ELY'S PROPERTY LAW OUTLINE
PROFESSOR LAWSON - SPRING 2007

What is Property?

Divergent Views

- Blackstone
  - Property as an autonomous doctrine

- Bentham
  - Property as a label for what is *protected by law*s; 99.5% agree with Bentham
  - **Today's legal scholars subscribe to this view**
    - BUT…everyone talks this way, BUT don't ACT this way
    - "X has Property, so X Wins" is all over the law; if really thought Bentham way would say X wins and therefore has property
    - Property law is completely parasitic to contract and tort law.
    - The metaphor that has developed to explain Bentham's position is the metaphor of the bundle of sticks: property is a bundle of sticks, and each stick represents a legal right. The law can come along any time and take a stick away from your bundle. The bundle of sticks reflects a contingent understanding of what your rights are. Tomorrow may be different; you may get a totally different bundle. This bundle can be rearranged in any manner you want.
    - **There is however one indisputable part of the bundle of sticks metaphor. This is a major theme of this course. One of the remarkable things about property law is the way in which it allows people to divide, sub-divide, and re-divide interests in property.** While the law generally does not support the Bentham idea, it does support it in this manner, and it is a major part of the Bentham theory.

Acquisition of Property

Capture and Conquest: Wild Animals

Pierson (D) v. Post (P) (N.Y. 1805)

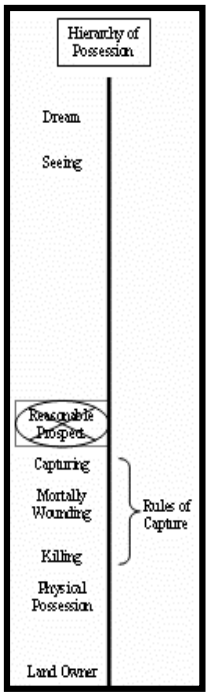
- The Foxhunt Case: Post is chasing the fox with his hounds and after he tuckers-out the fox, Pierson comes in and kills it: Who owns the fox?
  - Judgment for Pierson, the guy who grabbed the fox at the end.
  - Family Feud Case – no other reason for it to be brought – its out of pure spite
  - Cherry-Picking the fox was a huge breach of social etiquette of the times

Weird that Pearson would be chasing and interfering with someone else fox hunt

- The Events happened on UNPOSSESSED LAND – Assume Hypo where one party was trespassing on the other's land
  - In this Hypo – the landowner would win- ratione solie- – WHY? The other is a trespasser
  - What does it mean to own land?
    - Owning land meaning owning the "physical space" PLUS everything attached to it (unless otherwise specified and agreed upon)
    - "Attached" means things that DON'T move around – like rocks
      - It's generally understood that when you sell land, you sell everything attached to it – like the rocks and trees – but REMEMBER: you can contract around this if you want; but the default is that it all goes with the "physical space" because that's the ordinary way people do things
      - If you want to do something out of the ordinary – you just have to say so
      - Old school Roman idea: Own land and all above it and below it; Today: have air travel so need to adapt the rule…so now your legal right do extend to some extent above the surface (i.e. no trees growing over your property) but they extent to a certain reasonable height… i.e. airplanes flying over land excluded … BUT maintain ownership of things below within reasonable distance b/c cant get down far enough anyhow- minerals etc…
  - Law has never said you own wild animals on your land – only domestic animals – domestic animals are more like rocks and stay attached to your land; wild animals do not – they move around too much. **So, a landowner never owns a wild animal while that animal is alive on his land. Ferae naturae**
  - But, once the fox is dead, it has problems moving around – so now it is like a rock and goes along with land – but who has the right to covert the wild animal into an object of ownership by killing it?

- **Only the owner of the land has the exclusive legal right to perform the actions necessary to turn the fox into an owned thing – like killing it** → landowner would own the exclusive right to hunt the fox on his land and exclusive right to perform the acts that would turn the fox into an owned object – kill it (so if trespasser comes and kills a fox on your land, the D is a trespasser and guilty of interfering with your exclusive rights)

- BUT, neither Pierson nor Post owned the land – so what do we do? So who owns the land? – all land is owned by someone or some entity i.e. Government.. so who would then be the owner of the fox? – who ever owns the land
- RELATIVITY OF TITLE
  - There is someone out there who possessed the exclusive right to hunt the fox and turn it into an object of ownership
    - Both Parties were trespassers because every piece of land in the U.S. is owned by someone – if not by a private individual – residual owner is the State (if an original Colony) or the Federal Government
    - Blackstone defined the owner of property as the person who has the best claim in the universe to the property – the person at the top of the food chain – the "best gun in the west" – We call this the Blackstonian Owner
      - According to Blackstone, ownership is established over property when some person asserts a right to such property which trumps any other person in the world's right to such property. In this case, as well as in many, many cases, the "Blackstonian owner" will not be a party and the court will have to find which of the parties has the best relative claim to the property.
    - In this case – the Blackstonian owner would be the person who owns the property – but that person is not here – so what do we do? (subject, of course, to the idea that if the Blackstonian owner did show up, that person would trump whoever else may win)
  - We decide who – of the parties before the Court – has the best claim to the property – here the fox carcass
    - We're asking, "Whose the biggest loser?"
    - Call this the Irving Principle – Person with 141st best claim is hoping that his opponent is #142 – analogy to "best gun in the west" idea – 141st best gun in the west is look for #142
    - Thus, the Court ignores the concept of Blackstonian ownership and decides, who among the parties before the Court has the best claim to the property – even though the Blackstonian owner or someone with a better claim could – conceivably – come in and trump both parties
  - Why decide title relatively? (why decide who is the lesser loser?)
    - Avoid duels
    - If we force people to prove Blackstonian ownership, there will be a whole class of cases that could end up being dismissed and resolved with a duel (better for the court to decide and keep the peace) (this is a reality when the doctrine is developed)
    - So – our system of laws decides who, among the parties before the court, has the best claim to the property



- This is a case of first impression
  - All precedents either involved a landowner or a statute
  - Here, the NY court was faced with first case where landowner was not a party and there was no statute
- The RELATIVE winner is the person who first has POSSESSION of the fox
- Why? – easier to determine than a lot of the other possible criterion
  - SO...the question is: "what counts a possession?"
  - Physically Touching and Holding = Most obvious Possession
  - Killing the Fox = Possession (extremely small conceptual distance between killing it and touching it – just have to walk over and pick it up)
  - Capturing the Fox = Possession (Very small conceptual distance from killing it – with is possession)
  - Mortally Wounding the Fox = Possession (very small conceptual distance from actual possession as well)
    - If we draw the line here – Pierson wins because HE mortally wounded the fox
    - Post wants to stretch this conceptual line of possession just a little bit further to say a "*reasonable probability/prospect*" that one will Kill/Capture/Mortally Wound should be good enough (i.e., I tuckered it out so I was about to kill it, thus I possessed it). COURT REJECTS THIS ARGUMENT – see below.
  - Of course – the definition for possession is not uniform and it depends on the object
- Doctrinal Approach: What "doctrine" do we look to in order to answer the question of possession?
  - Constitution – Not here
  - Statute – None Exist
  - Regulations – None Exist
  - SO CONCLUSIVE AUTHORITIES ARE NOT THERE

- Case on point - Precedent: Prior judicial decisions addressing the same or similar issues – Don't have any: all involve statutes or landowners – this one doesn't
- Analogy Cases (cases from other jurisdictions)
- Academics – Treatise Writers → having exhausted everything else – they start reading everything from Roman Treatise Writers to Natural Law theorists in 1500s and 1600s
  - This is how far down the list the court has to go to get any authority
  - People settling in on Kill/Capture/Mortal Wound

- Majority Holding (although almost always a formidable minority view too)
  - If we adopt a "reasonable probability" standard – it would lead to a flood of litigation → a "fertile source of quarrels"
  - **Reasonable probability rule has too much uncertainty → HAVE to actually apply rules of capture: a. kill, b. capture, or c. mortally wound (then decide who did one of these acts first…)**
  - **Thus, Pierson Wins**
- **Rule of capture for wild animals in Common Law**
  - Pierson v. Post is generally universally accepted in its context as the dominant common law approach → for general wild animal possession cases
  - KILL, CAPTURE, MORTALLY WOUND gives you possession of the fox or other wild animal
    - But you are not necessarily the OWNER because the landowner could trump you that any time if you are not the landowner
  - Common Law only if no Statutes or Regs – which will exist a fair portion of the time

Instrumental Approach: Dissent:
Foxs are bad and hurt humanity.. so pick a rule that kills the most foxes.. such a ruled is "instrumental".. focus on means-ends reasoning…how to best accomplish this? …formalism vs. realism…… on this ground, Post ought to win to encourage more fox killings… judge is willing to succumb to doctrinal aspecs like constitution statutes, regulations or maybe even case on point…. Instrumentalism comes in when doctrinal materials are too far down the chain (i.e. if the choice is either killing foxes or listening to roman treatises, then apply instrumental principles…)

Whale Hunting
Under rule of capture, you have to kill the whale… so if your bomb harpoon kills the whale, and then it washes up you didn't loose the right to the whale…. property law takes this into acct, so if your whale washed up ashore, you will get the whale, but you have to compensate the beach owner… If the whale beached itself while still alive, or if you just set one harpoon into it but it is still alive, if the original harpoonist was not guaranteed right whale, no one would go into the whaling industry.. . so for whaling ind. have to fudge the rules…first harpoon rule give original harpoonist right to whale.. this is an exception to standard…

Bradshaw v. Ashley
Does the Relativity of Title (Irving) Principle apply to land?
- Yes – sometimes; if no one owns the land, then the first person to get there has a better claim to the land
- But what works for foxes (Irving principle) DOES NOT ALWAYS work for land (or other commodities)

Another way to turn wild animal into possession (besides killing or mortally wounding) is to capture… so what happens when the wild animal escapes?... do you lose ownership if you lose captured property?

Reese v. Hughes (Miss. 1926)
- **SO what if you have possession of the fox and you lose it?**
- What if you have it confined and it escapes? What now? Can you assert ownership rights?
  - Important issue for breeders – in this case guy paid $1K for it and some trapper shot it
- Settled law was that if you captured a wild animal and it escaped, it is now wild again – thus concept of ownership can't apply to it → So captured fox ceases to be property once it gets back out in the wild
  - Translation: tough shit fox breeder
  - Exceptions
    - Sometimes wild animals become a little less wild – i.e. domesticated
    - Test is whether animal has **animum revertendi** (habit of return)
      - If the animal is captured, but when it gets out and runs around, it has a tendency to return home
      - Like a Dog
      - Captured animal must be so domesticated as to have an intention to return home when it gets out and runs around
      - **If you can show that the animal you confined would probably come back on its own, then you keep your interest in the animal.**

- That law was settled – so why was the case brought in the first place?
    - #1 P argued that Fox had animum revertendi; this doesn't fly with Court
    - #2 similar to whaling industry…granted I lost ownership of fox once it escaped, but ask the court to amend rules to fit foxing industry….good for business/ good for all (farmer did not argue this, but could have as was in the Co case…)
    - BUT ALSO: The guy who shot the fox was a black man in Mississippi in 1926: Overt racism enough to get 2 lower courts to ignore years of precedent; why judgment HERE (in Miss. S.Ct.)
    - "surely this court will not take out skin and hide off us and give it to this darkey for the mere trifle of ruining the pelt by shooting it twice and filling it full of bullets"

Today, common law not that relevant, since we have statutes that oversee this…

Why is all this stuff about foxes important:

1. surface land: **ad celum** rule – own some useful state above surface and below (some gases and liquids which move are exceptions.. are those gases etc wild too? Not owned by anyone…until captured)…so while the wild minerals are under your property you don't' own it, BUT you have the right to hunt for it…

so a trillion dollar issue (minerals) were based on the property laws on wild foxes…

Capture and Conquest: Wild Minerals and Gases

Background of Law of Land Ownership

- How far up and how far down do your property rights extend?
- Latin: **he who owns the land owns it up to the heavens and down to the depths**: *cujus est solum, ejus est usque **ad coelum** et usque **ad inferos***
- Ad Coelum Rule – ABOVE THE LAND
    - This idea only starts to change when ballooning starts to take hold in the early 20th century
    - The consequences of the rule become untenable and is quickly abandoned
    - Reinterpreted to mean that your property rights extend upwards to a REASONABLE extent – everything higher is owned by the government
- Ad Inferos Rule – BELOW THE LAND
    - Theoretically, can go down at an angle from each side of your property line to the core of the Earth; but practicality takes hold before that
    - Metals and stuff that usually doesn't move is what is normally under your land
        - It is covered by Ad Inferos and the Rock principle
        - It's yours
    - But what about natural gas and oil that moves around like a wild animal beneath your land?
        - This wasn't an issue until the 19th Century when it became VALUABLE

Hammonds v. Central Kentucky Natural Gas Co. (Ky. 1934)

- The Gas Co. owns all the land around Hammond's property and there is a huge underground cavern that happens to be underneath both pieces of property
- Gas Co. extracts large amounts of natural gas elsewhere and then stores surplus in this cavern for times of high demand
    - Question is where to put the stuff once you capture it. Once oil and gas have been pumped out of an underground cavern they can then function as ready-made reservoirs. The best place to put the stuff you pumped out is back underground.
    - It's economically feasible since building a storage container would cost all sorts of money and nature has already provided one
    - The problem is that the Central Ky. Gas Co. owned MOST of the surface above the reservoir, but not ALL of it. Hammonds owned a little portion of the land above the reservoir.
- Hammonds sues Gas Co. for trespass for money damages in an effort to get them by the balls for a bunch of money – so we end up with each side arguing positions they wouldn't normally take
    - Trespass may be the easiest tort for P's to prove: you don't have to prove intent to trespass, you don't have to show damages, and most importantly with the tort of trespass, you can get an injunction, which you typically can't get unless you can prove to a court that damages can't do.
    - Hammonds argues that Gas Co. DOES own the gas that they inject into the cavern (this way she can sustain a trespass claim)
    - Gas Co. argues that they DON'T own the gas that they inject into the cavern
    - Would be arguing differently if Hammonds was tapping the cavern and selling the gas for a profit! → this is the next case
- So to answer the question, Court does the natural thing and reasons by analogy

- Now we have MINERALS ferrae naturae
- Wild animals is the other natural place in property law where we see things that move around a lot which can be reduced to ownership – so apply that law here
- On this theory, no one "owns" the gas under her land – but the landowner has the paramount right to reduce it to ownership through Kill, Capture, Mortally Wound
- How do you CAPTURE natural gas?
    - Find it, suck it up, and store it in a cage
    - But the issue is that gas is wandering into her ad inferos property!
        - She's not trying to exercise her land ownership rights to reduce the gas to her possession
        - She's trying to get the Gas Co. to PAY HER for the gas's continuous trespassing on her ad inferos property
- So we take this a step further:
    - The Gas Co. has released the gas back into its "natural state" since they are putting it in a cavern
    - **So the gas is like a released wild animal – no one owns wild animals if they are captured then released – your relinquish ownership (see Reese)**
    - Thus, since the Gas Co. released the natural gas back into its natural state – they relinquished ownership of it
    - Thus, since Gas Co. doesn't own the gas, it can't be liable for trespass and the "win" by getting to court to rule that they don't own the gas

- Gas Co. isn't worried about the future implications of this ruling because they will make sure they own ALL the land over a cavern next time
- By the mid-20th century there are objections to what had become known as the "*Hammonds* Rule." The criticisms were two-fold: (1) a criticism of application (2) criticism of principle.
    - Application: let's assume that the fox analogy holds. The gas companies are not releasing the gas into the wild; rather, they are releasing it back into a cage. It's not really releasing the gas back into the wild, it's releasing it into confinement, and should therefore still be regarded as property of the gas co. This was not the main argument.
    - Principle: it angered people that ownership to very valuable oil and gas was being determined by analogies to wild foxes. People thought this just didn't make sense.

Lone Star Gas Co. v. Murchinson (Tex. Civ. App. 1962)

- This is the classic dispute
    - Gas Co. owns all the land over the cave except for one little tract and Murchinson tapped the reservoir and began pumping the gas and sold it
    - (gas not really like foxes because it at least takes some skill to lure the fox (bait etc..) but with gas you just pump down and the gas comes to you…)
    - If you apply Hammonds rule – Gas Co. loses
    - BUT…Hammonds had been criticized big time by now:
        - 1. Hammonds mis- applied the fox analogy: gas still confined in a different cage… you clearly still own it.. its just gas on a really long leash; on the other hand, is the space so big that gas not really any longer confined?
        - What is the best way to resolve legal disputes: doctrinal or instrumental?
          Popular notion at the times was "legal realism"- especially upsetting to theorists was that we're equating oil with gas.. and letting some random guy come in and disrupts the oil/gas industry.
- Court finds for Gas Co. and say they own the gas
    - The cave (so long as there is structural integrity) is a reservoir for the gas
    - The gas has been captured and put into a cage from which it cannot escape; thus it is not in the wild
    - It is like a fox in a cage, but on a leash so that if the cage is opened, it still can't get out
- Court refuses to address the trespassing issue that is obvious now
    - Bottom Line: This is Texas and you don't fuck with our oil
    - Texas courts eventually announced a new rule that there is no liability for this type of trespass

Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co. (Ky. 1987)

- 25 years later, the Ky. courts get to revisit the issue. They say: we've taken a lot of heat for the *Hammonds* decision, people don't like the handing out of oil and gas rights because of analogies to wild foxes. They come into agreement with the Texas courts.
- Now Ky. Backs-off Hammonds and says they are not using it
- But they still use the wild fox analogy → the fox has just been released in a private confinement zoo – gas in the cavern; you still own it
- The morals are three-fold:
    - Although property law often "talks the talk" of consequentialism, i.e., speaking the language of not wanting to use century-old ways of thinking. But, when push comes to shove, property law does rely on these ancient ways of thinking. Perhaps more than any other area of law, property law is very reliant on labels and applying outcomes based on those labels.

- Always look for statutes, even if statutes are not discussed. Many times there will be a statute controlling these types of situations.
- Because property law has developed over so many years, very small changes come back to have huge doctrinal implications, perhaps centuries later. Think of the small decision of *Pierson v. Post*: out of this developed law that would deal with oil and gas.

