve up the property and create sole, individual ownerships of parcels of land.

i. used for both JTs and TICs

ii. Cons: parties may not want to do this, dividing up property physically is not easy – subparts of property are not equal to the property as a whole; what if there's an oil field on one parcel of the land? how do you decide who gets it?

b. owelty – 1 person can pay $ to the other to get more valuable piece of land
-but there must be a way to physically divide the prop

c. accounting - a settling up, relative equities of the situation – usually incident to a partition; must determine who's resp. for increasing/decreasing value of prop

i. things taken into account:

a) necessary/ "carrying charges": basics, nec. for maintenance of rights – i.e. taxes, mortgage payments, insurance, etc.

b) repairs: not nec. to maintain title, but is nec. to maintain basic value
-get credit for actual expenditures, but not before accounting

c) improvements:

-get credit for reasonable value of improvement

3. Waste Issues:

a. when co-owners hold the present interest together the doctrine of waste does not govern.
-an analogy exists though: If someone creates a wasteland with the property, theoretically there should be no possible action against them since they have complete possessory rights.

b. cases:

i. *Clark* (Ala.): There is a cause of action in egregious situations.

ii. *McCord* (Cal.): There is no cause of action. usually just partition anyways b/c wouldn't want to be co-owners any more

iii. If A & B are co-owners, and A leases to T;T abuses the land. Only A can sue T for waste purposes. We don't know if B can sue A to sue T because usually they just partition.

4. Statute of Anne: co-owners obliged to share profits, but not losses

a. Co-owner obliged to share rents received with the other co-owners whether or not they are on the lease. This has been adopted by all states by statute or common law.

b. Share of net rental income (after expenses, so if expenses outweigh rent co-tenant gets nothing). Co-tenant shares profit but not loss.

*note, if T1 makes bad deal, T2 can't claim he should get part of what would have been a reasonable deal

c. This only applies to third party renters. If B goes away (or does nothing with property), B cannot ask A for rent. However, some states say when one co-tenant possesses over the other, they have to pay rent.

5. ouster: One co-tenant physically denies other co-tenant of possession of property. One co-tenant must have specific concrete demand to use or possess property and be rebuffed.'

→ consequences:

a. Usually partition BUT

b. Ousted tenant can say that reasonable rent should be paid to them since other co-tenant has claimed 100% use or possession right.

c. Ousted tenant can say co-tenant is adverse possessor, but since co-tenant has 100% use or possession right, this shouldn't happen. Almost always, partition happens anyway.

V. LANDLORD-TENANT LAW:

A. NATURE OF A LEASE:

*lease is a present possessory interest in the land; reversion to landlord

→consequences: tenancies are usually defeasible on the condition that of not paying rent
law of waste applies
landlords can keep FIs (like POR or ROE)

1. Property v. Contract: signing a lease does 2 things at once:

a. prop. law: there is a creation of PI & FI, as well as laws re: conveyance of land

b. K law: creation of a K.

2. Solving Disputes:

a. read the lease – hopefully will provide resolution, but often transaction costs are too high for figuring out all possibilities; next step =

b. Common law approach: reacts to certain situations in certain ways

c. statutes

3. 3 different kinds of tenancies: acc. to how they end

-All can end by defeasibility written into lease.

-Only real difference is the other way to terminate and when notice has to be given. Sources of law to look to in order to figure out when tenancy ends -the hierarchy, generally is lease → statutes → common law:

a. term of years

i. end date must be specified in lease

ii. ends by clock running out or a defeasiblity condition blowing up

b. periodic tenancy

i. there is a term involved, but at the end of that term, instead of having the lease end, the lease automatically renews. Can only terminate at the end of a period.

*if it's periodic, you must figure out what the term is (i.e. month, yr)

ii. ends only if you say it affirmatively in the K or you give notice

iii. Notice: (way to end it)

a) When does the notice have to be given?

i) under common law, notice is due by length of tenancy, if less than 6 months. If more than 6 months, due by 6 months.
ii) Statutes: generally have shortened the time of CL notice
iii) Lease: Parties can agree to notice time in the lease itself; can specify a term different from CL or statutes (CL, & statutes in this case are usually default rules that kick in w/o anything express in the lease)

b) What does the notice have to consist of?
i) CL: doesn't say
ii) Statutes: sometimes do – i.e., "notice must be sent by registered mail"
iii) Lease: Parties can specify any form of notice they want in the lease; generally notice has to be in writing (SoF) but doesn't talk about how it gets sent, what kind of writing, etc.

c. tenancy at will

i. no fixed duration – endures only as long as L & T desire
ii. no notice req'd (potentially infinite) at CL; sometimes req'd by states
iii. generally not transferable
iv. can be defeasible if in the lease

d. Other issues:

i. Statute of Frauds applies: ∴ must be in writing
ii. Must have notice to terminate lease: Leaving the premises doesn't terminate the lease. Death doesn't terminate. Telling the L that the lessee dies doesn't terminate. Lease keeps going on until someone gives notice.
-Does the giving notice on the day that the notice is due count? CL says nothing. Statutes do. Leases do. No general answer though.
iii. Mailbox rule does not apply in property CL. Notice means receipt, delivery. Sending isn't good enough. Statutes can change this, but they almost never do explicitly. If the parties don't like, they can define form, term, and time of notice, they can decide if they want the mailbox rule to apply.
iv. Late notice applies for the subsequent period.
v. Ordinarily, unless it's specified in the lease, the ending point of a term of years is **midnight**. Landlord can reserve something in the lease to allow them entry before that.

4. Possession Versus the Right of Possession

a. *Hannan v. Dusch*

-15 year lease = term of yrs
-T1 is there for 15 yrs; then T2 supposed to occupy; but T1 won't leave
= "**tenancy at sufferance is not a tenancy at all"** – i.e. a tenant at sufferance is like a trespasser, but don't call them that, b/c didn't enter illegally

i. CL usually assumes covenant of quiet enjoyment – not in *Hannan* though
ii. duty to kick old T out after his lease is expired:
a) American rule: 1/2 US jur's: new T has to do it
b) British rule: 1/2 US jur's: it's L's duty
c) this case: CL norm: T is on his own, has to deal w/ it – L has no obligation to ensure T's quiet enjoyment against wrongdoers/ intruders

B. TRANSFER OF LEASES

1. Tenancies at will are generally not transferable, but terms of years and periodic tenancies usually are.
2. Leases can restrict transferability of the PI, and often do; law is ok w/ that
3. Two separate bodies of law establish liabilities (privities) among parties.

a. Privity of estate (POE) – liable as a consequence of property law;
No substantive difference in the parties liability to each other, just 2 bodies of law that will enforce the agreement; only time it matters is when there is a transfer of one of the relevant interests
b. Privity of contract (POC) - parties are bound to each other under the contract. The K and whatever norms of K govern define liability.* no conservation of POC b/c there can be multiple K's

= 2 diff. avenues to take to enforce a promise in a lease, unless it is a certain remedy you seek