- Irving principle- you don't have to have the best claim in the universe to win…
- Courts decide cases in all sorts of different ways (sometimes via doctrinal, sometimes via instrumentalism) – beware universals – 90% generalizations are useless in the other 10% of places!
- statutes always trump! – first thing to do is look at what legislature said if anything
- possession is key

Fox and Minerals Cases Today

- There will probably be some statute or legislative authority governing the situation
- Trespass issue will likely be resolved today by eminent domain statutes
  - Government can authorize private companies or firms to exercise the government's eminent domain rights

Acquisition of Property Rights by Find – Lost Items

The Basics – If the Prior Possessor (Owner) Shows-up, He Wins *(With 3 Exceptions)*

- **The law of lost and found property develops entirely without reference to the law of wild animals or wild minerals. It developed entirely separately. (it is inconsistent- otherwise, the issue below would be resolved by the landowner getting to keep the lost item)**

Usually all below is irrelevant, since we have statutes that overrule common law… basically just one category- lost items, and you must turn them in or get punished….(exceptions are statute of limitations, possible abandonment…)

- Three people we're worried about
  - (1) The Owner (Prior Possessor)
  - (2) The Finder
  - (3) The Landowner (Person whose land the property was found on)
- **RULE: The Prior Possessor (PP) has a superior claim over the Finder and the Landowner, no matter what** → Even if the PP is a thief and originally stole the property before he lost it. (don't have to prove you're blackstonian owner, just that you possessed it before you lost it; so thief #1 can sues thief #2 who stole from thief #1)
- Suppose you lose a wallet. You then see your wallet in someone else's hands, and then you ask for it back. The finder says no. This is such an obvious legal principle, that no one litigated it until 1986.
  - The legal principle comes from a 1986 Maryland case, ***Ganter v. Kapiloff***: "I'm a loser, I'm a winner." If you lose something, you will get it back. The finder does not prevail, the person who originally had possession of the item continues to have ownership.
- Rule, as stated by Gilbert's: An owner of property does not lose title by losing the property. The owner's rights persist even though the article has been lost or mislaid. *Ganter v. Kapiloff*. As a general rule, however, **a finder has rights superior to everyone but the true owner**; however, there are important exceptions to this rule.
- Dispose of the idea of "finder's keepers, loser's weepers." This is absolutely not true, and never will be true.
  - If you lost something, and you encounter again in the possession of someone else, it is yours. You may have lost possession of it, but you never lost ownership of it. Why? The first possession constitutes ownership, even if you relinquish ownership of it later. The person who lost wins; and the finder is shit out of luck. "You've got to give it to me."
- So, Finder and Landowner ALWAYS lose to the PP
- (statutes on books though to require founder to take reasonable steps to get property back- i.e. if you find wallet you need to try to find the owner of wallet…)
- **EXCEPTIONS (PP will LOSE to the Finder or Landowner)**
  - (a) Abandoned Property (you intend for the parting with property to be permanent)
  - (b) Statute of Limitations
  - (c) UCC § 2-403 – **DO NOT WORRY ABOUT THIS EXCEPTION**!
- (a) Abandoned Property
  - The PP must part with the property with the permanent intention of never reclaiming it
  - If when you lose the item, you did it on purpose with the intention never to reclaim it. You literally released it into the wild.
  - How do we determine the INTENT of the PP? → Permissive Inference from the Facts
- (b) Statute of Limitations (turns a legal wrong into a blackstonian ownership)
  - Assuming that you can find the person who has your wallet, you are going to have a "slam dunk win." Except that there is one possible hitch: pretty much every legal action has a statute of limitations attached to it. If you wait too long, you are fucked. The other party has an absolute defense: the Statute of Limitations has run out, and it is no longer your wallet.

- Replevin → which is the legal action for the return of personal property that is illegally held.
- If you don't want the wallet back, and all you want is money (damages), then your claim is for conversion (for destruction of personal property).
- General Statute of Limitations for replevin claim is 2-3 years, sometimes as much as 5 years
- Statute of Limitations can allow a rank thief the become a legit possessor
- Statute of Limitations can extinguish one's legal rights as a prior possessor

- There are two contenders for ownership of found property:
  - (1) the person who found the property and
  - (2) the owner of the land where the property was found.
  - In *Pierson* the owner of the land has the paramount claim, but this is not the case in lost and found law.
- Once you find something, you have an affirmative duty to take steps to notify the prior possessor (if you don't you have committed the crime of larceny) – usually statutory (NB: you are allowed to walk on by – don't have to be a "finder").
- But…most of the time prior possessors don't show up because they don't discover that someone has gotten/found their property
  - Most of the time you are left with Finder and Landowner
  - So then the dispute devolves into the Irving Principle → Who's the biggest loser?
- **The rest of Finder's Law is subject to the caveat that a PP will ALWAYS trump the claims of a Finder or a Landowner (subject to the stated exceptions)**

Loser – with the exception of the few exceptions (above), the person who lost the item will be the Blackstonian owner since he had the first possession; he will thus be able to reclaim the lost item

Finder – the Finder will presumptively have a better claim to a lost item, unless (1) the Finder is a trespasser, (2)

Landowner – the Landowner will always have a better claim than the Finder over mislaid property; this is because the law wants the Loser to be able to retrace his steps and go back to find his property, thus the law grants (temporary) ownership to the Landowner so that the property stays put. However, this being the law, the Finder that wishes to keep the property is less likely to announce to anyone that he has found some lost item.

Rules for Finder v. Landowner

General Framework

- Three Types of Found Property (**determined by the mental state of *the person who loses it***)
  - (1) Lost
    Unintentional Parting with Property; the prior possessor was unaware at the time of the parting.
    Gilbert's: lost property is property that the owner accidentally and casually lost (e.g., a ring slips through a hole in a pocket).
  - (2) Mislaid
    Intended to Part with the Property, but NOT Permanently. Having been knowingly parted with by the prior possessor, but then forgotten about.
    Mislaid property is property intentionally placed somewhere and then forgotten (e.g., a purse placed on a table and forgotten).
  - (3) Abandoned
    Intended to Part with the Property PERMANENTLY
    Gilbert's: Abandoned property is property intentionally abandoned by the true owner, who no longer claims any right to it (e.g., items left in a garbage can).
- There is fourth category, (4) treasure trove, but we RARELY deal with it.
- The dispute only occurs when the Finder IS NOT the Landowner
- Two Categories of the Land Locus:
  - (1) Public
  - (2) Private
  - By private we do not mean privately owned vs. owned by the government, we mean places where we don't expect other people to intrude.
  - Public vs. Private has to do with whether a large number of people travel through the area of the find
- Rules for **Mislaid Property**
  - ***Landowner wins, period***: the law favors the landowner unconditionally.
  - Reasoning for result → if someone deliberately puts property down and forgets to pick it up, they are going to be more easily able to go back and retrieve the property from where they remember they were
  - Flaws in Reasoning: 3 Types of People
    - Honest → Going to turn in the wallet they find in the pub; not think about legal rules
    - Crooks → Just going to take the wallet; not think about legal rules

- What's it going to cost me? → Folks in between; Might think about the legal consequences
  What sort of incentive does it give the finder to turn in his find when landowner has right against all others except for the owner?

- Rules for **Lost and Abandoned Property**: lost and abandoned property are treated the same under the law. (unlike wild animals rational soli rules…)
  - **Presumptive Rule: *Finder is going to beat the landowner*, subject to systematic, large exceptions** (which may end up covering more cases then they end up not covering).
    (1) *Trespassing* Finders LOSE
    - This rule is in addition to the legal consequences that flow from the tort of trespass.
    - This is the case in *Favorite v. Miller*: the D is out looking for pieces of the statue, which are blatantly on someone else's property. They have committed the tort of trespass.
    - There is a suggestion at the end of *Favorite*, pg. 40, that if a trespass is trivial or technical then you will get the property that you will find. In tort law, a trivial trespass is still a trespass: you don't have to prove intent or any particular state of mind. But, this is not a decided rule, just an idea.

    (2) *Contract* could alter who is the finder or whether the finder prevails over the landowner.
    - This idea comes up in *Banjamin v. Lindner*: airplane mechanic worked for a company. Or pool cleaner finds something on bottom of pool
    - Another ex.: you hire a plumber and when he is in your walls he finds an envelope filled with cash. There could be a contract in which it is stated that anything the employee finds is property of the company. Lots of times, however, there are no contracts
    - Nowadays, provisions written into the employment contracts explicitly governing disposition of found property

    (3) Finders Finding in a Private Locus LOSE
    - There is a line of cases that suggest, but do not hold or say, maybe, possibly, if an item is found in a really private place, maybe the landowner should walk away with it.
    - **This is not an exception, it's a doubt that the law has.**
    - This is relatively unclear
    - Ex.: I am invited to my friend's house for a Super Bowl party. I am at his house and I find $10 in the folds of the couch. It doesn't belong to my friend, it was left there during some past party, and no one knows who the prior possessor is. I am clearly the finder and I am not a trespasser. My friend did not make me sign any sort of contract. The money is best classified as lost. There is a good chance that you will win, but it is not certain.

	Definition	**Right of finder against original owner**	**Right of finder against 3rd person generally**	**Right of finder against landowner**	**Rights to object on public land**
Abandoned	When owner intentionally or voluntarily relinquishes all right, title, interest.	Property is un-owned and can be "captured."	General rule, finder has better title. Relativity of title.	Type of constructive possession awards item to landowner if in house or embedded in property.	
Lost	Owner unintentionally and involuntarily parts with it through negligence & doesn't know location.	Original owner wins. Wants to encourage productive labor of owner to acquire property.	General rule, finder has better title. Relativity of title.	Same	
Mislaid	Owner voluntarily puts it in a particular place and intends to reclaim ownership.	Original owner wins.	General rule, finder has better title. Relativity of title.	Same	All property left in public considered mislaid and given to owner or public owner/occupant.

Lost vs. Mislaid Property: Making the Distinction

- We're trying to discern the MENTAL STATE of the PP
- Two good ways to prove mental states
  - (1) Put the person on the stand at trial
  - (2) Examine the actions that they took and ask the jury to infer the mental state
  - Problems:
    (a) We don't have the prior possessor;
    (b) We don't know what exactly the prior possessor did; and
    (c) If we had either of those conditions, the problem would be mute because the prior possessor would be present and they would win

  These problems really don't turn out to be a huge deal, because you can infer it from circumstances.
- So law has set itself up in a weird possession:
  - **Have to make a determination that turns on the mental state of a person who is not present and whose actions we know nothing about**
- So we have to look at the **reasonable actions of the prior possessor in the situation**
  - Wallet on the ground vs. on the counter → look at the location of the item and make your best guess on a preponderance of the evidence
- Ex.: we find a wallet in a bar.
  - If the wallet has identifying information in it, we notify the person, because if we don't we have committed larceny.
  - But, suppose we just find $20. If it is labeled mislaid, it is the bar owner's. If it is lost, it is the finder's. Everything turns on this question. How do you decide what the mental state of the prior possess was? Suppose you find the $20 beneath the bar stool. A pretty good explanation is that the $20 fell out of the guy's pockets, but it isn't the only explanation or scenario. However, chances are that a jury will say that it is lost. A whole lot of situations in property law depend on questions such as this.

Benjamin v. Linder Aviation, Inc. (1995)

- P finds $18,000 in wing of an airplane; no question that P is finder of that property
- Question is whether the property is lost, mislaid, or abandoned
  - Obviously not lost, no logical explanation for this.
  - Interesting question is mislaid vs. abandoned
- Mislaid vs. Abandoned
  - Mislaid – TRIAL JUDGE SAYS MONEY IS MISLAID, APP. CT. AFFIRMS
    - The court says this money is mislaid because no one voluntarily gives up $18K. It was left there purposely, but never reclaimed.
    - Property owner gets the money
    - Then only issue is who is the property owner?
      - (a) Owner of the airplane; or
      - (b) Owner of the hanger →
      - Court is right that it is the airplane owner – the BANK – who is the property owner
  - Abandoned
    - P not trespasser, nor was it a private place, no was there a K in place
    - P would win if the property were abandoned
- What else do we know?
  - Mostly $20s, mint dates in 50s and 60s, smelled musty
- Majority: OF COURSE IT'S MISLAID!
  - Who abandons $18K?
  - Thus – Locus Owner Wins – the Bank
- Credible Argument for Abandonment (made by dissent): DRUG SMUGGLING
  - Feds on to them and they cut their losses
- Another credible argument for Mislaid
  - Previous Owner of the plane before the bank could have been someone who grew-up or lived through the Depression
  - Banks not stable, so they create their own "bank" for their money
  - Still don't trust banks
  - Supported by mint dates, small denomination
- POINT: **Whatever characterization of the property (lost, mislaid, or abandoned) that the trier of fact reaches will likely hold on appeal so long as it is rational .**
  - It is a question of fact for trial which will almost always be upheld on appeal (on appeal, give trial court presumption of correctness)
  - Fact Finders have big discretion and their conclusions will be upheld so long as they are reasonable

- Courts always have to decide these questions of lost property vs. misplaced property.
    - The NY statutes on pgs. 56 – 58 do away with the common law distinctions. What NY does is fairly typical of what statutes do. They say that the finders are going to prevail, but only sort of. The finder must turn it into the cops. The police are basically becoming the landowner. If you don't do this, you are guilty of a crime. If after a certain amount of time, a prior possessor has not shown up to claim the item, the finder obtains the item. To the extent that statutes govern, we are not concerned with the traditional common law categories.
- Some states don't have these statutes, some states do, and some states, like Iowa, have statutes that are basically the same as the common law. However, some state courts, including some in NY, interpret the statutes to resemble the common law.

Brazelton

- How do we determine who the Finder is?
- Brazelton goes through the effort of marking the location of the shipwreck and then someone else comes in and raises the wreck.
- Although Brazelton was the one who's work made raising the ship possible, the other guy was the first to actually raise the ship and thus was the first to take possession of it. Thus, the other guy is the Finder.
- Seeing is not possessing.

How to "Find" Property (what does it mean to be a finder?)

- Gilbert's: for the finder to become a possessor, the finder must – like the captor of wild animals – acquire ***physical control (kill, capture, mortally wound)*** over the object and have ***an intent*** to assume dominion over it.
- There are two dimensions to the problem of possessing something: (1) physical AND (2) mental state.

(1) PHYSICAL To be a finder – **you actually have to succeed in picking it up to take possession of it**; you must "complete the job of possession." If you don't actually take possession of the item, then you don't have ownership. - *seeing is not finding*… i.e. just noticing that there is a bracelet on the road, and then you come back the next day and its gone, you don't "find" the bracelet until you actually have it…a reasonable prospect of snatching is not good enough…

- Popov v. Hyashi – The Rare Exception of Constructive Possession
    - Suit over who owns Barry Bonds' 73rd HR Ball, a historic homerun.
        - Someone emerges from the stands with the ball, but another person argues that they caught the ball, but it was wrestled away from them.
    - The CA court convened a conference of property scholars to discuss this question. The CA courts solved the problem by making up something and ordered the two combatants to split the proceeds.
        - This is a relatively unusual circumstance: usually it's very obvious what it takes to physically possess an item.
    - Gilbert's: a person is in "constructive possession" when the law treats him as if he in possession although, in fact, he is not or he is unaware of it. Constructive possession is a fiction that permits judges to reach a desired result.
- (2) MENTAL **For possession to be complete, you need physical possession (above) AND a mental state**
- Ex.: you are stopped by a cop who finds cocaine in your pocket. You have the proper physical control for possession. But, the reality is that it was slipped in your pocket by a person escaping the police. You do not have the mental intention to possess the cocaine. You had no mental intention of exercising dominion over this item.
- Ex: Keron v. Cashman (1896)
    - 5 boys age 9 and up playing on the RR tracks in NJ; They find a sock and pick it up and start hitting each other with the sock; it breaks and $800 comes falling-out
    - The efforts to locate the prior possessor proved unavailing
    - What happens with the $800?
        - For Mislaid: No finder v. landowner; RR could intervene in principle because they were trespassers, but not worth it
    - Question is who was the finder among the kids?
        - (1) First to pick it up: 9 year old
        - (2) Holding it when the money came out: older kid who was hitting the others
        - *At what point do you have possession in the eyes of the law?*
        - They were working together as a group – in sock whacking – when they discovered the money – **it wasn't until the point that the money came out that the kids had the necessary mental state to count as possession**; before that, none of them did
- Gilbert's: keep in mind that possession in this context is like "capture" – there must be physical control of the property and the intent to assume dominion over it.
- Statutes
    - Modern world has statutes for everything
    - First question in a Finder's case should be "is there a statute, and if so what does it say?"
    - Statutes tinker will all aspects of Finder's law

Bailments and Accessions

- What are your responsibilities for maintaining found property for the prior possessor
    - You have to make reasonable efforts to locate the prior possessor; none shows up; dispute with landowner settled; then prior possessor shows up to claim property before statute of limitations runs out: what happens?
- Tort of CONVERSION → loss or destruction of items of personal property
- Blackstonian Ownership doesn't actually vest in you until the Statute of Limitations runs out
    - Thus, question becomes: to what extent are you liable to a prior possessor who shows up before the Statute of Limitations has run? Bailments and Accession give goof analogies

Let's make a more complicated case:

Original owner loses the item; A finds the item; A loses the item; B finds the item in C's house

- Who gets the item back?
    - If the Original owner comes into the picture, he will get it back unless he previously abandoned the item or the statute of limitations has run. Let's just assume that he doesn't show up.
    - Next, we look to see if there is a statute that controls what B must do with the item (does he need to report it to the police?)
    - Under the common law, Relativity of Title principle, A will have the best claim to the item because of prior possession (even if he was a trespasser when he found the item, or if he stole it – but he may subject himself to criminal penalty if he admits this – this general rule will be qualified later)
        - Of course, any statute beats out the Relativity of Title principle. If a statute exists that says that a previous owner that got the goods by stealing it, then A (who we'll assume stole it) will have no claim.
    - If A has no claim through a statute or never comes back into the picture, then whether B or C gets the item depends on how the law sees the item
        - If the item was "lost" then B, the finder, will get the item
        - If the item was "mislaid," or if B was a trespasser, then C, the land owner, will get the item

What about if the original owner shows up?

Can file action to recover property (replevin)→ want the item back

Can file a tort action for conversion (damages)

Person in physical possession of the item is person B

- if want recover property, need to file an action for replevin

Reasoning

- Is the prior possessor one of the claimants?
- Is there a statute that says B should give item cops or go to prison and if nobody claims it, the finder will be able to claim the item
- Who is the finder?
    - Person in actual physical possession or the person who found it first?
    - A is the finder because prior possession beats subsequent possession (unless the statute says differently)
- Potential conflicts
    - Can A (original finder) beat B or C?
        - Under Irving Principle, answer is yes → both B & C will lose to anybody higher up in the chain of possession
    - If the item is mislaid rather than lost, the first locus owner has best claim
    - If it's a lost or abandoned item the first locus owner has the best claim
    - In order for B or C to have a shot, A or D can't show up or abandon or statute of limitation has to run on them
    - If item is mislaid, owner of place has best claim
- What does the winner win?
    - Suppose that the item in question is an expensive bracelet
    - Once you are deemed to be the rightful finder, what can you do with it?
        - Blackstonian owner can do whatever he wants
        - If reason why you have the property is because you have the better claim than the other guy but others definitely have a better claim, the legal rights may be different
            - If win the bracelet, sell it, blow the money or if you lose it and the prior possessor shows up and claims the bracelet are you liable to the prior possessor?
                - Can bring a conversion action for the value of the bracelet?
            - Win the bracelet, polish it up increasing its value and prior possessor shows up and claims replevin→ does finder get anything back for trouble?
            - Win the bracelet, dismantle it, take jewels out and put in new setting, can prior possessor show up and claim replevin for the new piece?

- Answers lie in two separate areas of the law
    - Law of Bailments
    - Law of Accessions

Bailments

- Bailor → item → Bailee
- Gilbert's: a bailment occurs when a one person gives temporary possession of her property to another. The bailee has possession of another's goods. The major issues to focus on are when a bailment is created and the duty of care of the bailee.
    - A bailment is the rightful possession of goods by one who is not the owner. The true owner is a bailor; the person in possession is a bailee. The bailee has the duty to care for the goods and deliver them to the owner as agreed.
- Voluntary Entrustment of your property to someone else
- Bailor (the person who does the entrusting); Bailee (the person who takes custody of the item).
- Are Bailments a species a K?
    - Can outline exact specifications
    - If bailment disputes arise, first thing is to look at the contract
    - Bailor → originally has the items and entrusts to somebody else
    - Bailee → person who receives the goods

Ex.: if you stash $200M in a warehouse, chances are there is going to be a very detailed arrangement between the bailor and bailee. This arrangement will be fairly sophisticated, and at the end of the day, the owner of the goods is going to pay a lot of money to the warehouse owner. The owner of the warehouse is not agreeing to be a bailee because it's fun, they are being paid for it. Therefore, the rights of a bailee are going to be discussed via a K.

- Lots of time, bailments are not contracts.
    - still a legal relationship established under property law principles
    - bailee creates a legal relationship with the other party, even if they aren't getting a penny for it
    - Ex.: I'm going for coffee, can you watch my laptop? This is not a contract because there is no consideration. There could be a contract if you responded, "Yes, I'll watch it, but only if you bring me a cup and pay for it." As long as you are forking over something, there is a contract, albeit a simple one.
- some things can be a bailment and a contract
    - principles of contract law and property law both come to bear
    - conflict between the two bodies of law can arrive

Peete v. Roth Hotel

- Common Law Bailments depended upon nature of the agreement between bailor and bailee. The law generally distinguishes between kinds of bailments based on who is getting what. There are basically three possibilities:
    - (1) The bailee gets something, i.e., bailment for the sole benefit of the person to whom the property is entrusted (only the bailee benefits)
        - HIGH standard of care
        - Even MINIMAL negligence on the part of the bailee is enough to create liability
        - Can I borrow your snowblower→ sure (bailor)
            - Bailee gets the use of the snowblower (getting the benefit out of the deal)
            - Highest standard of care→ more careful than if they were guarding their own property
            - Liable for **slight negligence**
    - (2) Both Parties to the Bailment Benefit
        - Standard of Care is ORDINARY or NORMAL Negligence
        - "Watch my laptop and so I can get a coffee and I'll get you one too"
        - A mutual benefit is clear where the bailee charges for the service.
        - *Peet* is an example of this type of situation.
        - Parties in this kind of Bailment are in a K too – so if it is genuinely a K with Consideration, etc., they can overrule the Property Law default and make the standard of care whatever you want – bargain for it
    - (3) The bailor gets something, i.e., only the Bailor Benefits
        - Hold the bailee to a slightly lower standard of care when he is getting no benefit (gratuitous bailee)
        - Bailee only liable for GROSS Negligence
        - "Watch my laptop while I go get a cup or coffee"

Potential problems:

- Hard to define gradations of negligence

        - Express contracts can override the law of property
            - If in ordinary negligence regime under this structure, but the contract calls for strict liability→ the contract will control

- This case represents the move away from the Common Law Scheme
    - Gilbert's, pg. 55: This system of classification by benefits is not very satisfactory. In almost all bailments some benefit results to both parties. Nor are the distinctions between gross, ordinary, and slight negligence always easy to apply to facts. In view of this, modern courts may well be moving away from this system to a standard of ordinary care under the circumstances.
    - The court is not keen on using these traditional common law rules.
    - Negligence isn't a clear concept in Tort law → it's hard enough to define "negligence" let alone 3 different levels!
    - Both parties usually benefit; it's a pain in the ass to pigeon hole the cases
    - Thus → Gravitation towards Ordinary Negligence for all Bailment Claims
- Bailee's duty is to return property to Bailor in the same condition
    - Gilbert's: pg. 55, regardless of the standard of care required of a bailee while the goods are in his custody, a bailee is held to strict liability when it comes to redelivery.
- Bailee has a right to use the goods, but parties can contract around this
- When the Bailee is in possession of the property; he is vested will ALL POSSESSORY RIGHTS → Lawsuit Situations
    - The Bailee may sue on behalf of the Bailor and obtain recovery or a judgment → but as soon as the Bailor shows up, he's entitled to what you recovered on his behalf
    - If there is a wrongdoer involved, such as a thief or vandal; the wrongdoer only has to pay one recovery, whether it be to the bailor or bailee; so if bailee sues and gets a recovery, the bailor cannot sue the wrongdoer as well; BUT...the bailor could sue the bailee if the bailee refuses to hand over what he has recovered
    - Bailor can also sue Bailee for negligence in addition to the recovery he gets from the wrongdoer → wrongdoer still only paying once
    - Bailee can also recover his independent interest in the use of the property from a wrongdoer → i.e. a use interest independent of the Bailor's interest → so bailor can recover more than the value of the bailed property
    - Anything to stop finder from suing thief for damages and loser suing thief for replevin? NO – works in theory but thief may have to pay twice (once in damages and once in replevin) – but there is absolutely no case with this fact set – so no strict answer in the law
    - Tort of CONVERSION: destruction or damage to an item of personal property
        - Bailee can recover stolen property in replevin → he was the prior possessor and has the better relative title; then Bailor has the superior claim to the bailee
- Hypo.: regarding the bailee's rights against third parties.
    - You use your neighbor's snow blower in agreement to pay him $5. While you are using it, someone smashes into it with their car.
    - Your neighbor, the original owner and the bailor, has a claim against the driver's negligence.
    - What type of claim does the bailee (me) have? The bailee had a legitimate right in the snow blower and the driver interfered with that right. But, can the bailee assert the bailor's rights?
    - If the snow blower had been damaged beyond repair, the proper tort is conversion, and the bailee can recover from the tortfeasor for the full value.
    - If the bailee cannot return the item, he must return the equivalent of the item to the bailor. What if the bailor goes directly to the driver, the tortfeasor? The driver will say that he already paid, but the bailor will say that he didn't get paid. Driver cannot be punished twice.
- The law of agency comes into play here:
    - Strictly speaking, the bailee is not an agent of the bailor. If the bailee was the bailor's agent, then anything the bailee did would bind the bailor. But, most of the time this is not the case.
    - The law says in these cases that the bailor would be perfectly happy if the bailee did all of the work and got the money, knowing that the bailee would then turn over all of the money to the bailor.

Allen v. Hyatt Regency

- pull up in front of a hotel, you give car to valet→ bailment
    - entrust your car to the valet and they voluntarily take custody of it
- park in a lot, car is damaged/stolen
    - hotel claim is that they are leasing space for a period of time
    - bailor can do whatever want with it, and lot is not responsible or assuming custody (no bailment)
- In this case, there is no valet, it is a lot system→ don't care what they do with that space→ not taking custody of the car

Tennessee Court's ruling

- this is a bailment

- what are the legal consequences?
  - Minimal level of care imposed as a matter of property law
    - Person to whom property is entrusted assumes a measure of possession and control of car→ obligated
    - Hotel held to ordinary standard of negligence
- What is the interface between property law and contract law?
  - IN this case the contract said basically "screw you"→ no responsibility, go park somewhere else
    - Court finds against the hotel on this argument
- dissent argues that there was not assumption of custody

Hypo

- suppose drive car in, leave car, car is stolen
- hotel knows it will be held responsible because it didn't do anything different from the first time
- suppose there was $600,000 in the trunk of the car
- hotel responsible?
  - Refers back to the stamp case ($150,000 worth of stamps in a dresser)→ person buys the dresser→ original owner claims property was mislaid and requests its return
  - Law distinguishes between value of items and the nature of the item itself
    - eg., go to buy a new car, test drive, buy car
    - find employees wallet in the car
    - can't keep the wallet → it's lost property
      - purchasing the car, not what lies within it
    - in absence of specification that purchase includes contents within, the law will separate those out
      - if you buy the dresser, have to give back the stamps
  - In bailment situation, only liable for the car, not the contents
    - If person entrusted jewels, left out in open and got stolen→ jewels were worth 20 times what everyone thought→ liable for the full value
      - Voluntarily took custom of the jewels
    - In hotel parking lot case→ liable for the car, but not for the stuff in the trunk of the car
      - Unless it was generally understood that people driving into this hotel were going to have lots of expensive contents in their cars
      - Unless disclose contents of car and they accept custody, they will be liable

Self storage is NOT a bailment – it is simple a lease of space. The storage company does not take custody of the items in that space, nor does it know or care (for the most part) about what the customer do with that space.

- Valet parking is obviously bailment because the guy takes your car and drives it over to the parking space for you.
- But what about self-park garages?
  - Some courts have determined (with much dissent) that such garages are STILL a form of bailment. Any form of bailment necessarily brings with it some standard of liability on the part of the bailee. What are the garage's liabilities?
  - The garage has a very small contract printed on each ticket that disclaims their responsibilities. In the beginning, the garage would disclaim ALL liability, but the court has said that they can't do that. So the garage, according to common law, is liable for any damage done through its own negligence.
  - What if the car is stolen?
    - The garage will probably pay the bluebook value of the car. But what about the value of the goods inside? Is the garage responsible for those items too?
    - Normally, the law is not concerned with the value of an item – if I sell some old book for $1 and it turns out to have been worth $100, then that's my loss. However, if I sell a dresser without realizing that a $100 book is inside, then I haven't sold the book and I can assert my rights to it.
    - This means that the law makes a distinction between the value of the item, and the nature of the item.
    - Thus, the garage will not be responsible for the loss of any items within the car. They have agreed to take custody of only the car and so that's where the bailment stops.
    - If the car that is stolen turns out to be very expensive, then that's the garage's problem.
    - This problem can be overcome, however, if the bailee had a reasonable belief that there were extra things inside the car.
      - Say that the garage is near the airport. The garage can probably assume that there is some luggage in the car and they may be deemed to have voluntarily accepted custody of those extra items.
      - What about if I tell the garage attendant (a 16-year old high school dropout) that I have very expensive jewels in my glove compartment and he says that's fine and let's me in. Has the garage taken on liability for the jewels since they were told about them?
        - Typically, yes. The attendant, acting as the garage's agent, has voluntarily taken custody of the jewels and thus has become the bailee of both the car and the jewels.

- What if the garage says that the attendant is a minimum wage kid that obviously can't take on such responsibility for the corporation? In Agency Law, perception is reality. If the attendant seems like he would be the one to talk to about the jewels, then under the concept of Apparent Agency, he can and has committed the garage to take care of the jewels.

What does all this have to do with the finder?

- finders are not bailees
  - not a voluntary entrustment of property
  - prior possessor never consented to have a person find their bracelet
  - element of non-consent affects the way the law handles the issue

- *Samples v. Geary*, pg. 189
  - You go to a coat check room, and hand over your coat. It turns out in your pocket, not immediately visible, is a valuable fur. You get back the coat, and the fur piece is missing.
  - Is the employer of the coat check person liable? Court says no. Why not? The answer is what you gave them is not necessarily obviously a coat with fur inside. Remember that the law of bailment is an agreement. The company agreed to take a coat, but it did not agree to take a very valuable coat. It is very possible that that coat check would refuse to take the coat if they knew that there was a valuable fur inside.
  - Part of the argument in *Peet* is that it didn't know that jewelry was extremely valuable. The court doesn't buy this argument. It's one thing to have a coat with hidden value, but the same thing isn't true for jewelry: it is obvious valuable.

Airport Parking Case

- Issue is when a Bailment is actually created
- Voluntary entrusting of goods that doesn't rise to the level of a bailment
- Parking lot owner: I have not assumed entrustment; I have just rented you space with which you can do anything
- Voluntary entrusting requires a certain mental state on both ends of the parties
  - Issue becomes what you voluntarily took charge of
  - Ring vs. a Crackerjack Box with a ring in it → how is hotel supposed to know what's in the Crackerjack box?
  - Parking garage cases – if you take the keys, park the care, etc. – you have taken custody of the car and have been entrusted with it – you bet it's a bailment
  - What about luggage in the car? A reasonable person would expect there to be luggage in a car that is in tourist district of New Orleans
- Gilbert's, pg. 52: distinguish two types of cases:
  1. Park and lock: if O parks his car in a lot, retains the keys, and dos not deliver the car to the attendant, some older cases hold no bailment is created.
     - Ex.: O parks his car in the common airport parking lot, where he pays when he leaves. This does not create a bailment, because B has not assumed control over the car. But note: newer cases, however, hold a bailment is created in such a "park and lock" parking garage.
  2. Attended lots: if O leaves the keys with an attendant, who gives O a ticket identifying the care for redelivery, a bailment is created. If O does not leave the keys, but B has attendants present parking other cars and able to exercise surveillance – thus creating expectation in O that B has accepted a duty of reasonable care – a bailment may be found even though the attendant has no physical control of the car.

Bailee's rights: someone injures/damages item you are temporary under possession:
Rights of the bailee:

- Right to use the property while it is in his possession
- Right to reclaim the property if it was stolen or lost (prior possession)
- Right to sue the thief for conversion
  - The bailor could then get the money from the bailee in lieu of the item

A is bailee; B is bailor, C is thief… B can obviously sue C for conversion, but so can A (B can then sue A to get the damages back)

- why should bailee be able to sue for conversion? What is thief pays bailee, but then bailor also sues the thief… bailor can't sue for both (replevin- return of item, and conversion- damages)…
- BUT if bailee is not an express agent of bailor…. Bailee has rights, not just obligations…possesory interests of the bailee can be separate from possesory interest of the bailor, in which case BOTH can recover damages…(borrowed snowblower, it got stolen, bailee had to pay some kid to blow snow)
- SO If the bailee has been designated as the agent of the bailor, then between the two of them, they only get one option, BUT , in cases where I ask a friend to watch my laptop, the *bailee is not my agent*. Each of us has a different possessory interest and so (I think) each can sue the thief separately.

How does this relate to Finders?
Applying Bailment Law to the Rights of Property Owners

- Initial Matter: A Finder is NOT a Bailee because the Loser has not *voluntarily* entrusted the property to Finder's care
- However, it can be view as some sort of gratuitous bailment to the sole benefit of the bailor (although bailee can benefit too, but we disregard this for now)
- **If you are a finder you are assuming some kind of obligation with respect to a duty of care to a prior possessor – if the prior possessor shows up, you're going to be liable to a negligence standard**
    - CAVEAT: Prior Possessor NEVER shows up 99.9% of the time, so this is largely an academic/theoretical issue
- So, what standard of care does the Finder have toward the item, knowing that the Blackstonian owner could come back any time?
- Sometimes the Finder is known as a Quasi-Bailee (not really, but we'll give you bailee status)… law treats finders as gratuitous bailees (bailees who are not getting paid)…
    - BarBri p.8: Quasi-Bailee = possessor's title is good as against the world except the true owner, even to the point of sueing for the return of property in wrongfully taken from him.
    - Clearly the Finder is benefited in some way because he gets use of the item
    - But the Loser gets some benefit also because it's better that someone has possession rather than leaving the item to the elements
    - BUT, for whatever reasons, the law treats the Finder as a gratuitous Bailee (one that gets no benefit from the bailment)
        - Thus, the Finder will only be liable for damage to the item due to Finder's gross negligence

- What if you do something good to the prior possessor's property and then they show up? – Law of Accessions

Accessions

- This deals with situations not where value is lost when possession is transferred, but when value is increased, i.e., as a result of changing hands and back again to the prior possessor, it comes back worth more. One person adds value to the property of something else.
- The Players
    - Improver
    - Prior Possessor (PP)
- **MAJOR QUESTIONS**
    - *(1) Are the actions of an improver ever enough to divest a prior possessor of property rights?*
    - *(2) Depending on who ultimately ends up owning the item, does the other party get compensated (paid) for what they lost or gained?*

- CONVERSION: you start out with a good of one particular kind, it goes into the possession of someone else, and it is then altered in a way that decreases its value.
- ACCESSION: we are only talking about accession when everyone agrees that the change was a good change. The owner of the original item wants the benefit to come to him or her. The person who is the second possessor, in order for accession to apply, has to be an improver.
- Where A adds labor to B's raw material, the courts usually award the final product to the owner of the raw material (B), unless A' efforts have sufficiently increased its value to make it unfair to award the final product to B. In addition, most states require that for A to recover, he must show that he acted in good faith and not willfully.

HYPO -let's say your car gets stolen, taken apart, and your doors ends up on nicer car.. (usually contracts handle issues, but here no K).. who gets possession of improved item?