4. Two forms of transfer: (from T1 to T2)

a. Assignment

*transfer to T2 → T1 doesn't get it back for rest of lease
*POE (prop. rel) btw T1 & L is now gone – moved to btw T2 & L
*POC (K rel) btw T1 & L stays

i. Effect of POE transfer:
a) T1 loses rights *and* duties to L

ii. Effect of POC remaining:
a) L can still sue T1 even though T1 is no longer on the property
b) only way T1 can get out of K is by L giving T1 a **release**
-usually happens if T1 gives L $ or make a new K (novation)

iii. Assignment is also a K:
a) ∴ T1 can sue T2 and vice versa

iv. L has choice of 2 Ds if wants to sue:
a) T1 thru POC; T2 thru POE

v. Twists to this:
a) When you transfer POE, not necessarily every single part of the lease travels down to the new tenant. Only some subset of the promises transfer. (see running covenants, etc.)
b) There are three possible things about the transaction that can create POC between L and T2:
i) **write a new K** – get all the parties together and write a new deal -- Novation
ii) T1 & T2 make a deal that turns the L into a **3rd party beneficiary**; L now would have K rights against the T2
iii) **assumption** – as part of the deal between the T1 & T2, T2 explicitly takes on the obligation to the landlord

vi. *1st American Chicken System*:
-L has lease with T1. T1 assigns to T2 and T2 doesn't pay rent; and L assigns place to T3. L→T1→T2→T3: L made specific K w/ T3 = L-T1 (POC); L-T2 (nothing); L-T3 (POE & POC); L tries to claim T2 assumed K liability b/c it's the only one w/ $, but Ct doesn't buy it
-L essentially claims T2 made an assumption: 1 party voluntarily takes on K obligations of another (T1)

b. sublease
*transfer to S for less than the time remaining on the lease → T gets it back
-i.e. it's a sublease if T retains a reversion on property

i. S & L have no connection

ii. Basically created new L-T relationship (T is like new L) that has nothing to do with the original landlord.

iii. L can only sue T, unless T & S set up relation w/ L in their K

iv. Everything a sublesee has depends on the integrity of the original lease between L-T.
-If S pays T the rent, but T fails to pay L, L can probably sue S, as long as it's a defeasible leasehold with a condition of paying rent. L can use the breach a trigger to exercise a right of entry, the T's interest ends, so does S's interest.

v. limits on subleases:
a) Ls often put limits on transfers b/c when prop value raises, T can often capitalize on the difference. so either Ls can say no transfers, or stipulate that TI must get L's approval first and T1 has to share profit

5. Distinguishing btw 2:

a. *assignment is not a new lease, but rather a transfer of an existing lease; sublease is a new lease within an old lease*
*think of sublease as T maintains a "spot on the timeline" next to L after S's interest ends, so T & L maintain POE
*POE means being next to each other on the timeline

b. If assignment, $ going from T2 to T1 is *installment*, not rent. If sublease, its *rent*.

c. L cannot sue and collect rent from T1 and T2 for the same rental period.

d. How do you tell if it's an assignment or a sublease?

i. *Jaber v. Miller* (Jaber = L; Norbert = T1; Miller = T2; Jaber claims that it's an assignment, & so M owes J $; Miller claims it's a sublease, so M. owes J nothing)
-sets out trad'l CL test, but also look at parties' intentions: when lease term ends, L & Miller are next to each other on timeline, which means they are in POE, so it's an assignment

ii. Traditional CL test (dominant majority in form):

a) **assignment –** If T1 transfers all TI has remaining and T2 ends up next to L on timeline

*note however that it's ok for T1 to keep a POR or ROE and still have an assignment

b) **sublease** – If when lease term ends, and L's reversion kicks in, he takes it back from T1, not T2 (b/c T2's term has expired)

*If the original tenant keeps a reversion, would unambiguously be a sublease.

ii. Helmholtz Effect: a ct never used the CL test to override the intentions of the parties – it leaves unresolved what would happen if you had an explicit conflict → purport to be using CL test, but in reality may be going by intentions

6. Commercial Lease approval

a. *Kendall v. Ernest Pestan*

= modern view: Court held that the L is only able to refuse consent to the T's assignment to a third party for a commercially reasonable reason.

1. Narrow doctrine: not the law in all states, even in CA, only applies to commercial leases

b. General rule is that it's ok to restrict transferability of leases.

ii. Two other ways where a L and a sublesee can have contractual relations:

1. Statutes can say that they can directly sue each other
2. Equitable servitudes (see below)

C. INTERFERENCE W/ TENANT'S USE & ENJOYMENT

→ *what constitutes breach by a Landlord*?

1. Law of Waste: CL implies this as protection for L, *against* T

-lease can supplement this

2. Independent Covenant Rule:

-Breach by one party did not excuse the other party's performance.

→ L could not kick the T off the property simply because the T didn't pay rent unless it was written in to the lease

→ T could not w/hold rent from L simply b/c L promised to make repairs that he didn't

3. Covenant of Quiet Enjoyment:

a. 1 exception to ICR (above) that CL is willing to imply for L's obligations to T

b. implicit promise that L has something to convey/ no one has a superior title

i. if there is a superior claim: if T is enjoying the tenancy & someone comes along w/ a superior claim than L and ejects T, T does not have to still pay rent; T can then terminate lease

ii. if L tries to evict T illegally: it is also a breach of the Cov. of QE

-includes if L puts pulp mill next to you, and T can prove it was just to get T to leave; or if L persuades another to put pulp mill next to T

iii. CL often willing to imply that a serious breach/default by L (i.e. letting your place fill up w/ water) that results in **constructive eviction** (i.e. T has to move out) that it's a breach of the Cov. of QE

→ **4 elements of constructive eviction**

1) L must fail to perf. or breach an expressed or implied obligation

2) *Substantial interference* with the T's use and enjoyment of the land; it's objectively unreasonable to expect the T to stay on the land. Really has to be bad; not merely undesirable

3) T has to give the L notice and a reasonable chance to fix

4) If the L doesn't fix it, T actually has to leave. T has to prove that it's unreasonable to stay by actually leaving.

a. Risky strategy for T: If a T leaves the premises, then goes through the litigation process and loses (i.e., action by L didn't rise to the level of constructive eviction), then the T is still liable for everything under the lease.
b. Mass. allows T to get declaratory judgment that premises are rsbly uninhabitable, so he won't be told otherwise once he gets to ct
c. Usually, L not resp. to guard Ts against 3rd parties, although this now being challenged in cases of apt complexes in high-crime areas

→ **Result**: T no longer has to pay rent & may sue L

4. Major Failures of Common Law: (implied for statutory norms)

a. Heat or other utilities

b. make repairs that they had to make from lease
c. remedy unsafe, unhealthy, unsanitary conditions on the premises (rodents insects)
d. remove nuisances on premises (prostitute)
-Typically usually they didn't imply duties that weren't in the lease (hard to get them to repair)
-Tenant would have to make repairs to place and landlord only would have to do major things unless they were caused by negligence
e. things above still applicable to:
i. commercial lease
ii. jur. doesn't have an implied warranty of habitability

5. Implied Warranty of Habitability
a. history: 1960s – numerous urban slums – pp fight for more rts against landlord
-radical change occurs in 10 yrs; overturning of CL
-happened thru statutes, regs, case law, transformation of legal doctrine
b. 4 ways this label is misleading:
i. there's not actually any uniform doctrine. responses to same concerns vary from state to state.
ii. Not implied – sometime implied, sometimes expressed.
-usually implied in the lease, but explicit in the law
iii. Not a warranty in the traditional sense.
iv. doesn't always have to do w/ habitability of property
v. not really a legal doctrine, but an umbrella term used to describe transformation of L-T relations in law
vi. "warranty" is a K notion that's waivable, but here, it's not waivable
c. problems generally:
i. Ls can't afford to provide standard housing; tenants can't afford to pay for it; but law tries to encourage standard housing at substandard rates → *almost no one has been able to use it* – see more reasons why below
d. scope of coverage:
i. varies from state to state: single unit/multi-unit; urban/ residential/ all leases?
ii. usually ltd. to residential, multi-unit urban housing (Ky has no such law)
iii. Generally, doesn't include commercial leases – usually left to traditional CL rule.
e. Content:
i. Use existing housing codes as basis – existing body of law that deals with the problem – i.e. plumbing, construction, etc.
a) used to be only enforceable by govt agencies
b) now enforceable by private citizens too (but there are limits to this)
c) Read every lease as implicitly guaranteeing to the tenant that the unit will comply with the housing code
d) Pros: simplicity
e) Cons: provisions are likely to be
1) Under-inclusive - won't cover every aspect that one might deem important, the codes are usually confined to the physical safety of the building, not usually whether the stove worked or if there were cockroaches, b/c written by engineers
2) Over-inclusive - covers things that no one other than the housing commission cares about, i.e. pipe sizes
ii. Substantial violations of the housing code
a) no ct has ever found that only 1 violation is enough
b) solves part of the problem of over-inclusiveness, but doesn't deal with under-inclusiveness problem
c) but lose simplicity/ease of use; the housing code is diminished b/c now you have to deal with what substantial means;
d) makes it more expensive to litigate to argue whether the violation is substantial → if the idea was to help people in low-income housing then making it expensive to litigate doesn't help the people its supposed to
e) *the **gap** between amount people have and the amount it costs to litigate renders the whole scheme nugatory
iii. habitability – general standard
a) solves under & over inclusiveness problems, but it's even harder to determine than what a "substantial" code violation is; the fuzzier the standard, the costlier it is to litigate
iv. reasonable person std – still problems of definitiveness, but allows laws to tailor standards to the facts of a case

6. Remedies:

***** treat expanded obligations of L as would under Cov. of QE – allow T to terminate

*but termination not much help when T has no better place to go; ∴ want a bldg that allows T to stay there & get better conditions → can get damages

***issue → what to measure damages by**?

a. Rent reduction/ abatement:

= reduce rent by amt the value has lessened by the substandard conditions

= diff. btw promised rent (PR) and fair rental value (FRV) when warranty breached

***PR**: price in lease

***FRV**: really means FRV in a hypothetical well-functioning market, b/c acc. to reformers, market isn't functioning correctly or else there wouldn't be problem

1) in order to get FRV, need to construct hypo market
   -real FRV is essentially 0 – only value comes from housing crunch
2) economists can do this, but costs lots of $, which brings back problem of costly litigation for pp who can't afford it

→ *expensive solution that won't pay off*

b. Percentage diminution approach: (Pa)

-Damages/ rent reduction = PR minus % of the use of premises that you lost as a result of breach

-supposedly returns party to the position he would've been in

-idea is that T can come to ct w/o expert testimony; come up w/ #s on his own – greatly reduces cost

= *Pugh v. Holmes* – closest anyone has come to fair, in terms of cost

→ *idea is totally unreasonable though, b/c T just makes up his damages*

*-and even if you let trier of fact come up w/ damages (*like a tort action), *you still have to establish breach, which costs $, litigation, b/c L isn't going to admit to breach*

*has proven most effective in *high*-income housing areas

c. tort approach:

-T can recover for emotional distress; discomfort; punitive damages – but this really isn't a damages measure; rather *a whole new cause of action*

-reflects a new idea of how to approach this

➔ **problem is if you turn low income housing into higher income housing, higher income pp are going to move into it, and you don't want this either**

D. LANDLORD REMEDIES AGAINST TENANTS:

1. Abandonment:

a. means T leaves premises w/o legal right, i.e. before lease is expired; has expressed intention to be permanently gone → *must find mental state of T

b. only terminates lease if L has written it into K

-chances are L will only make it subject to condition subsequent, b/c L wants ability to terminate, not for it to happen automatically

c. legal effect of abandonment: breach by T. but CL doesn't give L a right to re-take premises, but most leases will have written clauses to that effect

c. essentially amounts to an **offer** to L to terminate

→ **L has 3 options**:

i. Surrender = "accepts T's offer to terminate".

a) If there's no more lease, then the T no longer has a continuing obligation to pay rent.

b) surrender can actually violate SoF, but cts acknowledge it as an exception due to the reality of L-T relationships

c) But, surrender doesn't relieve the T of prior obligations (back rent).

d) POE – prop. rel. is over b/c T reconveys remainder of his possessory interest to L

e) POC – T can still only get out of K rel. thru release

-∴ T still liable for future rent if L does not ***surrender & release***

-however, L has duty to mitigate, so if L doesn't, T can raise this objection if L brings an action to get rent after the abandonment

f) what constitutes acceptance: up to trier of fact whether L has manifested intent of acceptance

-ex: T sends keys to L; L goes to clean up; new T to mitigate?

g) how is L going to collect on damages?

****breaching T is essentially judgment proof b/c it would cost L so much more to get judgment than it's worth**

ii. Mitigate by re-renting, but not a surrender:

= Abandonment w/o acceptance of the surrender

→ L wants to keep POC *and* POE;

a) L is acting as agent for T, to sublease prop. on behalf of T

b) obviously a good thing for both T & L - ∴ isn't nec'ly seen as L accepting abandonment

c) still, jury issue comes up: did L create a new L-T relationship, or was he just putting someone on prop to protect it from vandalism?

d) in a jur that requires mitigation, amt of damages an L can collect from T will always be reduced by rsbl mitigation

e) other jur's will subtract actual mitigation

iii. L does nothing/ leaves premises vacant:

= can L let rent pile up and sue T later?

a) traditional CL – yes, based on property law concepts; it's a transfer of land; no duty on L to mitigate.

b) Modern approach – most still follow CL, but some require mitigation by L. = *Summer v. Krydell*

*doesn't usually happen, b/c Ls want to mitigate

2. Holdovers:

= T stays on premises w/o paying rent → **remedies?**

a. sue for damages – but can only sue for 1 mo. at a time – only breaches that have already happened

b. sue for anticipatory breach: very difficult to prove

c. Acceleration clause: L can draft around problems, saying in K that he can sue for rest of lease when T doesn't pay 1 month