- original possessor would *usually* get item back, BUT if its not the same item anymore or if the item is gone/used up, then your claim will be for conversion…
    - Destruction: But if the item (say wood) is destroyed, then obviously the prior possessor will not be able to get the wood back and will only be able to recover money damages for conversion.
    - Transformation: The law says (from Roman times) that an item that is transformed in such a way that the original item has become part of the new item and cannot be removed without harming the original item, then the original item has effectively been destroyed.
        - Eg] The stolen wood is used to build a house. The wood is effectively destroyed.
        - Eg] The wood has a cushion put on it and is used as an ottoman. The cushion can be taken off and the wood returned.

(damages) not replevin (get item back)… (unless its possible to separate your item from the new/improved item- this too is a tough question- depends on your view if your item has already been transformed into something else or not…)

Personal Property

- If the law doesn't have to determine ownership, IT WON'T
- Some basic Rules
    - If the improvements can be removed from the principal item without damaging the principal item, then the improver gets to remove and keep his improvements (i.e. the new engine in an old dump truck)
    - If the improvements can't be removed without damaging the principal item – then the law is going to have to decide who now owns the principle item – the PP or the Improver
        - Thread that get woven into the garment
        - Steal someone's wood and incorporate it into a building you are building
        - Time and Labor spent improving can't be separated
- Determining what the principal item is → Look to
    - (1) Common Sense
    - (2) Understanding of Value
    - (3) Fairness to the Parties
        - Why is improver improving?
            - Good Faith mistaken belief of ownership
            - Bad Faith (i.e. a thief who improves your property) → looked upon disfavorably in the law
- Then, the bottom line is that the Improver will sometimes divest the PP of his property rights by virtue of his improvements
    - Are there ever any cases when the finder transforms the item in good faith but then the prior possessor would get to take the entire new item?
        - It depends upon how much of an improvement there was.
        - A very large improvement would probably be viewed as having transformed the original item and the prior possession would not get the item back
        - A not-very large improvement would probably be viewed as having simply altered the original item, but not as having completely transformed it. Thus the prior possession might get to reclaim the item.
        - OR bad-faith actors might lose whole item (i.e. maliciously stole something and bettered it, then can lose new item);

-2 options: 1. replevin- you get new item; 2. conversion – take original item as totally damaged and give back damages. How to decide? – depends on how much improvement was on original item

- So when will the Improver divest / win?
    - No hard and fast rules
    - But think of the "diamond ring" polishing fact set
    - 5X increase in value won't be enough for improver to divest, but 25X will
    - No set standards – just a general idea of how much the improver must improve before divesting the PP
    - What about the absolute increase in value? – say from $1 million to $2 million – are going to say this is enough for the improver to divest? – we don't know because there has NEVER been a case involving this amount of money as it relates to personal property – most are land cases, and REMEMBER, land is different

Does anyone get any Money out of this (improver or PP)? -Can't impose obligation on someone else just by doing something nice for them- too bad for improver. Property law is against you.. but on the other hand, you have restitution law on your side.

- **If the improver gets title – the PP of the thing that gets mixed in is going to get some money because it was converted (tort of conversion).**
    - I use your paint on my car (to improve) wrongfully – car is obviously principle item – I'm going to have to pay you for your paint
- If the PP retains title – Improver is Shit-Outta-Luck-As a matter of property law, no matter how good faith an improvement was, the improver cannot force the prior possessor to retroactively pay for the improvement.
    - Moral – Improve with care
    - Make sure you have good title to what you are improving
    - I use my paint on (to improve) your car – tough shit improver
    - Property law has zero sympathy for the innocent improver, unless he has transformed the item
    - This is the baseline rule!!! Some jurisdictions have changed this to allow the innocent improver to simply pay conversion damages.
    - Another notion of thinking (Kull and the Restatements use this) is to use restitution:
    - Under this line of thinking, the prior possessor would be unjustly enriched by the improver's work and so the improver should be given something

Wetherbee v. Green

- A guy wanders onto someone's land, chops down trees, and turns the wood into barrels. Everyone agrees that the maker of the barrels acted in good faith, i.e., it was an honest mistake. If he hadn't acted in good faith, the case is over.

- In a straightforward opinion, the court knows it should be deciding what the principal object is. But, it knows the increasing value is huge: technically speaking, the items went from wood to wood, but the new wood was very valuable. There was no physical transformation.
- This case says that spectacular increases in value could well be enough to say that a person who improves in good faith actually acquires ownership in the new good. The original owner is just left with the tort remedy of conversion.

Real Property: The Innocent Improver Doctrine

- Honest mistakes about who owns land are common because it's easy to fuck up a survey or something – **so extremely plausible that you might improve land honestly believing that it belongs to you**
- Normal Law of Accessions
  - Land is ALWAYS going to be the principal item because it is special – no matter how big the building is that you put on it
    - You can't separate-out a building on the property
  - Best argument is that the value of the building is way out of proportion to the value of the land and I have improved the land to such a degree that I should be awarded title to the land (so now a conversion claim since item (land) is so much more improved, its now a new item and you just pay damages)
  - Bad Faith Improver will always loose
- *Somerville v. Jacobs (W.Va. 1969*) embodies the **modern law of Accessions as it applies to land**
  - **Two Options**
    - *(1) The Landowner can keep the land and pay for warehouse*
    - *(2) The Improver can pay the Landowner for the land since dispossession of one's land is not such a big deal in the modern world*
  - The Dual Option is the Minority Rule
    - 1/3 of states have some kind of remedy for innocent improvers of land
    - In 2/3 – there is no such rule – so you better be damn sure you're building on property that's not yours
- Remember that bad-faith improvers are SOL

Real Estate:
How to you get to own land
So do you have to live in eternal mortal dread that you could be disposed of your improvements?

- NO NO NO
- Personal Property → once the Statute of Limitations runs, YOU – the finder – become the Blackstonian owner
- Real Property
  - 3 Basic Actions to Recover Real Property
    - Action for ejectment (get off my land)
    - Action to quiet title (come challenge by blackstonian claim)
    - Trespass (injury to your land)
  - Each action has a statute of limitations that runs from 5-20 years
  - BUT → Passage of time is a NECESSARY – but not a SUFFICIENT – condition to take title to land – IT REQUIRES MORE
  - To take title of "found" land, the law requires
    - (1) The Statute of Limitations to Run; AND
    - (2) Proof of ADVERSE POSSESSION (the MORE)
  - Why? Land is fucking special
- Most of the time this issue is resolved by K – but sometimes not
  - Ex: you agree to right a book and give it to a publisher, who adds value to the product. How that value gets allocated is handled by the contract you have signed with the publisher. There isn't usually a huge legal issue here, because it is dealt with in contract. But, there are situations where value is added without contract. It can happen as a result of mistake or carelessness. How do you determine who gets what?

Acquiring Title to Land

Quick History Lesson

- The entire Anglo-American land system started in 1066 when William I conquered England
- In the beginning – the conqueror wiped out all property rights and there was a blank slate – this didn't hold up for long because it would ruin any market for land and economic consequences because huge
- By 1500s – Conquering got you
  - (1) The right to replace the government
  - (2) The right to all government land

- **But (3) all private land grants remained in tact**
- **So...conquering changed political alliances, but not property rights**

-Assume there are some uninhabited islands that people might want (minerals etc)- how to determine ownership? A few ways: 1. pope decides, 2.whoever has the biggest navy, 3. first possession, but consider what constitutes possession- must have agreement…consensus is that norm was that you needed to at least have a settlement (seeing it/landing on it is insufficient), then determine how far inland your reach is depending on your power/security force to affect distances; IN CASE OF DISPUTE, submit to arbitration

- HOW do these rules apply when the Americas were discovered?
  - Same, but it changed a bit because we wanted colonies and the lands were already inhabited by Indians
  - Thus, European conquest law didn't apply to "heathens"
  - But, the "heathens" DID have a "recognized right of occupancy"
    - In Limbo – not full ownership, but its still something
    - Consequence: only European governments could kick the Indians off their land – i.e. only they had the right to extinguish the Indians' right of occupancy (private citizens lacked this right)
- 1783: U.S. Treaty with England ending Revolutionary War
  - Now the U.S. inherited all of England's property rights in America – including right to extinguish Indians' right of occupancy
- 1788: Current Constitution ratified and U.S. as we know it comes into existence
  - U.S. inherited certain land rights from original 13 States b/c whatever it got, it got from them, who got it in Treaty of 1783
  - States generally transferred western lands to the Mississippi to the Feds b/c they couldn't guard it themselves
  - But – from 1788 onward – all new land belonged to the U.S. – from the Louisiana Purchase onward
    - Result: Feds own a big chunk of land from Appalachians to Mississippi
    - Government transferred some of this land to M'Intosh

Johnson v. Macintosh (U.S. 1823)

- Johnson's ancestors bought the land from the Indians (Johnson's grandfather had essentially bought what is now the state of Illinois from two Indian tribes. If in fact that purchase was legit, presumably then when the U.S. became a nation, its entry did not alter that private right). M'Intosh received a land patent from the U.S.; suit is about who owns the land.
- Johnson sues for EJECTMENT- Action to determine who legally possess disputed land; essentially saying, "I have a better claim than you do, get off"
  - Remember Irving Principle – don't need to be the Blackstonian owner and have the best claim against the whole universe – just need to have a better claim that the person you are trying to eject – RELATIVITY OF TITLE
  - Other type of action: QUIET TITLE ACTION (this is when the Blackstonian land owner can prove that he holds the best claim to the land by tracing his land claim all the way back to the original land grant by the sovereign.)
    - This is different from regular ejectment because there, the claimant only needs to show that his claim is better than someone else's, rather than better that EVERYone else's
    - An action for Quiet Title cuts off anyone in the future who tries to lay claim to the land.
    - This case is not really about Quiet Title since each party is only claiming that their claim is better than the other's
- All the Indians had was a Right of Occupancy, thus, all they could have conveyed to Johnson was a Right of Occupancy, extinguishable at ANY TIME by the sovereign – i.e. the U.S. government (see above history)
- Thus, when U.S. gave M'Intosh the land patent, they effectively extinguished Johnson's right of occupancy that he got from the Indians
- Case formalized U.S. accession to European tradition of property rights and acquiring title
  - Thus, every title is ultimately going to trace back to some grant from a European sovereign
- Moral of the story: a basic principle is that if you really want to be sure who owns land you must be able to transfer it back to a grant to that person from a recognized sovereign.

Cherokee Nation v. Georgia

- **Remedies don't enforce themselves; need the executive**
  - **Need to understand the potential costs of enforcing the legal rule**
- **"The Cherokee Principle"**
- **This is just a long digression to make the above point that a judgment means nothing unless you can enforce it with the power of the executive**
- Here: S.Ct. ruled that GA couldn't constitutionally regulate Indians and their lands and thus some missionaries who had gone onto Indian lands in violation of GA law needed to be released; GA ignored the S.Ct. and President Jackson refused to affirmatively enforce the S.Ct. judgment because we know he was all about hating Indians
  - "Marshall has issued his opinion, now let him enforce it"
- The Cherokee (Lindsey) Principle: a complete legal strategy must consider the fact that judgments are no good if they cannot be enforced

Modern Mechanisms of Title Assurance

- REMEMBER: to establish your ultimate claim of land, you must be able to trace it to an original grant from some sovereign. But, how do you do this?
- Common scenario:
    - You go to sell your land. Buyer asks what he is buying. Buyer will be willing to pay more depending on the amount of certainty that he has about what he is buying.
    - Who is going to bear the risk that there is something wrong with the title to the land? The seller, the buyer, or they could share it. The law doesn't care: it is perfectly happy with all three outcomes. It is entirely up to the parties in the transaction.
    - The way the parties allocate this risk is by having the seller make or not make promises.

- Suppose you lose a rolex, someone finds it and puts it on ebay and someone buys it
    - You are able to discover all this and locate the purchaser
    - Can you demand your watch back from that person? YES. As long as statute of limitations isn't up. the good-faith of purchaser thinking he was in a good transaction means nothing…
        - "Nobody can give what he doesn't have"

- What about the buyer? – can he get his money back? Maybe: 1. perhaps the seller does not have the money to give it back – the Cherokee problem- remedy is unenforceable 2. seller never claimed to be blackstonian owner- he did not offer warranty…. You got the watch with the risk….THUS ppl can only transfer what they own (some exceptions exist)

1. Difference between common law and the UCC 2- 403

    - **Nolan Jewelry Case:**
        - UCC 2-403
        - In order for the good faith purchaser to be able to divest the prior possessor, the person who sold the item has to be a merchant in that field
            - i.e. you take a rolex to a jeweler to get it cleaned/repaired (bailment)
                - If jeweler then sells the watch to someone, that person has every right to think the jeweler had the right to sell it
                - You can NOT get the watch back from the good faith purchaser, can only sue jeweler
                - At Common Law you could, under UCC you cant
                - For UCC to apply, it must be :
                1. Good Faith Purchaser
                2. The Seller (the middleman) must be a merchant that normally does business in the goods that are involved!
                1. So not every good faith purchaser will be able to keep it.

    - EXAMPLE:
    - I bring my Rolex in to be cleaned (bailment). A Buyer comes in and offers $20k for the watch because he really likes it and is in a hurry. The Buyer has no reason to believe that the jeweler does not have the right to sell the watch and so is buying in good faith. Although the jeweler had no right to sell my watch, under UCC 2-403 I cannot take the watch back from the good-faith Buyer. I will, however, have a damages claim against the jeweler.
    - If I gave my watch to a friend to clean and then he subsequently sold it to some guy on the street, I would be able to get the watch back from the Buyer because the Buyer should have known that something was up with a guy selling a Rolex on the street.

    - What about land?
        - You pay mortgage, move into house, someone comes to your day and says get out of my house…. i.e. *Ppl sell houses over which they do not blackstonian ownership… (fraudulent title, mistake in survey, etc.)*

Modern Mechanisms of Title Assurance - 2 ways of acquiring land

- REMEMBER: to establish your ultimate claim of land, you must be able to trace it to an original grant from some sovereign. But, how do you do this?
- Common scenario:
    - You go to sell your land. Buyer asks what he is buying. Buyer will be willing to pay more depending on the amount of certainty that he has about what he is buying.

- Who is going to bear the risk that there is something wrong with the title to the land? The seller, the buyer, or they could share it. The law doesn't care: it is perfectly happy with all three outcomes. It is entirely up to the parties in the transaction.
- The way the parties allocate this risk is by having the seller make or not make promises.

- The Buyer always takes a chance that what he is buying (including land) is not completely owned by the Seller (unless he checks all the way back to the land grant from the sovereign)

1. Warranty Deed – ALLOCATES RISK TO THE SELLER
   - Says that the seller has absolute Blackstonian claim to this property, and if he ends up not having complete title, then he is liable. **This is a way of allocating risk about uncertainty to the seller.**
   - Seller is warranting to the Buyer that their Title is good
   - I.e. Seller is warranting Blackstonian Ownership à that no one else will ever be able to come dispossess you, the buyer
   - Seller takes the risk of the title not being good against the whole universe
   - But, in reality, having a Warranty Deed implicates the Cherokee Principle
     - What are the chances that the fraudulent seller actually stuck around?
     - Can get all the judgments you want – but there will be no one to enforce them against unless the seller is still around

SIDEBAR: Title Insurance
- Just like any other insurance – except this one insures that your title is good
- If you end up being dispossessed – insurance will cover the costs
- If you want to actually REDUCE the risk that the prior possessor of the land will come along later, sort of.
- You can buy insurance to give the risk to some third party.
- 99% of the time, the type of deed that is used in the sale of the property only indicates who will be paying for the Title Insurance, rather than who will be taking the on the risk.

2. Quit Claim Deed – ALLOCATES RISK TO THE BUYER
   - The buyer is asking the seller, "What do you have?" The seller says, "I have no fucking idea what I got, but whatever I got, you got." A quit claim deed says, "whatever I got, you got." **It is a device of allocating the risk of uncertainty to the buyer.**
   - Seller is honest and is acknowledging that they don't know whether they are the Blackstonian Owner or not – they could be; they could not be
   - Essentially, when conveying, the seller is saying "whatever interest in this land that I've got, now you've got."
     - No warranty one way or the other
     - The BUYER takes the risk of the title not being good in this situation
   - Gilbert's, pg. 448: A quitclaim deed warrants nothing. The grantor merely transfers whatever right, title, or interest he has, if any. A quitclaim deed is useful in clearing an apparent defect in title, where the grantor is nor pursuing the claim.
   - Why would any buyer assume the risk?
     - If you get a good enough break on the price, you will take on the risk.
     - There may be buyers who can reduce the risk more cheaply than the seller.
     - Suppose you are buying a house, and you move in and live there for many years. Of course you are going to want a warranty deed. But, in some places, like Mass. the custom is to use a quit claim deed.

PARTIES can come up with anything in between the above two forms--- i.e. Quit Claim Deed but where the seller says no warranty except in cases a,b, and c ….etc…

Depending on who is bearing the risk, economists can come in and help determine price…

Guaranteeing Title
- Suppose you think you have the best claim. How would you establish that you have this claim?
  - Wouldn't it be convenient if you could sue the entire world? Ex.: I think I am the Blackstonian owner, and if you think I'm wrong, bring it on.
  - You can do this: it's called an **ACTION OF QUIET TITLE**. It's different than an ejectment action. An ejectment action is a dispute of a possession. If what you really need is a piece of paper that says you have a really good claim to a piece of property, you want a quiet title. Basically, you really are suing the entire world. You are issuing a challenge to everyone else regarding your claim to the land.

- To prove that you have the best title in a quiet title one way is to show that your claim can be traced back in a fashion that is unchallengeable.
- You think you have claims to land, on what do you base these claims? Most of the time when people have interests in land, these interests are written down in deeds. Lawyers take these deeds to county offices where they are stored. If you really want to know what is going on with a piece of property, you can go to the deed office and look through these deeds. But, not every piece of paper is going to be on file in the deed office. Therefore, you can have completely legal transfer of property of which there is no publicly available record.