-but some jur's don't allow this on basis of unconscionability

-penalty provision – L can't collect damages and re-rent to someone else too

d. can bring **ejectment** action if nonpayment was a defeasibility condition:

i. i.e. L has reserved an ROE that ends the lease upon nonpayment; if L exercises ROE, and T refuses to get out, L has valid claim of ejectment

→ T no longer as a present possessory interest in property

ii. problem of getting into court:

- may take awhile – L losing money meanwhile

iii. enforcement problem: eviction not on top of police's list

iv. some jurs allow L to bypass this machinery and simply change locks on the doors as long as done w/o violent confrontation = **self-help remedy**

-still risky – if found L didn't do it peacefully, could be tort action

e. Summary eviction/ forcible entry & detainer actions

= response to L's plight (above) w/ ejectment actions

i. special cts that hear L-T issues:

a) usually they give notice to T and then can go in to evict

b) ct solely tries who has possession, but won't determine the damages

ii. 3 problems still remain:

a) Tenant will be able to bring up defenses (ie warranty of habitability) of dependent breaches on landlord; this slows down the supposedly speedy trials

b) These courts get clogged because there is a lower cost for litigation

c) Still doesn't solve the local law enforcement problem

f. Self-help remedies being disfavored

-law doesn't like things that disrupt the peace

→ *Berg v. Wiley* – ends L self-help in MN; modern trend; not the case that L self-help options are barred by the law; unclear what efforts by L are permitted; clear that it has to be peaceful, L has to be right; if he's wrong, L is interfering with the T's possessory right to the property, if L damages T's property, could be liable for conversion, possible tort actions/punitive damages; basically ugly for L if he's wrong.

3. Doctrine of Fixtures:

= Innocent Improver Problem w/ L-T law

a. ex: T installs portable A/C – L says it is part of apt & won't let T take it when moves

b. idea: ownership of the land carries w/ it ownership of the things affixed to the land
-usually written in lease
c. generally what can be moved is taken; what cannot – stays
*still, "fixedness" is somewhat a matter of discretion

E. FEDERAL ANTIDISCRIMINATION LAWS

→ Two primary federal statutes:

1. Civil Rights Act of 1866 (42 U.S.C. 1982)

-"All citizens of the US shall have the same rt, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, & convey real & personal property"
- meant to address <u>state</u> statutes that restricted sale of land to blacks; no one at the time thought that it had anything to do with private acts, but 100 years later applied to private conduct in housing in *Jones v. Alfred H. Mayer*
-i.e. now a violation of fed law to say "I, as a private citizen, will not sell my prop to a black person." – found to only apply to race disc, not any other disc.

2. Fair Housing Act (1968) - created to cover for private conduct

*Congress given power to enact this by 42 USC 1982; but this broader than 1982
*on the other hand, 1982 could be seen as broader b/c it is absolute, whereas here you have exemptions in certain cases – also, in 1866, "race" was a broader conception – i.e. gypsies, Jews, etc.
§3601: declares policy
§ 3604.a – unlawful to refuse to rent or sell based on race, color, religion, sex, familial status (can't refuse families with kids), or national origin
*DOJ won't enforce actions against ads seeking "women only", even though these are flagrant violations of § 3604 (c).
b – can't disc. in terms of conditions, or privileges of the lease based on race
c – unlawful to make/print/publish notice statements or ads for sale that indicate pref. or disc. based on color, religion, *sex*, handicap, familial status, or nat'l origin
d – can't represent that dwelling not available to certain classes
f – can't disc. against handicapped – but this is a *reasonable basis/ cost-benefit* test, not a per se rule – i.e. might not want to hire a handicapped person for some job

§ 3607: <u>More exceptions</u> (but don't apply to racial disc.)
a – religious organizations: can disc. who they let in
i. has to be bona fide religious purpose; **ii**. can't be religion based on race
b – familial status exceptions: basically can't disc. against parents w/ kids, except:
(i) limit # of pp acc. to state fire codes
(ii) retirement homes – don't have to let families in here

§3603.b – <u>exemptions from 3604.a</u> – "Mrs. Murphy" exemption
-FHA doesn't apply to a single family houses provided that the owner:
(i) doesn't use a brokerage house, real estate agent
(ii) doesn't own more than 3 houses at one time
(iii) only invokes the exemption for a sale once within a 24 month period
(iv) FHA also doesn't apply to small boarding houses (no more than 4 families, owner has to live there)
§3613: <u>remedy</u>: an aggrieved person can get damages, injunction, rsbl atty fees, costs
*note that DOJ won't take legal action where ads involve multi-person housing, except if it's based on race or nat'l origin; essentially lets gender classifications slip by

3. Rules in practice:

a. *Hobson v. George Humphrey*
i. Proof of discrimination: trier of fact infers disc. from the owner's conduct if the conduct targets of one of the prohibited classes
-here, essentially say disc'y effect is enough – presumes intention
-easy cases are like here, where it appears characteristic was chosen in order to be able to disc.
-harder cases are where characteristic seems like it could be chosen for innocent reasons, but it turns out to be disc'y
→ in such cases, D still has good opp. to rebut presumption
ii. not cheap – same kinds of practical problems as in IWH

4. State and Local Anti-discrimination Laws

a. State statutes can be very broadly worded; fills in the gaps of federal laws

V. PROTECTING OWNERSHIP

→ NUISANCE AND TRESPASS

A. TRESPASS

- 'super-tort'; unlike most torts which require act/ damage/intent, here, you only need intent = SEE, FEEL, TOUCH TEST

1. Rest. § 158: "one is subject for liability for trespass, irrespective of whether you cause harm, if you intentionally enter land of another, or remain on the land, or fail to remove from the land anything which you have a duty to remove, etc." → unauthorized boundary crossingk

2. Don't have to prove damages

a. the encroachment is the damage; no harm necessary (Rest. § 163)

b. one exception to the principle that if you can get damages, you can't get an injunction

3. D's conduct:

a. D doesn't have to know he's going onto your land

b. only intent is to do what he did (i.e. walk) – basically no intent req

c. D's conduct does have to be *voluntary*

d. Only ways D can get out of liability for trespass

i. involuntary (i.e. D was pushed over boundary)

ii. Certain privileges where you are entitled to be on someone else's property (i.e., to prevent a crime, you're invited onto the property)

4. Where: Rest. §159: *ad selum* rule

a. Trespass may be committed on, beneath, or above the surface of the earth

b. flight of aircraft is only a trespass if it enters the immediate reaches of the air next to the land; or if it interferes subst'ly w/ the owner's use & enjoyment of land

5. Who can bring suit:

a. Present possessor; not someone w/ an FI in the prop.

6. Reasonableness not an issue:

a. only play in w/ respect to privileges (above)

7. Affirmative Defenses:

a. owner's consent (implied or express)

b. past consent which is irrevocable

c. various kinds of public access rights – i.e. for police

8. Remedies:

a. damages

b. injunction – but if $ will do the trick, you won't get an injunction

B. NUISANCE (private)

- Relates to use right and not crossing your space (ex: blaring Metallica at 3 a.m.). While only possessors can cover for trespass, other groups can recover for nuisance. § 821E

1. Rest. §821.d: Definition:

*a private nuisance is a non-trespassory invasion of another's inters in the private use & enjoyment of land

-(makes explicit the exclusivity of trespass & nuisance – can only be 1 or the other)

2. Rest. §821.e: Who can recover:

a. possessors of the land

b. owners of easements & profits in the land

c. those w/ FIs in the land whose use & enjoyment are detrimentally affected by the nuisance

3. Rest. 821.f: Standard of harm:

= **most imp. provision for nuisance**

a. There is a liability for a nuisance only to those to whom it causes **SIGNIFICANT HARM** of the kind that would be suffered by a **normal person** in the community or by property in normal condition and used for a normal purpose

i. insignificant harm won't suffice

ii. significance is based on an objective, not subjective standard
= no eggshell skull rule; no exceptions for particularly sensitive pp

4. Rest. §822: Standard for liability (biggest difference from trespass)
-Liable if, but only if, conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land and the invasion is either:
a. Intentional and unreasonable
i. § 825 - definition of **intention** – it's intentional if the actor
a) acts for the purpose of causing it, OR
b) knows that it is resulting or is substantially certain to result from his conduct (same std for intent under trespass – just aware of your acts)
ii. § 826 – definition of **unreasonable**
a) Gravity of harm outweighs utility of the conduct (*very discretionary*)
→ §827: factors determining **gravity** of harm
1) extent of harm
2) character of harm involved
3) social value law attaches to type of use/enjoyment invaded
4) suitability of the particular use or enjoyment invaded to the character of the locality
5) burden on the person harmed of avoiding the harm
→§828: factors determining **utility**
1) social value law attaches to the primary purpose of conduct
2) suitability of conduct to character of the locality
3) impracticability of preventing or avoiding the invasion
b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the person have to shut down
b. unintentional & otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities
*but not, you can probably make a claim under some other tort for this prong, so it's sort of unnecessary
5. Other "useful" restatements: (p. 718)
a. § 829A – when gravity v. utility = Severe Harm
b. § 830 – when gravity v. utility = avoidable invasion
c. § 831 – when gravity v. utility = Conduct Unsuited to Locality

***Difference btw trespass & nuisance**:
1. type of invasion
a. nuisance requires *significant* harm; trespass requires no harm
b. trespass – can see/touch/feel invasion; nuisance you can't
2. what it protects
-trespass: possession
-nuisance: use & enjoyment
3. who can bring claim (corollary of #2)
-trespass: only present possessor
-nuisance: anyone who has claim to use & enjoyment, thereof
4. establishment of nuisance much harder than trespass
5. if you est. liability for trespass, you automatically get an injunction – not so for nuisance
6. note, you can have an instance that gives rise to both claims though

6. *Inquiry*
a. Has there been a trespass or a nuisance?
i. trespass = See/Touch/Feel – if something is a tangible entity that you can sense unaided by sophisticated tech and there is a sufficient quantity of this thing, then it's a trespass
ii. otherwise, it's a nuisance (particles – if not enough to touch, then nuisance)
b. does their property interest qualify them for protection?
c. R. 821.f: in order to be a nuisance, it has to be a significant harm as judged by a reasonable person in the normal uses of property (obj. std)
i. if doesn't meet this **threshold**, law isn't interested
d. is the conduct unreasonable (R. 826: substantive Q, somewhat discretionary)?
i. either gravity of harm must outweigh utility of conduct → **injunction**

ii. or it's serious harm & making D pay won't down, then make him pay
=*Boomer* (unrsbl, significant harm, but has utility) → **damages**

e. modern evolution:

i. what seems to go on in certain cases however is that cts treat 821.f (subst'l harm as suffered by a rsbl person) not as a threshold for liability, but as a sufficient condition for liability

→ if you have (1) a nontrespassory invasion in private U & E; (2) you have the correct property interest; (3) and you have significant harm, then that **suffices for a pfc for liability**

= *Kress Chevrolet v. Williamson*

= *Morgan v. High Pan Oil Co.* – oil refinery put in next to homes
– gets shut down despite utility

ii. although **826** purports to be a test for liability, the factors it lists for **balancing** test are usually those used in **determining a remedy**

*826.b was added later, as a codification of what cts were doing when there was utility, but they were awarding damages anyways

*still, measuring damages is a problem – values of land over uncertain amts of yrs → ct usually comes up w/ its own #s

7. Remedies for Nuisance

a. P is entitled to damages for the harm that was caused - no problem, just like the rest of tort law.

b. But while most torts only happen once, nuisances frequently are continuous, P could keep bringing lawsuits, but P doesn't want to do that.

c. If P has good reason to think that it's a continuing activity, P has to choose one of 2 things:

i. Permanent Damages: Establish the nuisance and that there's reason to believe that the nuisance will continue. Then, bring expert witness to determine what the total past and future loss will be in lieu of the P bringing lawsuit after lawsuit Reduce full measure of damages to one number. OR

ii. Injunction: P needs to show that it's a nuisance, plus prove that it's a better world if the injunction is issued. Judges can take into account the impact an injunction would have on the town/economy.

*An injunction doesn't preclude P from seeking past damages, but P can't seek future damages.

iii. Possibilities with respect to remedies for nuisance other than damages for the past nuisance:

a) **Nothing** – if the nuisance has stopped, even if you can establish that there's a possibility that the nuisance will continue in the future, might be too speculative to compute. Only remedy would be an injunction – but to get it, you need to pass the balancing test – no guarantee.

b) **Injunction** – stop what you are doing or go to jail; P can keep or sell; P will most likely always want to get an injunction – D has to stop unless D wants to buy out the plaintiff; injunction can = $$

c) **No injunction, but damages**

= *Boomer v. Atlantic Cement* – dust from cement plant. court says that all things considered it wouldn't be beneficial to shut down plant b/c it brings in so much $ for local economy;
-grants damages, basically forces the plant to buy out the neighbors through the courts
= **826.b remedy**

→ it's significant harm acc. to rsbl person, but has utility

d) **Injunction, but because the injunction imposes costs on the D, the P pays damages to the D.**

1) Situations where it's not obvious who should relent. *Hendricks v. Stalnaker* – essentially had to resolve it by saying 1st come, 1st serve

2) *Spur Industries v. Del E. Webb Development* –cattle farm is a nuisance to a growing group of houses that came after the farm; court says it doesn't that the farm was there first. Still a nuisance, P gets injunction, but since the P basically brought this on, court makes them pay for D to stop/move.

→ Most courts haven't followed *Del Webb* and say that a nuisance is a nuisance – if the plant wanted to protect itself, it could have bought the land around the plant itself and sold it to homeowners and reserved the right to perpetuate the nuisance
(i.e. sell houses w/ a covenant??)

→ Some courts use **coming to the nuisance** as a bar against a P asserting a claim

→ R. §840.d – coming to nuisance doesn't preclude claim against nuisance, but is a factor to consider

8. Non-invasion nuisances

a. Nuisances causing diminished property value – generally no C/A.

i. *Nicholson v. Conn. Halfway House* – residents want to shut down a halfway house for parolees b/c property values are going to plummet.