- Normally, we think of the prior possessor of the land as having a superior claim to the land (common law). But, if the prior possessor has not notified the government that he has title over the land, then if someone else, through fraud or mistake, sells the land to another Buyer, then the prior possessor's claim to the land is overridden by the new Buyer's claim. This is why the prior possessor always wants to let the government know what his title is.
    - Rules: the Buyer must have purchased the land in good faith and for value (pays good money for it) and must not have any reason to believe that this transaction was not valid (since the Seller did not really have title over the land)

Other Issues in Title Assurance

- First – deeds are just pieces of paper that transfer ownership in land
    - The piece of paper is not itself a K, it is merely a deed. You can transfer a deed without consideration: you can give it as a gift.
- Title Searches
    - Mechanics are long and difficult
    - Will cost a lot of $
    - Records get lost and destroyed
    - You are not by law required to file your deed in the registry of deeds, but the recording statutes attach consequences of not filing that deal with the validity of your title should claims be made against it because of subsequent transactions
    - So there are "incentives" to file your deed, but no affirmative penalties for not
- Warranty and Quit Claim Deeds are both in wide use and there is no inherent necessity for one or the other

Recording Statutes

- The entire apparatus of recording documents derives itself from statute, not from the common law. Before this, the common law had the "first transfer rule": the first transfer trumps all other transfers.
- Common Law: "First in Time, First in Right" → can be changed by recording statutes.
    - Gilbert's, pg. 469: The common law rule gave legal effect to conveyances in accordance with the time of execution. Thus, a grantee who was prior in time prevailed over one subsequent in time.
        - Ex.: if O conveyed Blackacre to A, and later O conveyed Blackacre to B (who knew nothing of A's deed), A prevailed over B on the theory that O had conveyed title to A and had nothing left to convey to B.
- Recording Statutes can alter this rule and make what is recorded first controlling
    - Pg. 1159: every state in the country has a statute that essentially says the first transaction rule of the common law does not stand if the person takes his piece of paper and puts it in the county office. The state is going to reward the person for doing a public service. But, if someone else has already beat you to it, then your deed is not valid.
- **So, bottom line: You don't have to record your deeds, but these statutes give you an incentive to**
- There are three basic categories of statutes:
    - Race Statute (NC), pg. 1159: Have to be first person to record - notice of prior transaction irrelevant
        - Gilbert's, pg. 473: under a race statute, as between successive grantees to the same land, priority is determined solely by who records first. Whoever wins the race to record prevails over a person who has not recorded or who subsequently records. Notice is irrelevant.
        - No transfer from A to B will be valid against C (who has paid a valuable consideration – person who actually coughs-up good hard money), unless B has registered the transaction
        - So…pretty good incentive to record transaction, even though no affirmative penalty.
            - Ex.: On Jan. 1, O conveys Blackacre to A. A does not record. On Feb. 1, O conveys Blackacre to B. B ***knows*** of the deed to A. B records. Then A records. B prevails over A because B recorded first. It is immaterial that B had actual notice of A's interest.
    - Race-Notice Statute (WI)
        - Gilbert's, pg. 474: race-notice statutes protect only subsequent purchasers ***without notice*** of the prior claim. But they do not protect all such subsequent purchasers. They protect a subsequent bona fide purchaser ***only if he records before the prior guarantee***. Under a race-notice statute, in order for a subsequent purchaser to win, he must ***both*** be without notice ***and*** win the race to record.

- A typical race-notice statute provides: "A conveyance of an estate in land (other than lease for less than one year) shall not be valid against any subsequent purchaser for value, without notice thereof, ***whose conveyance is first recorded***.
- Explanation:
  - a. subsequent purchaser;
  - b. for value (consideration);
  - c. w/o notice of prior interest;
  - d. first to file.
- Ex.: On Jan. 1, O conveys Blackacre to A. A does not record. On Feb. 1, O conveys Blackacre to B, a bona fide purchaser. One Feb. 3, A records. On Feb. 15, B records. A prevails over B because B's conveyance was not first recorded.

- This statute requires good faith, meaning you have to believe that the seller has something to sell. Therefore, if you are engineering a sale merely to screw over the first person, you cannot undue the first transaction. If the second purchaser actually knows about the first transaction, then he cannot undo the first transaction. It also requires that the second purchaser give valuable consideration. What does valuable consideration mean? Valuable does not mean fair market value, it means more than trivial. This statute combines "you better record" and that the second buyer not have any idea about the first transaction.

- Notice Statute (MA), pg. 1159
  - Gilbert's, pg. 474: a subsequent bona fide purchaser prevails over a prior grantee who fails to record. The subsequent purchaser wins under a notice statue if he has ***no actual or constructive notice*** of a prior claim at the time of the conveyances.
    - Explanation:
      - a. subsequent purchaser;
      - b. for value (consideration);
      - c. w/o notice of prior interest
  - Doesn't worry about whether anyone has paid any money; just have to make sure the document is recorded
  - Knowledge is the only criterion of when you can undo common law "first in time" rule.
- All variations on the same theme → in order to protect yourself against a dishonest seller, get the documents into the registry à incentives provided by presumptions in the statutes

-NOTE: if the 2nd possessor wins property via statute, the 1st possessor does not have any property claims against the seller.. he might have a K-restitution claim (unlikely) but def not property remedy…

The Search Process In General

- The incentives for people to record are fairly strong.
- Generally title insurance only covers the sort of thing that title insurance would cover. It covers things that are available in the publicly available record.
- More problems in the search process exist:
  - What if you properly file your document, but it is put into the wrong place, or the clerk spills his coffee on it? No one would ever find it. As a general proposition, most states treat this error in the same way as not filing your deed. But what do you do when this causes you to lose huge amounts of money? Do you sue the county employee? You can, and you could win. But you won't collect huge amounts of money. This is the "Cherokee Principle" at work: the county employees are pretty much judgment proof because even if they are found liable, they don't have the money to pay for the damages.
- Wouldn't it make sense as a practical matter to say if you can go back to a set period in time you have done enough? Yes, it does make sense. Costs mount the further back you have to go. Most title searches proceed on the assumption that if they haven't found anything in the past 80 years, the chance of finding something is very slim.
- Some legislatures have passed statutes that say if there is a problem in the chain of title, but it occurred a long time ago, then they are wiped out. These are called curative statutes. They rescue the title process from these problems.
- Another method says that if people are on property for a long enough period of time, the law will say that the land is yours.

Every state has statute of limitations on claims of ownership rights…can be 5-20 years

- What if you miss the deadline? With other things, you would lose the claim (watch, car, etc)
  - With land, the SOL doesn't always mean what it says
    - Why? The reasoning is historical
      - In 1400s, there were SOLs

- Then, land was not just a source of economic wealth…it was a source of social status, political power
- So there was extra protection for land

Adverse Possession

INITIAL QUESTION: Has the Statute of Limitations Run Out?

- Gilbert's, pg. 24: ***basic theory of adverse possession***: if, within the number of years specified in the state ***statute of limitations***, the owner of land does not take legal action to eject a possessor who claims adversely to the owner, the owner is thereafter barred from bringing an action in ejectment. Once the owner is barred from suing in ejectment, the adverse possessor has title to the land.
- **With land, in every single state, without exception, the running of the SOL is a necessary condition for a wrongdoer to become a landowner, but it is not a sufficient condition. With land, the clock must run and something (1. statute and 2. common law) else must have happened.**
- Before even considering whether you meet the criteria for adverse possession, you have to look and see if the statute of limitations has run out

- **IF the statute of limitations HAS NOT RUN OUT** – the Prior Possessor can bring a recovery action and force you off the land ((before SOL runs out, the adverse possessor is just a trespasser/tortfeaser so easy way to remedy)
    - Action for ejectment (get off my land)
    - Action to quiet title (come challenge by Blackstonian claim)
    - Trespass (injury to your land)

- Each state has its own quirks regarding the statute of limitations, and some impose different lengths for different situations…ALWAYS LOOK TO THE STATUTE!
    - What a lot of states do, especially where the SOL is shorter, is require you to pay taxes on the land because this is a way for a prior possessor to identify someone with an adverse claim – if the prior possessor is not paying attention to their land, they are SOL.
    - This tax rule is a West-of-the-Mississippi phenomenon: large tracts of land; hard to ID if someone if constantly trespassing – so trade off is that we'll have people pay taxes so you can ID them, but statute of limitations is shortened, but you have to be paying taxes for whole statute of limitations to get the benefit of a shorted period of limitation
- **BUT...the main point is that in order to even reach the question of Adverse Possession, the statute of limitations has to have run out**
    - AND...since land is special to us, we require that an adverse possessor show MORE than just that the statue of limitations has run
    - We want to give the prior possessor one last thing to fall back upon after the statute of limitations has run out
- **Although an adverse possessor acquires property, it is due to the running of the statutes of limitations—the former owner is *barred from suing* to recover the property.**
- **Even if you follow all of the requirements in the statute, you do not necessarily get the land. You have to follow the common law requirements.**

*Common Law Elements to Prove Adverse Possession – **ENCROACH***

- (1) Exclusive
- (2) Notorious
- (3) Claim of
- Right
- (4) Open
- (5) Actual (Productive)
- (6) Continuous
- (7) Hostile
- The exact list of factors change from state to state, but the basic ideas are the same
- Some state statute may require even more than the Statute of Limitations running and ENCROACH (i.e. like paying taxes on the property) – so just have to be weary of that
- This is how a trespasser – a tortfeasor – can become a bona fide owner – so we want nice strict requirements for winning an adverse possession claim

Fact-Set to Make the Discussion Concrete - Jarvis v. Gillespie

Deadbeat goes to the town and says he will give them his land if the town feeds him. When he dies the town gets the land. 50 years later the town hands the land over to Jarvis. In those 50 years, Gillespie has been doing thing on the town's land. At that time, Gillespie was clearly a

trespasser—it doesn't matter if Gillespie thought the land was his. During those 50 years, the town could have brought a legal case against Gillespie. The SOL was 15 years, so the SOL ran out in 1962. Has the clock run on Gillespie? Yes.

Requirement #1: "Actual"

Summary: Actual (Productive): The trespasser must have actual possession over the land (he must be on it or using it). The trespasser cannot claim possession over the land simply because he looked at it everyday on his way to work. Generally, the trespasser should be using the land in a productive way, like he normally would have done if he was the actual owner of the land. The reasonableness of the trespasser's use of the land is dependant on the type of land and whatnot.

- **The Adverse claimant ACTUALLY has to be on the land – ACTUALLY has to USE it**
    - Good Test: If the statute of limitations hadn't of run, could the prior possessor bring a land action against you? (although NOTE- in order for SOL to even start running, you have to be on the land…)
        - If yes, then you are actually on the land
    - You can't just watch and drool and wait for the statute of limitations to run out, you actually have to be on the land
    - **The requirement of actual possession is really actually use. The law is quite particular as to what it counts as uses.**
- What do you have to do with the land?
    - The would-be adverse possessor has to use the land in an AFFIRMATIVE and PRODUCTIVE fashion.
    - **You have to do things that a reasonable person would do if they were the true possessor of the property**
    - What is ACTUAL use?
        - Building on property is obvious
        - Ongoing grazing is obvious
    - Jarvis v Gillespie:
        - G is on land, J gets land-grant from town and tried to remove G, claiming G is not actually on the land… G claims that while he doesn't live there he's been doing reasonable things to land and qualifies for actually being there…- all agree that while G was doing these things before SOL ran out, he was trespassing, but now that SOL has run out…
        - Grazed animals occasionally
        - Parked vehicles
        - Cut some wood
        - Put up no trespassing sign
        - Tapped some trees for sap
        - G didn't use it for much over a 39 year period
    - True, it's not much doing on the land, But, the **question is what a REASONABLE person would do with the land (depends on type and location of land)**
        - This is a forest in VT, not a plot of land in Manhattan. What are you going to do with forest land in VT? Probably basically the same things that Gillespie did. The trial judge says that it was actual enough.
        - There is no formula for this – its' about reasonable use given the circumstances
        - Also – whether the adverse claimant Actually used the land is a question of fact that generally won't be disturbed on appeal- (thus these fact-specific inquiries are decided at trial level and unlikely to be overturned on appeal)
- Most of the time, this factor isn't an issue – what the Adverse Claimant is doing with the property is usually rather obvious

Requirement #2: "Continuous"

Summary: Continuous: How continuous is "continuous?" The occupancy must be reasonably continuous as what a normal land owner would do. Leaving the land for errands or taking a short vacation does not stop the occupancy. But, an extended leave from the land will stop the occupancy and then when the trespasser returns, the occupancy will restart. Different courts have different standards of how long the trespasser can leave.

- Standard: **The way a reasonable true owner would continuously occupy property**
    - Go to grocery store or see in laws – obviously not going to affect continuity
    - 3 months in Europe? – getting interesting
    - 3 years in Tibet? – obviously not continuous
    - This is also a question of FACT – thus the trial court's determination will hold on appeal – it just has to be a REASONABLE finding of fact
- **If any of the breaks were sufficient to warrant a decision that the use was not continuous, then when the break occurred, the period of the SOL starts over.**
- Model Case
    - Never absent more than a year; but absent for up to a month or more
    - Using property episodically

- Have to assume that he was gone for 11 months at one point because the Adverse Claimant bears the burden of proof in adverse possession claims
- So is being gone for up to a year enough to defeat continuity?
  - Urban – not continuous
  - Forest land in Vermont – not so weird not to go onto property for a period of time
  - In Vermont – reasonable true owners probably don't go on land for periods of time
- Bottom Line: Possession was continuous enough for this case – it's not a slam dunker, but is doesn't have to be – it only has to be reasonable
- This case represents the outer boundary of continuity – 1 year is a while

- "Seasonal Occupancy"
  - Characteristics of the property dictate your absences
  - Courts are split 50-50 on allowing Adverse Possession claims based on seasonal occupancies
    - Some say that seasonally Adverse Possessed property can never be adversely possessed
    - VT goes with the view that seasonal use is OK
- Jarvis Case: when the land itself is by its nature only usable during a certain season, then we mean the continuity is only applicable during the season when it can be used. Basically, if Jarvis left because he couldn't use the land because it was covered in snow, he has not broken the chain of continuity. American jurisdictions are split on this issue.
- Mendosa Case
  - Guy on land for 18 years, then actual owner uses it for 3 weeks, then guy uses it again for 15 years, then owner wants land back… Ct rules guy's use not continuous
    - This and the model case are the two extremes… Ct treat each case on case-by-case basis

Requirement #3: "Open and Notorious"

Summary: Notorious and Open: The trespasser's occupancy must be obvious to the land owner or others. If the land owner does not know that there is someone else on his land, how can he assert his right to keep the land and eject the trespasser?

- Occupation has to be out there for people to see.
- Open and notorious are a pair. They are not two separate elements, they are paired up.
- If the true owner would not be on notice, then the SOL doesn't run. So, doing something under the cover of night would not work.
- Two twists on "Open and Notorious"
  - **(1) Adjacent Property** (theoretically fascinating, but fucking useless – One Mass. case where this happened)
    - This situation is insignificant because it rarely happens: there are certain kinds of land that are very rare where the kinds of uses that any normal person would make just aren't obviously visible.
    - Cave Case (beginning of class with 2 openings) Scenario → entrance to a cave on parcel 1 that extends under parcel 2 – owner of parcel 1 charges people to go into the cave – statute of limitations runs – can the owner of parcel 1 make an Adverse Possession claim to parcel 2?
    - Court held that the owner of parcel 1's use of the part of the cave that extended under parcel 2 was NOT OPEN AND NOTORIOUS.
    - Court refused to hold owner of parcel 2 responsible for knowing where the cave ends → NO ANSWER AS OF YET FROM COURTS.
    - Does ad inferos rule work in reverse?
      - Adverse Possession of cave so then you get the surface too?
      - Unresolved because court said possession was not Open & Notorious
  - **(2) Who is Responsible for Knowing Where the Property Line is?**
    - THE question responsible for a large percentage of Adverse Possession litigation
    - Scenario
      - Some structure nominally infringes on a neighbor's property, unbeknownst to either neighbor
        - Parcel 1 = dog house owner
        - Parcel 2 = neighbor
      - So Parcel 1 tries to sell and a survey reveals the encroachment
    - If the statute of limitations has not run – the dog house is going bye-bye
    - But if the statue of limitations HAS run – has the owner of the dog house satisfied the requirements of Adverse Possession for the little sliver of land that the dog house encroaches upon? (a few feet or inches?)
    - The Answer is split all over the map – no single answer or resolution – varies from place to place
    - **So there is no answer to who is responsible for knowing where the property line is**
    - *Mannillo v. Gorski*: case deals with a garage on someone else's land; case says yes, it is open and notorious that it is a garage, but is it open and notorious that the garage is over the property line? Is it the property owner's role to know that their actual boundaries are? What the court says it's only open and notorious that it is reasonable

apparent that the structure is encroaching. The court is not going to charge property owners with knowing the exact boundaries of their property.

Requirement #4: "Exclusive"

Summary: Exclusive: The land must be occupied by an exclusive, identifiable occupant. If a highway goes over someone's land and he doesn't protest for years and years, no one has a claim to that land because there had not been exclusive occupancy – many different people have "occupied" the land over the period, but the group of them as a whole is not readily identifiable.

- There are not a lot of cases explaining what it means for occupation to be exclusive.
- Exclusivity does not mean that you have to be the only one wrongfully occupying the land. You can wrongfully occupy land as a team or as a group, ex. a Girl Scout troop. A team of people can collectively work as adverse possessors, but this is not exclusivity means
- Means "**not a use shared by the general public**"
    - i.e. random people going through your property to get to a public beach
    - The amorphous public isn't going to get title to your land though Adverse Possession
    - **Requirement is use by a discrete person or group of persons**
- Also – prior possessor can't be using the property too.

Requirement #5: "Hostile"

Summary: Hostile: The adverse possessor must be occupying the land without permission! The trespasser cannot be on the land with permission from the landowner – the trespasser must be a wrongdoer. If the landowner has given permission for the occupant to be on the land, he can later ask that occupant to leave.