-no actual invasion, i.e. they broke into your house

= mere depreciation of land values caused by subjective apprehensions of buyers cannot support a nuisance action

ii. *Arkansas v. Needler* – Ark. seems to be the exception: Halfway house for convicts enjoined simply for diminution in prop. values

iii. But when it's virtually certain that a nuisance will happen, you can shut it down ahead of time, like a trash dump moving next door (i.e. will attract bugs).

b. Funeral homes an exception; not cemeteries though:

i. *Jack v. Taurant*: granted injunction of a funeral home w/o proof of damages or that there had been an invasion = *only anomaly to general rule*

-seems to be consistent for all states – i.e. for decline in morale

ii. homeowners lose, however, when try to get injunction against cemetery

VI. SERVITUDES

-Right to do something that would otherwise be a nuisance or a trespass OR

-Rt to forbid what would otherwise be a lawful use of someone's prop

A. EASEMENTS

= nonpossessory right to use land in possession of another

1. Rest. §450: Definition: (p.590)

An easement is an interest in land in possession of another which

a. entitles the owner of such interest to limited use/ enjoyment of the land in which the interest exists

b. entitles him to protection as against 3rd parties from interference in such use/enjoy.

→ allows you to sue 3rd p. that harms another's land if in harming the land, they are hurting your use/enjoyment of the easement

c. is not subject to will of possessor of land

→cannot be revoked at will; *can* be revocable/ defeasible

d. is not a normal incident of the possession of any land possessed by the owner of the interest

→ acknowledges that pp have rts to do/not to do things, i.e. by virtue of being a neighbor, but the law of easements goes beyond that

e. is capable of creation by conveyance

→you can be deed create & transfer easements

2. Main ideas:

a. An interest in land that isn't possessory; only rt. to use in specific way

b. Law of Perpetuity applies

c. A right to do something that would otherwise be a trespass or nuisance on or to someone else's land, but not to possess it

d. Holder of an easement has a right to use and enjoy, but not possess – can't bring an action for ejectment, but can bring action for nuisance if use right is being interfered with

e. critical distinctions with respect to easements

i. All easements are either:

a) **Appurtenant** – benefits particular piece of land and transfers with ownership of land

1) Land that is benefiting from the easement is **dominant tenement**

→ to which easement attaches

2) Land that is subject to the easement is **servient tenement**

→ piece of prop. to which someone else has a use rt

b) **In gross** – benefits particular person. not attached to land.

1) Only has a servient tenement; no dominant one.

i. CL doesn't permit the creation of a negative easement

a) **affirmative** – right to do something to someone else's land, i.e., the right to walk across a driveway.

1) 1st party: create easement btw 2 acting parties

2) 3rd party: 1st 2 parties create easement for a 3rdp.– not allowed by CL

= *Willard v. Church of Christ*: P has been letting church pp park on her land; she sells land w/ such easement attached for church – not allowed – see transfer problem w/ this below

b) **negative** – right to prevent someone else from doing something with their land that they could otherwise have done, i.e., the right to prevent your neighbor from building a driveway.

i. can do them, but only by K, and ∴ they don't 'run w/ the land'

ii. but in most jur's, law does not allow creation of negative easements

iii. you can still do things to prevent pp from doing stuff to your land, but it's just not called an easement

3. Creation of an Easement

a. SoF applies: must be in writing

b. method:

-by grant (simplest, but easy to accidentally make it a license), implication, necessity, or prescription

b. runs w/ the land?

i. easement runs w/ the land in which it is sold in appurtenant easement

**when rts endure thru transactions, it's prop law, not K law*

ii. if you want it specific to the person, make it in gross

c. creating an easement during a transfer:

i. *can* keep an easement for yourself if you transfer the land

ii. but *cannot* create an easement in a 3rd party when you transfer = CL

= mistake in *Willard* (above)

iii. *can get around this* by doing it in 2 transactions if CL still applies in jur

a) seller makes easement w/ 1 party; then she sells land to another party, and easement runs w/ the land – binds successors

b) grantor can transfer land to new party, on stipulation that they later give an easement to 3rd party

c) transfer land to A for peppercorn, then have them make sale & keep easement

d. must specify **scope** – nature of use right

e. must specify **duration** – or else law will imply you gave away all that you had

*easements subject to same durational classifications as possessory interests

f. must specify **location**

g. must consider **defeasibility/ termination**

h. consider **incidental/ subsidiary rts**:

= rts going along w/ it – ex: if rt to use your driveway, can they shovel snow too

i. transferability – and if so, under what circumstances – i.e. can it be divided up, w/o limit? = *Miler v. Lutheran Conference & Camp Assoc*.

4. Transferability of Easements

*if you want to extend rts to further generations, beyond the original transaction, it's prop. law, not K law

a. appurtenant: transferable: easement travels with the land; benefits specific land

= "survivability"

i. must incorporate: duration, termination (defeasibility), location, scope, subsidiary rts, & transferability

ii. must find intent of parties to make it appurtenant

→ *but where the nature of the arrangement meets the physical req's of appurtenance, there's a good chance the ct will find that easement appurtenant – i.e. will find intent*

→ if you don't want it to be connected to the land, you should explicitly say so

b. in gross: generally not transferable, w/ exceptions

i. if purpose of easement is **commercial**, then it's **assumed to be transferable**, even if owned by an individual, unless specified to be non-transferable

ii. *Miller v. Lutheran Conference & Camp Association*:

-3 partners build lake in JT – possessory rts pass to heirs, but what about use rights: can heirs parcel them out for profit?

-easements here were clearly in gross, attached to people
*issue was not whether use rts were transferable, but whether they were transferable w/o limit? → ct said NO.

c. one stock rule:
= if you have an easement, and it's transferable, you can transfer it, but only to 1 entity/ so that the servient tenement does not qualitatively change = *Miller*
-still difficult to determine what changes a use right

➔ cts tend to favor appurtenant: b/c then Qs of transferability drop out

5. License
= form of legal permission w/o easement

a. Rest. §512:
i. entitles owner of the interest to a use of the land
ii. arises from the consent of the one whose interest in the land used is affected
iii. is not incident to an estate in the land
iv. is not an easement

b. basically: if 1 or more formal req's for an easement is missing (i.e. not in writing), then it's a license

c. consequence: revocable at any time by the grantor (w/ reasonable opportunity for licensee to remove himself from the land)
= legal difference btw license & easement

d. exception to revocability:
i. *Shearer v. Hodnette* – if there's a license, and the licensee spends resources in a way that the licensor should have known, licensor might not be able to revoke **= irrevocable license**
ii. licensor has a legal rt to revoke his consent, but ct might not let him if licensee has detrimentally relied on license = estoppel
-licensee can get damages by reliance claim
iii. but certain jur's say licenses will not be enforced, hands down