- Hostile does not mean evil or malicious—it has nothing to do with the thoughts going through the head of the wrongful occupant. It simply means they are a wrongful occupant. It means the wrongful occupant cannot be there by permission, i.e., it cannot be permissive.
- **All it means is "NON-PERMISSIVE"**
    - i.e. you don't have permission to be on the land
    - is just redundant
    - **can't eject someone on your land permissively** – need to have a an action against person to start statute of limitations running
- **Objective inquiry: Are you a wrongdoer?**
- SOL can't tick off unless you do something wrong

Requirement #6: "Claim of Right"

- This does concern the thoughts going through the head of the wrongful possessor.
- Inquiry: **What beliefs does the wrongdoer have with regard to his occupation of the property?**
    - Good Faith – You think the land belongs to you
    - Bad Faith – You KNOW the land DOESN'T belong to you
    - Middle Ground – I don't know whether this land belongs to me
- 3 Approaches for the Answer
    - (1) Only GOOD FAITH Adverse Possession Claimants can win (if you only award to wrongdoer, aren't we just encouraging tortfeasers)
        - The trespasser must have some belief that he is on his own land, even though he is not. A substantial number of jurisdictions require this.
    - (2) Only BAD FAITH Adverse Possession Claimants can win (it encourages true owners to pay attention to their land)
        - This approach does not require the trespasser to think that the land is his. It requires landowners to keep watch over their own land. This is on the wane – most jurisdictions don't use it anymore.
    - (3) Fugitive-I Don't Care → law won't even make this inquiry; we shouldn't try to get inside the head of these people. (it's good b/c it's hard to prove what's going on their head—invitation for perjury and fraud)
        - If one was to take a count, the clear plurality is the third: the "who cares" approach.
        - "I didn't kill my wife." "I DON'T CARE!": This approach is not concerned with the trespasser's state of mind. It does away with the possibility of the trespasser perjuring himself in order to get the land. The majority of jurisdictions use this modern trend to take the thoughts of the trespasser out of the law.

- This inquiry is about the state of mind of someone who is PRESENT
    - "If state of mind is X, you win; if state of mind is Y, you are a tortfeasor"
    - What the fuck do you think the Adverse claimant is going to say?

- But – there will be more evidence than just your own testimony about your state of mind – to guard against perjury

- **Jurisdictions are cascading towards the "I don't care" position**
  - Refusal to even make the good faith or bad faith inquiry
    - American Courts have done all three—modern trend is to take subjectivitiy out of the law of adverse possessions—most say they don't care
      - Bad Faith—can't find courts doing this any more really
      - Good Faith—Iowa
        - Carpenter v. R.—using corn field but not his, now prior possessor says get off but corn field user says it's too late the SOL has run out
        - There is a 2nd line of defense—ENCROACH—the burden of proof on tortfeasor, they must prove all of these (this is true in all but LA)
          - In most states need to prove it with heightened standard (Clear and convincing proof)
        - In Iowa, need to show in "good faith"
      - Howard v. Hunto
        - In WA, they required good faith
- Professor Helmholz and the "I don't care" position: "**Helmholz effect**"
  - Law professor reads over a 1,000 cases about adverse possessions where issue was about state of mind—in J's that said that they didn't care about state of mind BUT still find that bad faith actors seem to lose these cases a lot more often than reported facts suggest they should
  - **Bad faith actors lose a lot more frequently than a dispassionate assessment of the facts would suggest they should**
  - Not saying that bad faith actors ALWAYS lose – just that they do most of the time
  - Not a rule of law → just something going on in the background
  - Close factual questions on other AP factors may lead to skewed views on these other factors based on whether we're dealing with a good guy or bad guy
  - If you're a finder of fact you're not deciding whether they are thinking about thoughts in the head—b/c that's off the table—you should be thinking about whether or not there's possession
  - But is it hard to imagine that they are not also thinking if they're a good or bad guy even if the court says not to—one explanation
  - One more application to Helmsholms—if you go back to Irving principle, it's so strong that if you're a thief and you drop your booty and an innocent women picks it up—the thief is the prior possessor has a claim over the innocent women
    - Helmshols tries to run analysis but his sample isn't large enough (not a 1,000) cases and the pull wasn't as strong—so we don't know if being a thief has anything to do anything

Other Issues in Adverse Possession

"Tacking" → adding two or more wrongful occupants to beat the statute of limitations and claim Adverse Possession- If you took all of the owners and added up their time period that their trespassers—then they've outrun the SOL—Can you do this? (tacking—adding on one period of wrongful occupation to another to see if it adds up to SOL)

- Example
  - Statute of Limitations is 15 years
  - I'm there for 13 years and then pass my interest in the land on to you by Will
  - You use the land for 5 year before the prior possessor shows up and tries to remove you
  - Can the 18 years (13+5) beat the 15-year statute of limitations?
- **Adverse Claimants are allowed to "tack" if the handover of the interest in the land from a previous wrongdoer (potentially adverse claimant) was VOLUNTARY**
- Trespasser #1 must be in PRIVITY with Trespasser #2 → The handover of the interest must be voluntary
  - Privity: you are allowed as a wrongful occupant to add your period of wrongful occupation to another person's period for the purpose of the SOL if and only if you are in privity with the other wrongful occupant. Privity means a voluntary handing over of possession. Any transfer of possession between one occupant and another is voluntary, counts as privity.
- The original entry onto the land occurred by C in 1990, and this entry was wrongful. B comes along and forcefully removes C from the premises in 1999 and then C sues B in 2004. The change was not in privity.
- Passing someone land by will (inheritance) or sale is a voluntary handoff.

- Note: Trespasser #1 can kick Trespasser #2 off the land on the Irving Principle if Trespasser #2's use isn't authorized by Trespasser #1 (random exchanges or ejectments of another wrongdoer are not voluntary and thus you can't tack on time)
- Note: The Prior Possessor (and his heirs) doesn't get a new clock for the statute of limitations when he dies or sells the property

Stopping the Statute of Limitations Clock from Ticking (or delaying its start)

(Usually when we start running the SOL is determined by Civ pro but there is some times when property law takes over)

- MOSTLY is a function of state statute
- Common situations where the Clock may stop or fail to start
  - You are a MINOR – statutes sometimes say if owner is a minor – we will stop the clock
  - You are LEGALLY INSANE and not competent to bring suit
  - You are INCARCERATED
  - The universal thing is that the trespassing/wrong has to occur when the disability is there
    - The disability must be present AT THE TIME OF THE OCCUPANCY for these rules to take effect. If the landowner is competent at the time the trespasser begins his occupation and then the next day is in an accident and becomes incompetent to sue, then the clock has already started and will not now be stopped for the disability
    - Legislatures can change this but Lawson doesn't know any that do it
- **Examples of disabilities**
  - Legal: landowner is prohibited from bringing suit for whatever reason
  - Practical: landowner is in jail and technically is allowed to sue, but how is he going to know that someone is on his land that needs to be sued?
    - If the point of adverse possession is to get owner to watch their property this wouldn't make sense
  - Physical/mental: landowner is incompetent or a minor and must have someone sue on his behalf.
    - If you're in the armed services

Adverse Possession of Government Property

- **You can NEVER adversely possess property of the U.S. Federal Government**
- Most States also prohibit Adverse Possession actions against State-owned land
- Question of Adverse Possession is more open when it comes to land belonging to entities below the State level – cities, towns, etc.
  - Some states allow Adverse Possession claims against subordinate entities so long as the land was not being held for public use by the subordinate entity
  - Every State is different though

Sidebar:

- The real twist in AP law is merely because of statutes, described on pg. 206 and 207. Example of a statute is on pg. 206 for Ohio. This statute deals with the SOL and what happens if when the time accrues the person who needs to sue was prevented from suing for some reason. In Ohio, it covers situations where the owner of the land is under a legal inability to sue, it does not cover a situation when the owner of the land is in prison. **The bottom line is to know that SOL do not run the same against everyone.**

Proving AP

- Normally in a civil case, the P must establish whatever they are claiming by a preponderance of the evidence. With AP, you can see the adverse possessor as being both the P or the D in different types of situations. Whoever is claiming AP, as an affirmative claim or as a defense to an ejectment, has the burden of proof to all of the elements, and has to show each element more than just a preponderance—it is more like a standard of clear and convincing evidence.

Caveat: Adverse Possession is COMMON LAW; thus, if a State wanted to, it could abolish ALL of the common law requirements of Adverse Possession and limit the inquiry to the running of the Statute of Limitations

If the adverse possessor sells the land before the SOL runs out:

What if you buy the land the day before the SOL runs out—you transfer it voluntarily so it will still expire the next day

- Problem with the title rights—in don't get recorded in county's office (don't tell county that their in wrongful occupation of someone's land—usually don't even know)—it's possible to buy property where all of the components of adverse possessions have already been met
- Once you made out a claim for adverse possessions, it distinguishes all tort actions retroactively from when you are first trespasser
  - 2 edged sword—if rent is collected or tax bills are due for that prior times or toxic waste dumps and tort actions during this period—who is liable?
  - It should seem that adverse possessor should get the benefits and have to pay the prices
- You can bring quiet title action but it depends on who gets the paper in

❖ How much land do you actually get?

- Only that which you are actually using
- One way in which you can get by adverse possession over more than you actually occupy—varies by J and often by statute—it's called color of title

- Why are you wrongfully on someone's land—maybe b/c you have a paper that you think says that they own the whole lot of land
- Normally people don't think that they need to do anything with all of all of the land—
  - Occupancy isn't actual or open or notiorious etc. but if you enter with color of title (with piece of paper) maybe you can get all of it (depends on if it's a whole M and you're only on 2 acres—law is unclear)

Gifts

- Why we don't spend a lot of time on gifts:
- One theoretical problem that has no practical aspect to it
  - The law has certain formalities the law likes to see for transfer of property
    - Why K has requirements for consideration
    - In trusts and estates there has to be things done for a will
    - Law is concerned with enforcing agreements they actually want to make
  - Problem is for gifts—I want to give you my watch in a week
    - Giver's intention was to give the watch in a week, but if the law enforced the problem, it sends law of consideration down the drain
    - If giver dies and law honors this promise—what does it do to laws of trusts and estates
    - But isn't it a good idea to let people give things away and not be able to get it
    - Trying way the to problems—
  - The law must reconcile the intention to give with the damage that would be caused if the law were to enforce all promises to give a gift.
  - ***Law requires 3 things for making a gift***
    - 1) Make sure doner wants to donate the gift; giver must have actually intended to give the gift.
    - 2)Donee must actually accept
    - 3) Have to deliver item to donee; gift must be actually accepted.
      - But there are certain things you can't donate
      - Or in Reese (in hospital) can't go home to deliver
      - Sometimes delivery impossible- so what is a plausible substitute of actual handing over of item? – no practical answer…cases all over the map

Estates in Land and Future Interests

- Law all about the disposition of personal assets whose lives are longer than yours → LAND
- Will legal system recognize ability of dead people to control future possession, use, or distribution?
- Conceptual move – I can control future interest is possession, use, disposition of my land
- What does it mean to own a piece of land?
  - POSSESSION
  - USE
  - DISPOSITION
- Note the Feudal history of land law – it all begins in 1066 after William the Conqueror wins the Battle of Hastings
  - Need to create a MARKET in land – vital to economic stability
- Historical State of the Law that Matters for Us
  - (1) "Heir Apparents" (expectant heir) have ***no*** say as to what a present possessor of land can do with that land – the heirs have no interest whatsoever until they become the present possessor…HEIRS ARE NOT CREATED UNTIL SOMEONE DIES.
  - (2) Conceptually, **one's interest in land is POTENTIALLY INFINITE**
  - (3) **Your interest in land is FREELY TRANSFERABLE**
- Escheat: if a landowner does not have a valid will, the state will try to guess at how the landowner would have wanted to apportion his land. If there is no one in the world that has a valid claim to the land (no heirs), the land will go back to the state.

- Very early, the law made a very important distinction: every grant of property uses words that convey different meanings. Estates are created by using appropriate words in a deed or will:
  - **Words of PURCHASE**: who gets the stuff; the language used by the landowner in granting land to another person that specifies who the recipient of the land will be. This title is somewhat inappropriate because the land need not be sold, it can be given away in a will or as a gift.
    - Ex.: if I give property "to Gary Lawson and his heirs" the words of purchase are "to Gary Lawson"
  - **Words of LIMITATION**: the language used by the landowner in granting land to another person that specifies how much of the land and for how long the land will be given to the chosen recipient. This title is also somewhat inappropriate because the period of the grant need not be limited at all.

- Ex.: if I give property "to Gary Lawson and his heir**s**" ("s" meaning that can give interest in last than extend potentially forever- until someone has no heirs or the family line does out) the words of limitation are "and his heirs."
- It just means how long the grant of property lasts.

- If you have a land deed until infinity, any owner along the time line can sell the land off.

Present and Future Interests in Land: Grantor-Grantee Relationship

SIDEBAR: Gilbert's, pg. 71:

- Estates are classified by ***duration***. There are only four possessory estates (the ***fee simple***, the ***fee tail***, the ***life estate***, and the ***leasehold***), and any present possessory interest must be classified as one of these. To identify an estate:
  1. Look for the ***technical language*** that creates the estate.
  2. Consider how long the estate can ***endure***.
- Pg. 72: A nonlawyer talks about owning "property" or "land," what he holds legally is an ***estate*** in land.
  - An estate is an interest in land that ***is or may become possessory***. An estate is an interest ***measured by some period of time***.

*General Framework: There are only FOUR potential Present Interests in Land (*THREE ways -fee tail is not relevant to us - that the law allows a landowner to divvy up the title to the land over various times*)*

- **(1) Fee Simple – Potentially Infinite Interest that is Freely Transferable**
  - Gilbert's, pg. 73: a fee simple is an estate that has the potential of ***enduring forever***. It is created by O, the owner of Blackacre, granting the land **"to A and his heirs."** This estate resembles absolute ownership, and the holder of a fee simple is commonly called the owner of the land.
  - An estate in fee simple is an estate which has a duration potentially infinite turnable upon an event certain to occur but is not certain as to when it occurs
- (2) Fee Tail
  - Not in American Law
- **(3) Life Estate – For the Period of A Human Life**
  - Gilbert's, pg. 73: a life estate is an estate that will end necessarily ***at the death of a person***. It is created by granting the property **"to A for life."**
- (4) Tenancy / Leasehold Estates
  a. Tenancy for years
     i. ***for any fixed calendar period*** or any period of time computable by the calendar
  b. Tenancy at will (tenancy until cancelled)
     i. so long as ***both the landlord and the tenant desire***
  c. Periodic tenancy (like tenancy for years, but auto-renews until cancelled)
     i. from ***period to period*** until the landlord or tenant gives notice to terminate at the end of a period
  - But, just know, that it is for a term of ***fixed years*** – and the grantee (or his heirs) gets to keep that Tenancy until the fixed term is up
  - Thus, a Tenancy could end up being longer, in absolute years, than a Life Estate, but it is considered a "LESSER" interest than a Life Estate for the purposes of the general land-transfer rules
  - The Hierarchy here is only CONCEPTUAL

Since every form of divvying up temporal interests in property MUST fit into one of these three categories, each category breaks down into several other labels.

- These labels determine how the law will be applied to the contract
- The language of the contract can be tailored to force the contract to fit into whatever category the drafter wants.
  - BUT, forcing the contract into an obviously wrong category in order to make use of the application of the laws is considered malpractice.

WE ONLY CARE ABOUT **FEE SIMPLES** AND **LIFE ESTATES** RIGHT NOW

Language to Distinguish Present Possessory Interests

- **"TO A AND HIS HEIRS" – FEE SIMPLE**
- **"TO A FOR LIFE" – LIFE ESTATE**

General Framework:

Future Interests in Grantor-Grantee Relationship

- (1) Reversion
- (2) Possibility of Reverter
- (3) Right of Entry

Fee Simple Absolute

- The easiest label under this category is
- Fee Simple Absolute: an interest in property that has no internal limitation on its **temporal** duration
    - This does not mean that there are no limits; the end of the world (an external limitation) would end the interest in the property
    - Under this label, the grantor has no control over the new possessor's interest in the land after the grant is made
    - The grantee always wants to get this label in his land, but it is not always easy; sometimes the grantee will have to gather several landowners that own the same piece of property over several different time periods
    - Someone who owns a piece of land over ALL time periods is said to own the property "in fee simply absolute"
        - **This does not necessarily mean that the landowner has ultimate ownership over the land; he could own only the rights to search the land for natural gas**
        - "in fee simple absolute" only refers to temporal duration of ownership

Some General Rules

- A grantor can only grant away either
    - (1) what he has; or
    - (2) something lower on the hierarchy of Present Interests
- **A grant "To A and his heirs" unequivocally means "To A in fee simple absolute"**
    - **"and his heirs" language means "fee simple"**
    - Grounded in history and tradition
- Conceptualization Help
    - View it as an infinite Timeline owned by the Grantor
    - The Grantor grants away a portion of the timeline up to the whole thing
        - Present Interest –**the right to use the property now**
        - Future Interest – **possible rights to use and posses the property in the future**
    - We're generally going to use Fee Simples and Life Estates as examples, but the transfer rules and labeling rules we go through apply all the way down the line, no matter what the grantor's interest is

Life Estates and Reversions

GRANTOR → GRANTEE

Background on Life Estates

- You can only create a life estate if you already have a life estate: you can't give someone a piece of the timeline that you don't own.
- To avoid these problems, we should assume the person has a **fee simple absolute, i.e., control of all possible timelines with respect to these timelines.**
- Gilbert's definition, pg. 89: **a life estate is an estate that has the potential duration of one or more human lives.**

Life Estates, Generally; Gilbert's, pg. 89

- The usual life estate is measured by the grantee's life. Thus, where O conveys Blackacre "to A for life," the grantee, A, gets an estate in the land for so long as A lives. On A's death, the land reverts to O, the grantor.
- A life estate can only last for the duration of a HUMAN LIFE:
    - Thus, "To A for the life of my pet cat" is NOT a life estate
        - Actually, this grant is a Fee Simple → see below
- Ex] Ash owns a piece of land in fee simple absolute
    - Ash wants to grant the land to Brock, but not forever.
    - If Ash picks a date on the calendar and says that Brock will own the land until that date, this transfer would fall under the Tenancy category; we'll disregard this type for now
- The Grantor can grant for the duration of ANYONE'S life he wants → he just has to be specific in his drafting:
- "To A for Life"

- Whose life?
- The ASSUMPTION here is A's life – firmly grounded in law
- But...to guard against ANY judicial fuck-ups, the more prudent way to draft would be: "To A for A's Life"
- It doesn't take any extra effort to be specific here
- Let's say that Ash wants to create an interest in Brock that will last for the duration of Brock's life
  - How would Ash's lawyer draft the grant?
    - "To Brock for his life." would be sufficient to establish a life estate.
    - "To Brock." would grant away Ash's entire temporal interest in the land.
      - The law says that Ash is presumed to grant away all of his temporal rights to the property unless he specifically declines to do so.
      - Before about 100 years ago, the presumption was that the grant was for the life of the grantee unless otherwise stated. This has obviously changed.
    - "To Brock for life."
      - Who's life?
      - The law will assume that the grantor intended to convey the grant for the life of the grantee, and so the assumption would be that Brock would be granted an interest in the land for the duration of his own life.
    - "To Brock for Ash's life."
      - There's nothing wrong with this.