6. Easement by implication

*4 elements – take on life of their own; separated from intent over time = checklist
→ needed in cases where person buys land, w/o explicit mention of easement, but really, no one would have bought the land w/o the easement – must prove following to get ct to imply the easement
= *Romanchuk v. Plotkin* – typical sewer case

a. unity of title:
i. have to start with one person owning the whole land who is engaging in the use, and then carving out a piece of that land
ii. If the severance takes place before the use begins, can't get implication
iii. can see this in conjunction w/ severance of a joint tenancy

b. quasi-ownership rule/ continuous use:
i. circumstances that are subject of the easement had to be in place at the time the unitary ownership was broken up

c. Apparent use
i. rsbl person going onto prop could actually see smthg that might be subject to an easement
→ I.e., you see a house, you just figure that there must be pipes running from the house.
ii. can also say this "had to be the intention of the parties" – it's so obvious, they just didn't put it in the K = like a gap filler

d. Necessary to the beneficial enjoyment of the land granted
i. doesn't really mean "necessary" in strict sense
ii. really means helpful, convenient; high degree of usefulness
iii. CL standard for 'necessary' is higher for grantor's claiming an easement in land they've transferred than to purchasers trying to claim an easement in land they've bought, but there's doubt as to whether this really happens in practice

e. problems w/ implied easements:
i. most easements are appurtenant = runs w/ the land
ii. but if it's implied, can you be sure? otherwise, what's the duration, scope, subsidiary rights, who pays for repairs

7. Easement by Necessity

a. analogous to innocent improver doctrine
b. exact circumstances vary from 1 jur to another – based on statutes
c. ex: land-locking situations = *Roy v. Euro Holland Vastgoed*

8. Easement by prescription

-i.e. "easements by adverse possession"

a. statute of limitations: have adopted the same one for recovery of possession

→ i.e. you have been trespassing long enough that now you have a rt to do it

b. Same ENCROACH elements that are necessary for adverse possession, but there are differences – it's not possession, it's use rights.

i. continuous: you get easement for what you do – if you walk on land every Sunday, you get it for Sunday.

= it has to be continuous in the intermittent character appropriate to the use rt

ii. hostility: nothing to do w/ state of mind, but rather whether use is permissive

a) *competing theories:

1) If you're using adverse possession, then of course the use has to be hostile – i.e. permission defeats the claim

2) lost grant theory" - permission by the person who's land is *evidence* of the lost grant of an easement.

b) **problem** with these 2 theories – evidence of permission defeats one theory and establishes the other.

c) Modern trend toward adverse possession; Courts deal with the conflict by creating a presumption of hostility, but make it very hard to defeat - just living neighborly for 20 years isn't enough, need something like a piece of paper to defeat presumption.

d) *Fischer v. Grinsbergs* – formally doctrines says that permission defeats the claim, but ct is not going to find permission very easily

-here, 20 yrs of peaceful coexistence wasn't "permission"

→ *must figure out what the jur says about role of permission*

iii. others:

-exclusivity doesn't make sense, but all other elements of AP apply

c. same problems ensue as w/ implied easements – duration, scope, subsidiary rts

i. *Farmer v. Ky Utilities Co.* –

-everyone agrees there's a prescriptive easement to pass power lines across lands, but is there a subsidiary right implied that power co. can cut down tops of trees to keep them from interfering w/ power lines – ct here says yes.

B. RUNNING COVENANTS

-CL won't let you create negative easements that bind successors. (but 2 parties can K between themselves). didn't want pp to imply a negative easement thru prescription

-is a K; capable of binding non-parties; runs w/ the land

1. Requirements:

a. Enforceable contract – usually pretty obvious, but sometimes there are problems with the Statute of Frauds; must be in writing

-i.e. no implying like w/ easements

b. Parties have to intend for their successors to be bound/ to run w/ the land

i. can be determined from lang: "shall always/ never"

ii. Spencer's Case (minority):

a) If the agreement concerns things that don't exist, have to use "magic words:"

→ "successors are to be bound"

→ "these are the *assigns* of the promisor"

b) Not strictly necessary for things that are already in existence. ("I will not paint the fence blue")

iii. *Moseley v. Bishop* – (majority) - infer intent from the instrument as a whole when the covenant is a promise to do or not do something on a particular piece of land and the promise clearly improves the value of the land

c. 'Touch and concern' – way to limit the class of promises that run with the land; comes from Spencer's Case; what does this mean? No one knows exactly;

i. Doesn't mean 'anything that benefits the land' (too broad)

ii. Doesn't necessarily mean 'things that physically affect the land' – physical things can touch and concern the land, but they don't all have to be physical, i.e. rent doesn't physically affect the land, but it runs with the land;

a) Certain personal promises to pay money that don't touch and concern the land: 'T agrees to pay L's vet bills'
→ rent - could be either; won't build a fence – clearly; feed the cat – no
b) Rest. proposes to get rid of it altogether

d. Privity – different than the other previous uses of privity – ct will only enforce if both horizontal & vertical

i. Vertical privity – describes rel btw original parties & successors

a) at CL, successor had to succeed to same estate as was in promise
-didn't count if was successor carved out a tenancy
b) modern cts have changed it to something closer to tacking / adverse possession definition of privity
**supposedly not responsible for this*

ii. Horizontal privity – rel. btw original parties to the agreement

a) British rule: (*Spencer's case*) simultaneous interests
1) parties must have same interest in same prop, just on diff. parts of the timeline
2) 99% of covenants were L-T ones
b) American rule: if the promise is made in connection w/ a transfer of the relevant land (i.e. if the way L1 is getting land is buy buying it from L2), then that will suffice
1) still doesn't let neighbor 1 & 2 sit down & make a neg. covenant
→ they can only do it if do it in 2 transactions: you transfer the land to 1 party, then reconvey it back w/ the land promise in it
-or: can transfer it to lawyer who transfers it back w/ promises in it
c) minority: *Mosely*: as long as parties have any interest in each other's land, and other elements fulfilled (i.e. written K, mean to bind successors), then promise will be upheld = proposed 3rd Rest.

e. Notice not necessary: Successors are bound whether or not they have notice. If it's a valid running covenant, then successor is bound even if he has no notice. Also, successor is not bound if they do have notice and it's not a valid running covenant.

i. BUT many states now have recording statutes – file w/ recorder as notice - in order to bind successors
-but problem arises when someone makes a "secret" deal that conflicts w/ new covenant

C. EQUITABLE SERVITUDES

1. *Tulk v. Moxhay*, 1848, England
-Dealing with is a situation where a person knew about a restriction, purchased the property knowing it and wants to ignore the promise once he's got the land – wouldn't be fair; this is an equitable servitude

2. elements required:

a. written document: exception for house issue discussed below
b. intent to bind successors by original parties
c. notice to successors – key to the whole thing was that the purchaser had notice of the restriction and now they're trying to get out of it
d. touch and concern