- The Grantor can grant for the term of more than one life
  - Ex.: "To A for B and C's life."
  - But a competent lawyer will specify whose death controls the end of the Life Estate
  - The natural way to understand this grant is that BOTH A and B must be dead for the grant to run out
  - "To A for A or B's Life"
    - "or" is generally understood to mean that when one of them dies, the grant runs out
- The Grantor CANNOT grant to a long string of lives
  - The law will let you grant for term of more than one life (see above) as long as it is a manageable number.
  - You couldn't do this: "To Brendan for the life of all the babies born at MGH for the last 5 years, whoever lives the longest."
  - General Rule of Thumb: when you get in to double digits – law will probably have an issue with it
    - Rule against Perpetuities come into play too
  - Too many people is just too hard to keep track of – people and their heirs, etc.
  - The is a reasonable limit to the number of people that the law must keep track of
    - "To Brock for 20 people's lives."
      - When does the grant end? When one person dies or when all die?
      - It depends on how the grant is drafted; the language of the grant
      - If the people named in the grant have nothing to do with the grant, then mentioning their names does not now give them some interest.
      - "for the lives of A and B" sounds like the intent is to convey the grant so long as both A and B are both still alive.
      - "for the lives of A or B" sounds like the intent is to convey the grant so long as either A or B remains alive.
      - The courts are not likely to look kindly on a grant of land that will force the court to keep track of so many people's lives. The court would probably allow some leeway up to ten or so people, but if there are too many, the court will simply declare the grant to be invalid.

    - "To Brock for the life of Pikachu (Ash's cat)."
      - There's nothing wrong with this.
      - BUT, this is not a life estate since we're not dealing with the life of a human being. To fall under the category of a Life Estate, the life must be that of a (or several) human being(s)
      - This would fall under Fee Simple.

- "To Brock, for the life of Brock"
  - What does Brock now have?
    - Brock now has whatever rights Ash had (could be everything, could be only the right to occupy the land, could be only the right to search the land for natural gas)
  - Suppose that the land has an oil well under it
    - Can Brock pump all the oil out or does he have to pump it out slowly to preserve the value of the land over a long period of time?

        - This may be easier in thinking about landlord and tenant law
            - Landlords realize that tenants will have no respect for the upkeep of the house and so they use contracts to limit the tenant's rights to do things to the house.
        - The present interest holders want to maximize the use of the property to maximize the benefit to them; the future interest holders, of course, want the property to be used now to maximize the value of the property until their future interest comes up
        - The land grantor can limit the rights of the grantee (present interest holder) to maximize the value of the property for the future interest holders
            - If the grant does not explicitly cover this issue, the law will apply a background rule called "the law of waste"
    - Present Interest in the property
        - There's always a present interest
        - There can be more than one present interest (several people can own the land)
    - Future Interest in the property
        - An expected right to have or use the property in the future

Future Interests

Future Interests Generally

- Gilbert's, pg. 104: **A FUTURE INTEREST is a non-possessory interest capable of becoming possessory in the future. A future interest is a *present* interest in the sense that it is a presently *existing* interest. But it is *not* a presently possessory interest, and that is why it is called a future interest.**
- There are only 5 categories of future interests: ***reversion***, ***possibility of reverter***, ***right of entry***, ***remainder***, and ***executory interest***.
- Future interests are divided into two basic groups:
    1. Future interests ***retained by the grantor***; and
        - If the future interest is retained by the grantor, the future interest must be ***reversion***, ***possibility of reverter***, or ***right of entry***.
    2. Future interests ***created in a grantee***.
        - ***remainder,*** and ***executory interest***

FUTURE INTERESTS RETAINED BY GRANTOR (Reversion, Possibility of Reverter, Right of Entry)

Reversion

- Gilbert's definition, pg. 107: **a REVERSION is a future interest left in the grantor after he conveys a vested estate *of a lesser quantum*** (quantum being the hierarchy where fee simple is on top, then life estate, then tenancy…. The actual #s of years of each type do not change the hierarchy –i.e. tenancy could be longer than fee simple but not relevant to us here) **than he has. A reversion may be expressly retained.**
        - A reversion is a future interest kept by a grantor when the grantor conveys a "lower" interest than he starts with:
            - Fee simple
            - Life estate
            - Tenancy

            } **CONCEPTUAL Hierarchy of Labels**
    - Ex.: O, owning Blackacre in fee simple, conveys Blackacre "to A for life." Since O did not convey a fee simple to anyone—but only a life estate, which is a lesser estate than a fee simple—O has a reversion. When A dies, Blackacre will revert to O. If O had conveyed a fee simple to A, O would not have a reversion.
    - Ex.: O conveys Blackacre "to A for life, then to revert to O." Where it is not expressly retained, a reversion will arise ***by operation of law*** where no other disposition is made by the property after expiration of the lesser estate.
- When the Grantor grants away anything LOWER on the list than what he has, he has kept a REVERSION:
    - Ex.: O, owner of a fee simple, conveys a life estate to A. O has conveyed a lesser estate than O's fee simple. Therefore, O has a reversion.
    - Once the grantee's interest in the land runs out – the grantor (or his heirs) gets it back as a present possessory interest
- So, in our example: "To A for A's life"
    - Grantor has keep a REVERSION in FEE SIMPLE ABSOLUTE
    - (assuming the Grantor had a fee simple absolute to begin with)
- ***All future interest have a first name and a last name***
    - ***First name = name of the future interest***

- ***Last name = what the interest will be should it ever become a present interest***

- This is a legal right you have that you can do legal things with
  - Can sell it, etc.
  - Value depends on health of person who own LE (life estate), for example
  - Have all the legal properties of a present interest, but you just can't go on the land and use it right now

Divergent Interests of Present and Future Possessors

- Anytime you divide ownership of an asset across time you create a possible conflict between the person who has the interest now and the person who will have it in the future. These interests are not well-aligned.
- What control does the person with the future interest have?
  - The person with the present interest will look at maximizing the use of the property in the time that they own the property; person with present interest not concerned with long-term health of property – will loot it for what it's worth.
    - Ex.: tenants with a year lease who have parties.
  - Grantor can handle his concerns in the grant:
    - Can exempt certain uses, etc.
    - Can do this with LE just as a landlord does for a tenant.
    - The issue is cost – have to draft an agreement.
    - So we get standard agreements with similar residences – apartment lease.
    - LE – people just may not think about the issues. LE are also usually used in family and it's awkward to write limitations into grants.
- So what are courts going to do in face of grantor silence as to limitations on use?
- **The LAW OF WASTE: (conflict between future interest and present interest)**
- **- grantor can specify restrictions, then ok.. if not, the law fills in the background**
  - Law of waste: a rule that says when there is a present and future interest, the present interest holder has to be a **reasonable person**—they can do things to the land, but they must realize that someone in the future is going to take over the land.
  - This is a background presumption, the law just assumes this is what grantors would want.
    - Whatever specifications the grantor makes could change the rule of waste.
  - What is waste? What counts as waste really depends on the land, the use, the people, how long the present interests last, etc.
  - Could have assumed it meant grantee could do anything
  - But this doesn't closely approximate what grantor actually intended
  - REASONABLE USE is what the law presumes in the absence of any specifications → what the grantee can do – reasonable use
  - Unreasonable Uses can be three fold:
    - **Affirmative/Voluntary Waste**: steps that can negatively affect the value of the property; occurs when the life tenant actively causes permanent injury by, for example, destroying buildings. - could be ok.. just need to use property reasonably.. so just decreasing value could still be ok… (has to be extreme- i.e. tearing down condos for a mosquito farm)
    - **Negative/Permissive Waste**: things you fail to do; occurs when the land is allowed to fall into disrepair, or the tenant fails to take reasonable measures to protect the land from the elements. - present interest depreciates value- failure to act- failed to maintain value (again not required to keep property pristine or same as when you got it, just have to be reasonable): (i.e. property has leaky roof and as a result water destroys whole structure)
    - **Ameliorative Waste: Present interest appreciate value** - usually obviously fine for all, but not everyone wants to be rich… can future interest who have non-monetary concern argue for status quo? – can there be such a thing as waste where there is no monetary loss? – traditional English view: yes, at least with respect to land on the theory that land meant more than econ value but also social status, American view is more money oriented if it makes you more money, tougher to show waste… tougher also to find damages
      - Present interest holder's transformation of the property does not depreciate the value of the property, but fundamentally changes the use or the character of the property in such a way that it injures the future interest holder's interests. Ex] tearing down an historic mansion to put up a strip mall even though it will make all parties involved a lot of money.

  - **Law of Waste - Remedies:**
    - **Damages (Money Damages)** – if you can prove it: (and consider Cherokee principle)
      - If you can prove the numbers – person with future interest can sue at the time of the waste….then get sheriff to collect items etc…
      - In a lot of jurisdictions – depending on how flagrant the waste – you can get double or triple the damages
      - Problem #1 – lots of uncertainty in the numbers – have to hire bunch of experts

- Future interest has to be certain to become present and possessory for damages (So suing on a POR or ROE ain't gonna fly for damages – see below) – so essentially a REVERSION is needed for $ damages

- **INJUNCTION (conduct or forbearance from conduct)**
  - what if damages can not be calculated, or are uncertain, or there are no damages (added value) – the can only ask for injunction which would be the preferred remedy… problem is that even if liability established, injunctions are just discretionary- courts don't have to issue it… have to consider how likely is the chance there will be a problem? – consider when the future interest will actually take rights – if its in 1000 years (or like a million if ever- consider the example where future interest in when heirs is eaten star goat), then you have a legal right, but in a practical sense, you have nothing (when allocating damages that may even be very high but with even a low discount rate, over time they become minimal or almost 0)
    - This remedy is available for waste in this situation
    - But remember – injunction is discretionary (damages are not) → will implicate law enforcement for contempt enforcement
    - Injunction could just not be in the public interest
    - So remedy will vary as a function of the certainty that the future interest will become possessory
    - Is it serious enough to start throwing injunctions around?
    - So long as the future interest holder's interests are sufficiently remote either in possibility or in time, the chances of his getting an injunction is effectively 0.
- **Forfeiture**
    - If waste committed is sufficiently blatant – in bad faith – remedy court could issue is to terminate Z's present interest in the property and give it back to grantor who has future interest
    - **No case in modern times where this remedy has been invoked**
    - Only exists even in THEORY on ¼ of the states

Fee Simples, Possibility of Reverters, and Rights of Entry

FEE SIMPLE ABSOLUTE (no future interest)

- Gilbert's, pg. 75: a fee simple absolute is absolute ownership. It is of ***potentially infinite duration*** (therefore called a "fee"). There are ***no limitations on its inheritability*** (therefore called "simple"). It ***cannot be divested***, nor will it end on the happening of any event (hence called "absolute").
  - A fee simple absolute is what most lay people thing of when they think of owning property. This estate gives the owner maximum rights in the land.
- Your interest in the land extends on to infinity
- Can transfer this by succession or Will or inter vivos
- **When you receive a grant phrased "To A and his heirs": this is a Fee Simple Absolute.**
- If you grant away anything else that's not a fee simple, you keep a reversion in fee simple absolute
  - This does not mean that there are no limits; the end of the world (an external limitation) would end the interest in the property
  - Under this label, the grantor has no control over the new possessor's interest in the land after the grant is made
  - The grantee always wants to get this label in his land, but it is not always easy; sometimes the grantee will have to gather several landowners that own the same piece of property over several different time periods
  - **Someone who owns a piece of land over ALL time periods is said to own the property "in fee simply absolute"**
    - This does not necessarily mean that the landowner has ultimate ownership over the land; he could own only the rights to search the land for natural gas
    - "in fee simple absolute" only refers to temporal duration of ownership

I. FEE SIMPLE DEFEASIBLE – broad label for any fee simple that is not absolute

- Gilbert's, pg. 79: a fee simple can be created so that it is defeasible on the happening of some event, and the owner of the fee simple then loses, or may lose, the property. **If the fee simple is defeasible, it is of course not absolute.**
  - All of these are called fee simples because they have the ***potential*** of infinite duration, although not the certainty. Defeasible fees are most commonly encountered in deeds ***restricting the use*** of land, but they may be used for other purposes as well.
- Your interest in the land is POTENTIALLY infinite, but it can be defeated and brought to an end….. thus in these cases there is always a future interest
- Carving a Fee Simple out of a Fee Simple creates a Fee Simple Defeasible that is either Determinable or Subject to Condition Subsequent.

a. FEE SIMPLE DETERMINABLE (defeasible fee simple with possibility of reverter)

- Gilbert's, pg. 79: a fee simple determinable is a fee simple estate so limited that it will ***automatically end*** when some specified event happens.
    - Ex.: O conveys Blackacre "to School Board so long as the premises are used for school purposes." The words "so long . . . purposes" are ***words of limitation***, limiting the duration of the fee simple given. The School Board has a fee simple determinable that will automatically end when Blackacre ceases to be used for school purposes. When that event happens, the fee simple automatically reverts to O.
    - A fee simple determinable is a fee simple because it ***may*** endure forever. But, if the contingency occurs (Blackacre is used for other than school purposes, as above), the estate ***automatically*** ends. The estate terminates immediately on the occurrence of the event—nothing further is required—and the fee simple ***automatically reverts*** to the grantor. This is the distinguishing characteristic of the determinable fee.
    - "To brock and his heirs until he gets drunk"
    - The meter of the grant flows – its ONE thought. (what if you have a semicolon? – to brock and his heirs; until he gets drunk- that break can signal fee simple subject to condition subsequent)
    - "so long as," "while," "during," or "until" generally signals a Fee Simple Determinable.

b. FEE SIMPLE SUBJECT TO CONDITION SUBSEQUENT

(fee simple defeasible with future interest bears possibility of right of entry or power of termination)

- Gilbert's, pg. 81: a fee simple subject to condition subsequent is a fee simple that does not automatically terminate but may be ***cut short*** (divested) at the ***grantor's election*** when a stated condition happens.
    - Ex.: O conveys Blackacre "to A, but if liquor is ever sold on the premises, the grantor has a right to reenter the premises." The words "but if . . . premises" are ***words of condition*** setting forth the condition upon which the grantor can exercise her right of entry. They are not words limited the fee simple granted A. A has a fee simple subject to condition subsequent. O has a right of entry. If O does not choose to exercise her right of entry when liquor is sold, the fee simple continues in A.
- A fee simple subject to condition subsequent is a fee simple because it may endure forever. If the contingency occurs, O merely has the ***power*** to reenter and to terminate the estate. The fee simple subject to condition subsequent ***does not automatically end*** on the happening of the condition. Rather, the estate continues in the grantee until the grantor ***exercises*** her power of reentry and terminates the estate. The grantor has the option of exercising the power or not.
- A fee simple subject to condition subsequent is created by first giving the grantee an unconditional fee simple and then providing that the fee simple may be divested by the grantor of his heirs if a specified condition happens. Traditional language to create such an estate includes: "to A, ***but if*** X event happens...," or "to A, ***upon condition*** that if X event happens…," or "to A, ***provided, however***, that if X event happens…," the grantor retains a right of entry.
- The meter of the grant does NOT flow – it is interrupted – not one thought – the condition is tacked on afterwards.
- To brock and his heirs**,** but if he gets drunk, he loses it
- "but if," "on the condition that," "provided, however," or "if, however" generally signals a Fee Simple Subject to Condition Subsequent.

c. Fee Simple subject to executory interest (to be discussed later)

a. Where the interest is created in a third person
b. FI is given to grantee

- **Difference between fee simple defeasible and fee simple subject to condition subsequent:**
    - The fee simple determinable ***automatically*** ends, regardless of whether the grantor does anything.
    - With a fee simple subject to condition subsequent, the grantor ***must act*** to retake the property or the grantee's estate continues.
- Grammer:
    - "To Brock and his heirs unless he gets drunk." is flowy and can be read without any pauses.
    - "To Broke and his heirs, but if he gets drunk then he will lose his interest." is not flowy and has a huge pause in the middle of it.
    - These grammatical distinctions are trivial, but the law often has only the language of the grant to work with and so they distinguish legal doctrines based on grammar.
    - Rules:
        - If the condition seems to be attached to the grant and can be read as if in a single thought, then the court will assume a fee simple determinable interest.
            - Grant until/unless/so long as/etc.
        - If the condition is separated by a grammatical break as if made in a second thought, independent of the grant, then the court will assume a fee simple subject to conditions subsequent interest.
            - ", but"
        - What happens if some stupid lawyer uses the language that we normal associate with a fee simple determinable, but adds some grammar thing to make a break, such as "To Brock and his heirs; unless he gets drunk."

- The law will DEFAULT TO FEE SIMPLE SUBECT TO CONDITION SUBSEQUENT.

- These grants can be conceptualized as containing a **"time bomb"** waiting to explode, and if it does, the grantor gets, or has the opportunity to get, his present possessory interest back.
- **Some states have legislated the end to having this choice, and eliminated fee simple determinable only kept fee simple subject to condition subsequent** (more flexible and thus the type the law prefers)
- Since most grants will be fee simple subject to condition subsequent and thus the grantor will have to do some affirmative action to reclaim the property, what must the grantor do to get the property back once the condition has been met?
    - The law is not clear on this
    - Suing the grantee will surely work.
    - Writing a letter demanding ejection will probably work.
    - Calling and yelling at the grantee to leave will probably not work.