3. Difference btw Equitable Servitude (ES) & Running Covenant (RC):

a. Equitable servitude is a running covenant with notice substituting for horizontal privity.
*but while notice is not a formal req for a running covenant, it is 98% of time by statute → only real difference is then horizontal privity
b. as a lawyer:
-1st: try as an easement, b/c if you make it appurtenant, then it will transfer w/ land
-2nd: try to do ES, b/c it is easier than using RC, which adds extra req.
c. remedy:
i. standard remedy for K breach is cash = RC
ii. standard equitable remedy is injunction = ES

D. RESIDENTIAL SUBDIVISIONS:

1. Nature:

a. when developer owns large piece of land and starts to make covenants w/ everyone who buys each of his divided lots

b. *after urbanization, you had suburbanization in 1940s – pp want land burdened with negative restrictions in order not to get it too populated → RCs perfect for this

c. *technically a form of equitable servitudes, but usually doesn't follow that law

i. willing to imply things that doctrine of ES never would

2. Procedure:

a. developer sells off 1st parcel, forcing buyer 1 to sign covenant w/ all restrictions he wants on land.

b. developer can now enforce against the first buyer and when he sells part of the remaining land, anyone who buys it, takes it with all the conditions that run with the land.

c. Developer then makes the same agreement with his remaining parcels to owner # 2 and so on. everyone can enforce against everyone. but if you leave 1 purchaser out, the whole scheme falls apart.

3. Enforcement:

a. nec. to have enforcement mechanism beyond just knowledge that everyone is "signed on" – inevitably someone will put up something that will decrease value of property – want to be able to restrict them w/o high cost of litigation, which won't really be worthwhile to homeowners.

b. What if lawyer making deed screws up?

i. Courts try to enforce promises homeowners never made - invented new kind of servitude: **implied reciprocal servitudes**

a) Courts imply that everyone who bought knew that they were getting into a residential community w/ restrictions – otherwise they never would have bought there

= *MidState Equip. v. Dell* – ct essentially wipes out servitudes law by implying promises from 1 document into all other documents

b) better reason – speculative – is that judges live in these sorts of subdivisions, so are willing to imply restrictions

c. ct makes evidentiary Qs – where do you find out what is implied?

i. Filings that the developer makes with the regulatory body.

ii. Promotional brochures - most of the time is enough to put people on notice.

iii. Oral representation by the developer is a stretch; probably won't work.

d. rule: when a kind of development suggests it will be residential, this is enough to bind all owners, and means no commercial buyers

*laws enforcing restrictions in subdivisions strongly favored

e. **caveat**: this only works in residential areas

F. OTHER EASEMENT ISSUES

1. Non-use

a. formally, just b/c you haven't used your easement for 100 yrs doesn't mean it's extinguished

b. BUT if you make a claim that you have an easement (i.e. to defense of trespass), nonuse will be strong evidence that you've *abandoned* the easement

c. if someone continually infringes on your easement, and then you bring a claim 10 years after infringement has been going on, this is also strong evidence that easement is abandoned

2. getting rid of an easement: you must buy it back

3. changed conditions: if assumptions on which easement was made change, then you can rebargain

G. ZONING

*closely related to servitudes

1. **Restrictions are valuable:** can a) increase value of land and b) inhibit competition (if you are a gas station & you don't want any more nearby)

-sometimes it may be easier to prove violation of zoning code than nuisance, which is so complicated

2. People aren't going to make restrictions if they get something out of it: usually pp want $$ → problems: a) how do you value this? how much? b) transaction costs of getting everyone to sign

3. use zoning board or law instead: might be cheaper to have zoning board make neighbor do it → try to pass zoning law. Probably costs less $ to persuade the zoning board than paying tons of neighbors

4. 'star wars':

a) "the force" it is easier than buying people off (you just have a zoning board that tells you what and where to put things) (Increases wealth in the way you want it to: for example if I just want houses in my neighborhood that look like my house and are the same shape as my house I can have the zoning board of it that way) *Example*: Boomer

b) "darkside": because zoning provides a way of limiting land use w/o bargaining, there are massive opportunities for wealth transfers, either corrupt or not. 1 effective way of taking large sums of wealth from 1 place to another is to manipulate land use rules since so much of land's value is in its potential use.

-ex: putting a grocery store somewhere rather than a house – prop. is more valuable – but only what it's worth to someone who can get the law changed; but relatively costless for those who are imposing laws

5. Zoning is tough: mechanisms of zoning evolve around recognition of "twin character" (above)
-must start at most local level – they're most willing to spend time hearing your cause. deal w/ ordinances.

➔ Maximize Benefits of zoning while avoiding collective actions and minimizing dangers of rank wealth transactions (Look for this in the book)

Process of Zoning:

1. Enabling act: usually a state statutes: gives states and towns the power to govern themselves
   -challenges often made to way local zoning board enacted the ordinance, esp. if enabling statute set out certain procedures
2. Basic Rule: if what the local institutions do is tantamount to what legislatures do, local inst. will likely be treated like state legislature, but it depends on the facts

*different legal consequences depending on how you classify the ordinance by the local zoning board

   a) legislative-like = rule-making
      -harder to challenge – nothing says legislatures can't be biased
   b) judicial-like: adjudication
      -but a biased "adjudication" is illegal
      -to challenge a law, helps then if you can sow direct targeting of individuals

   → hard balance to strike:
      -administrative bodies make general laws, but here, the more general the law, the more over- or under-inclusive it is → you want to be able to make adjustments at a very local level

   → law tries to compromise: start w/ an ordinance of a fairly high level of generality for basic concerns. then introduce series of mechanisms at local level for dealing w/ the problems over over/under-inclusiveness (the "comprehensive" plans tended to look too much like soviet central planning)
      = 2 mechanisms
      → ordinance: a) amend zoning ordinance; b) variance – won't apply rules to you, b/c if we do, X will happen; c) ∴ make special exception; d) planned unit development (PUD)
      → non-conforming use:
         a) if you're *planning* on building smthg, board can pass zoning law to prevent you
         b) if you've *already* built smthg, govt can (i) exercise eminent domain – take land, but give you compensation (otherwise 14th am violation) or (ii) local govt can initiate condemnation proceeding, forcing you to sell land & getting judicial determination of a fair market value (iii) or if your existing use is inconsistent w/ new law, they'll either make exception for you or give you 5 years to move out.
         c) govt restricting use of your land: only if they make your land really valueless do they have to compensate you

3. If you want to change the law, then:
   a) find out what institution enacted the ordinance
   b) "amend it" – only smaller, local bodies going to take time to hear your case - ∴ if local body says no, then you have little change of getting it changed
   ➔ ***rule-like or adjudicative-like?***
      → if what they say is that they're going to leave basic zoning form in place, but make an exception for a specific part, trend is to call this adjudicative (even though has form of legislation) = spot-zoning: *to a large extent, it is illegal* → will be closely scrutinized
         *legislature gets rational basis review; judiciary gets little deference
   *other method: get referendum passed at town meeting in order to effect zoning change
      -can't just get referendum of 20 nearest neighbors, unless it's an RC or ES, b/c residents are biased w/ financial stake = legislative-like, but adjudicative concerns

➔ law likes to maintain certain level of generality in zoning process w/ some specifics → enormous tensions