- **Grantor can specify as a condition that will terminate a grant, just about anything they want, subject to 3 exceptions:**
    - (1) Can't be against public policy (violate PP)
    - (2) Some states say that conditions cannot be frivolous ("To Brock until the moon is eaten by a space goat."); this is allowable in general common law, although most courts will effectively disregard them.
    - (3) Principle against restraints on alienation: Sometimes the grantor wants to grant the property away, but he doesn't really trust the grantee (e.g. Parents want to give some land to their son but worry he will sell it to buy a giant bong.) and so the grantor will add a condition that limits the grantee's ability to transfer the land to another person ("To Brock until he tries to sell the property."). The law does NOT allow the direct restriction of transferability in a fee simple interest. Thus, if the grant is for a life estate or tenancy, the law is not concerned with this condition (that's why leases always say no subleasing without the landlord's permission).

Three things can happen to future interest:
1. become present interest;
2. continue to be future interests;
3. fold up and leave time-line/fizzle out (definitely fail to vest) – i.e. to brock and his heirs so long as brock never serves alcohol on premises- once brock dies w/o serving alcohol, future interest fizzles (**so can start as a fee simple defeasible and end as fee simple absolute**)

*Possible Future Interests a Grantor Can Keep with a **Fee Simple Defeasible***

Possibility of Reverter (POR)

- Gilbert's, pg. 105: a possibility of reverter arises when a grantor carves out of her estate a ***determinable*** estate of the same quantum. In almost all cases it ***follows a determinable fee***.
    - Ex.: O conveys Blackacre "to Board of Education so long as Blackacre is used for school purposes." The Board of Education has a determinable fee; O has a possibility of a reverter. O's interest is not a reversion because O, owning a fee simple, has conveyed a fee simple determinable to the Board. All fees simple are of the same quantum.
    - Ex.: O conveys Blackacre "to A and his heirs so long as liquor is not sold on the premises." A had a determinable fee; O has a possibility of a reverter.
    - Future interest become possessor once present interest blows itself up
- **For all practical purposes, a possibility of reverter is a future interest remaining *in the grantor* when a *fee simple determinable* is created.**

Right of Entry (ROE) / power of termination

- Gilbert's, pg. 110: when a grantor creates an estate subject to condition subsequent and ***retains the power to cut short*** or terminate the estate, the grantor has a right of entry. Like a possibility of reverter, a right of entry cannot be created in a grantee. The right of entry is sometimes called **"a power of termination."**
    - Ex.: O conveys Blackacre "to A and his heirs, but if intoxicating liquor is ever sold on the premises, O has a right to reenter and retake Blackacre." A has a fee simple subject to condition subsequent; O has a right of entry for breach of the condition subsequent.
    - You will usually see the right of entry (if there is one) expressed in the grant of an estate subject to a condition subsequent.

- when condition happens, possibility of reverter automatically transfers future interest to present interest

In Illinois cant sell right of reverter to anyone but the holder of fee simple defeasible.

What do we call a future interest that becomes a present interest?

- It depends on what kind of present interest the future interest will turn into.
- "To Brock and his heirs unless he gets drunk."
    - If Brock gets drunk, the grantor's future interest will turn into a FEE SIMPLE ABSOLUTE interest (since there are no other future interests)
- "To Brock and his heirs unless he gets drunk." and then "From Brock to Celio for Celio's life."
    - Once Celio dies, Brock's future interest will become a present interest.
    - The future interest will have two names: First – the type of future interest it is (reversion, possibility of reverter, right of entry); Last – the type of present interest it could become (fee simple determinable, etc.)
    - Brock's future interest in this situation will be called a "Reversion in Fee Simple Determinable"
        - Reversion because he granted his fee simple determinable interest away to a life estate and life estate is lower on the conceptual hierarchy
        - Fee simple determinable because the grant to Brock was phrased in such a way that the court would interpret it to be so (i.e. it was "flowy")
- "To Brock and his heirs so long as no one drinks alcohol on the property." and then "From Brock to Celio for Celio's life." Then Celio has a beer after work.
    - Since Celio's interest in the property was contingent on Brock's interest in the property, when Brock's interest goes away, so does Celio's.
    - Thus, when the condition for possibility of reverter (ANYone drinking alcohol on the property) is met by Celio's drinking a beer, the property automatically goes back to the original grantor and Brock and Celio both lose their interests.
    - If the original grant had been phrased as a fee simple subject to condition subsequent, then even if the grantor himself observed Celio drinking the beer, he would not be able to walk onto the property as if it were his.
        - Under fee simple subject to condition subsequent, the original grantor must take some action to reclaim the land before it is his again. Thus, until he has taken that action, he will be considered a trespasser on that land, even if the condition for right of entry has already been met.

CASE: Huttons – Marron Hole cases

Distinguish b/w fee simple determinable and fee simple subject

- Property owners give warranty deed to School District
- What temporal interest do property owners have? Fee Simple
- Do they give over entire fee simple to School District?
    - The grant says "land to be used for school purpose only; otherwise to revert to grantor's land"
        - This is a Fee Simple Defeasible (not absolute)
- So they either created a fee simple determinable or a FSSCS…does it matter which one they created
    - YES!
        - Based off complicated chain of events
- March 18, 1941…grant takes effect.
    - School board now has present possessory interest…either a FSD or FSSCS
    - Huttons have future interest…either a POR or POT
- Mr. Hutton dies…no will, but law of intestancy the land goes to Mrs.
    - So she now has all the future interest
- In 1959, the Jacque-bainns trasferred a large chunk of land surrounding school property to Merenholz
    - 10 years later, Mrs. Hutton dies w/o leaving a will…step son gets property
    - So as of 1969, school board owns FSD/FSSCS and Harry Hutton owns POR/POT
- **In pretty much every state, POR is freely transferrable…with ROE/POT, not as clear**
    - Illinois is weird about it…they say with either interest you can pass them freely at death, but not during life…can only sell or give them to person that owns the corresponding present interest
- In 1973, school board stops using property to conduct classes…use it for storage of school supplies
    - Did this violate condition? What does "school purpose" mean?
- In 1977, Harry conveyed interest to Merenholz…then 4 months later Harry conveyed his interest to school board
    - The question is what did Harry have in 1973? A POT or POR?
- **If he had POT/it was FSSCS**…he had the power to terminate that if he wanted to turn into a present interest he could.
    - In 1977, he conveyed his interest to Merenholz…but in Illinois you can't do that during life…so he gave Merenholz nothing
        - So 4 months later when he conveyed interest to school board, they did get the POT
- **If he had POR/ it was FSD**….assuming that school board did violate the condition

- What did harry have in 1973? His POR automatically became a present possessory interest…he had a Fee Simple Absolute
- So 4 years later when he said to Merenholz "whatever I got you got", he gave them a present possessory fee simple absolute….these ARE transferrable during life
- If he would have thought he had a future interest and said "you can have my future interest" then they wouldn't have got anything….even if he was mistaken.

- **But this all comes down to what huttons intended created in 1941**
  - **How do we know which one? FSD or FSSCS?**
  - Court looks at grammar of the grant
  - There is a semicolon
    - Suggests a FSSCS
  - But they use word Reverter which suggest FSD
  - Do we go by punctuation or the words?
    - They wanted FSD

Summing It Up – Future Interests with Fee Simples

- **Grant of Fee Simple Determinable leaves the Grantor with a Possibility of Reverter.**
- **Grant of Fee Simple Subject to Condition Subsequent leaves the Grantor with a Right of Entry.**
- **And, don't forget: grant of Life Estate leaves the Grantor with a Reversion.**

- **Fee Simple Determinable → Possibility of Reverter:**
  - We start with a Fee Simple Determinable:
    - Ex.: "To A so long as alcohol is not used on the premises."
    - The meter of the grant flows – its ONE thought.
    - "so long as," "while," "during," or "until" generally signals a Fee Simple Determinable.
  - **When the grantor grants a Fee Simple Determinable, he keeps a Possibility of Reverter**
- **Fee Simple Subject to Condition Subsequent → Right of Entry:**
  - We start with a Fee Simple Subject to Condition Subsequent:
    - Ex.: "To A on condition that if alcohol is used on the premises, O shall have the right to reenter and retake the premises."
    - The meter of the grant does NOT flow – it is interrupted – not one thought – the condition is tacked on afterwards.
    - "but if," "on the condition that," "provided, however," or "if, however" generally signals a Fee Simple Subject to Condition Subsequent.
  - **When the grantor grants a Fee Simple Subject to Condition Subsequent, he keeps a Right of Entry**

Legal Properties of these Present and Future Interests

Transferability ***(SEE CHART #1)***

- Fee Simples: no limitations; can do whatever you want with it
- Life Estate: can limit if you want
- Reversion: freely transferable
- Possibility of Reverter: in every state that allows that interest to exist (some states, like CA, have abolished this future interest), it's freely transferable
- Right of Entry: long tradition that they can be inherited but not sold or given away; but about half the states have done away with this limitation

Twists and Dips about the Time Bombs

Lower Interests Can Have Conditions ("time bombs") Attached to Them, Too:

To Brock for Brock's life till he gets drunk: Not a fee simple., Brock gets a life estate.. so grantor is keeping a reversion…. Post Brocks life, grantor again gets fee simple absolute

- Like a fee simple (the highest interest), a life estate can be created so as to be determinable or subject to condition subsequent.
- "To Z for Z's life unless booze is served on the property"
  - 2 things can bring it to an end:
    - Z's life, or serving booze on property.

    - **Life Estate Determinable**
- "To Z for Z's life, but if booze is served on the property, then O retains the right to reenter."
    - **Life Estate Subject to Condition Subsequent**
- This all applies to tenancy, too.
- Grantor Keeps TWO Future Interests:
    - For Life Estate Determinable:
        - Reversion and Possibility of Reverter
        - But, **all of it's just called a Reversion**
    - For Life Estate Subject to Condition Subsequent:
        - Reversion and Right of Entry
        - One takes effect when Z dies (Reversion), the other taking effect when condition broken, giving option to enter (Right of Entry).
        - Important to distinguish because they cover **different parts of the timeline**.

Eg.: to Brock for the life of his pet cat. (not a life estate since not human life, so a fee simple, obviously not absolute, since def gonna crash at some point, so must be some kind of fee simple defeasible- either determinable or subject… prob determinable)

Grantors Who Have Something Less than a Fee Simple

- O grants "To Z for Z's Life", and then Z grants "To S for S's Life."
- Future Interests:
    - Grantor → Reversion in Fee Simple Absolute
    - Z → Reversion in Life Estate
        - If S dies before Z, Z gets his present possessory interest back because the grantor doesn't get his interest back until Z dies.
        - No special names for carving a Life Estate out of a Life Estate, like when you carve Fee Simples out of Fee Simples.
- So, you keep a "reversion" if:
    - Give away something lower on the list (i.e., you have a Fee Simple and you give away a Life Estate); or
    - Carve a Life Estate out of a Life Estate or a Tenancy out of a Tenancy.
- REMEMBER: carving a Fee Simple out of a Fee Simple creates a Fee Simple Defeasible that is either Determinable or Subject to Condition Subsequent!

Fudging the Definition of "Fee Simple"

- Definition of Fee Simple – temporal definition (from Restatement of Property)
    1. (i) potentially infinite
    2. (ii) terminable upon the happening of a certain event and that event will definitely occur (but not a human life or the happening of a certain calendar date)
    3. Note: we are talking about a FEE SIMPLE, not a FEE SIMPLE ABSOLUTE!
- "To Z for the life of my pet cat"
    4. (1) Has to be a fee simple under this definition – the estate is not measured by a human life, so therefore it cannot be a Life Estate.
    5. (2) Obviously not "absolute," so Fee Simple Defeasible
    6. (3) Has to be Determinable given the flowing language ("so long as my pet cat is alive" is the same grant) – unless you're in a jurisdiction like Cal. that has abolished this future interest, in which it would be a Fee Simple Subject to Condition Subsequent.

Future Interests in People Other Than the Grantee (Remainder & Executory Interest)

- Remember: if the future interest is retained by the ***grantor***, you've narrowed it down to a reversion, a possibility of reverter, or a right of entry. If it is given to someone ***other*** than the grantor, it must be a remainder or an executory interest.

Eg.: to Brock for Brock's life, then to Celio for Celio's life/ Celio and his heirs, to Celio so long as X, etc…

Future Interests in 3rd Parties:

- (1) Remainder
  - Vested Remainder
    - Indefeasibly Vested
    - Subject to Executory Interest
    - Subject to Open
  - Contingent Remainder
- (2) Executory Interest

Defining Future Interests in 3rd Parties

Remainder

Remainder, Generally

- Gilbert's, pg. 112: a remainder is a future interest created in a ***grantee*** that is ***capable of becoming a present possessor estate on the expiration of a prior possessory estate*** created in the same conveyance in which the remainder is created. It is called a remainder because on the expiration of the preceding estate, the land "remains away" instead of reverting to the grantor. A remainder never divests or cuts short the preceding estate; instead it ***always waits patiently*** for the preceding estate to expire.
  - Ex.: O conveys Blackacre "to A for life, then to B if B is then living." B has a remainder because B's interest is capable of becoming possessory upon the termination of the life estate.

- Must meet 4 Requirements:
  - (1) Created by a grantor in someone else, i.e., in a 3rd party; (this condition is obvious, so really have 3 below requirements)
  - (2) It must be possible (not necessarily certain) for the future interest to become a present interest as soon as the prior present interest expires. (eg. where not possible- to brock for brocks life, then one hour later, to celio and his heirs, NOTE that if there is such a break, the original grantor has present interest during break)
    - Is it POSSIBLE for the future interest to become a present interest THE INSTANT that the prior interest expires?
      - Ex] "To Brock for Brock's life and then to Celio." It's possible, in fact likely, that Celio's interest can attach as soon as Brock dies, so this will meet this requirement.
      - Ex] "To Brock for Brock's life and then to Celio after Brock is properly buried." This does NOT meet this requirement.
  - (3) Cannot divest a prior interest (not kept by the grantor) (i.e. Does the FI divest the prior interest?) (e.g.: to brock for brocks life, but if brock gets drunk, then to celio and his heirs…. So this future interest in not sitting back and patiently waiting for brocks life estate to end…. So there is a way for the future interest to divest (snatch away) the present interest…. Compare with : to brock for brocks life so long as brock stays sober, then to celio and his heirs ---- looks same, but is not- here, law does not view celio as snatching anything up.. but just waiting patiently
    - Does the future interest wait patiently for the prior interest to expire? Is it a non-divesting future interest? In other words, is the grant to the present interest holder phrased as a determinable interest?
      - Ex] "To Brock for Brock's life and then to Celio." Since Celio's future interest must wait patiently for Brock's life estate to end, Celio's future interest meets this requirement.
      - Ex] "To Brock for Brock's life, but if Brock gets drunk, then to Celio and his heirs." Here, Celio's future interest is greedy and is lying in wait for Brock to get drunk. Since Celio's future interest does not have to wait for Brock's life estate to end, this grant to Celio does not meet this requirement. The law makes the distinction on whether Celio's interest is "greedy" or not on whether Brock's grant of a present interest is phrased as determinable (not greedy) or subject to conditions subsequent (greedy).
      - Ex] "To Brock for Brock's life so long as Brock stays sober, then to Celio and his heirs." On its face, this seems exactly like example two, but the law sees it differently because the condition is phrase as a fee simple determinable interest. Thus, Celio's interest is not "greedy" and may possibly be called a remainder (if the other two conditions are met).
  - (4) Cannot take possession immediately after a fee simple (other than the one kept by the grantor) eg: to brock and his heirs so long as brock stays sober, then to celio and his heirs
    - Does the future interest become possessory after something OTHER THAN a fee simple expires?
      - Ex] "To Brock and his heirs so long as Brock stays sober, then to Celio and his heirs." This grant to Celio passes both requirements 1 and 2, BUT, since Brock's present grant is a *fee simple* determinable interest,

Comment [EMS1]: In fee simple?

Comment [EMS2]: Review greedy vs not.

Celio's future interest can never be called a remainder (we want the determinable label, but we don't want the fee simple label).

Ex] "To Brock for Brock's life unless Brock gets drunk, and then to Celio." In this grant, Brock's interest is a life estate so Celio's grant may possibly be called a remainder. In fact, since Brock's grant is phrased as determinable and it's possible that Celio's interest can become possessory immediately after Brock's interest ends, this grant meets all of the requirements to be called a remainder. Yeah!

- A remainder is any future interest limited in favor of a transferee (created in someone else/other than the grantor) in such a manner that it can become a present interest upon the expiration of all prior interests simultaneously created, and cannot divest any interest except an interest left in the transferor.

- Then, you must ask whether the Remainder is Vested or Contingent.

Vested Remainder

- A remainder created ***in an ascertained person*** and ***not subject to a condition precedent***.
- Two Requirements:
  - (1) At least one ascertainable taker of the property
  - (2) There must be no condition precedent to possession other than the expiration of prior interests

Contingent Remainder → **ANY REMAINDER THAT IS NOT VESTED**

- Gilbert's, pg. 118, definition: a remainder is contingent if it either is limited to an ***unascertained person*** or is subject to a ***condition precedent***.
- As we see, Vested vs. Contingent Remainders are mutually exclusive and exhaustive – if it's not one, it's the other

Executory Interest

- Any Future Interest in a 3d Party that IS NOT a Remainder I.E.
- Remainder vs. Executory Interest are mutually exclusive and exhaustive – if it's not one, it's the other

Observations on Naming Future Interests

- Future interests take their names and legal properties **at the time when they were created.**
- You can transfer Future Interests, too, subject of course to your jurisdiction's special rules.
- Ex.: a grantor grants "To A for A's Life," keeping a Reversion in Fee Simple Absolute, and then transfers that Reversion to a 3rd party.
  - It's STILL called a Reversion when he transfers it.
  - Future interests take their names at the time they are created.
- Point: it's possible for a 3rd party to end-up with a Future Interest that can only be created in a grantor, it's just that you have to do TWO SEPARATE transactions and pay the lawyer twice.
  - **You can NEVER create a Reversion, POR, or ROE in a 3rd party using ONE grant**
  - Can only create Remainders and Executory Interests
  - But, sometimes it is beneficial to do it the long way if you want the 3rd party's interest to have certain legal properties or if you need to get around the Rule Against Perpetuities.
- "To Z for Z's life, then to S and his heirs"
  - S CANNOT have a R, POR, or ROE → those are future interests reserved for the grantor
  - When a grantor creates a Future Interest in someone other than himself in the same grant in which he creates a Present Interest, it can only be a Remainder or Executory Interest
  - Z: Life Estate
  - S: Indefeasibly Vested Remainder in Fee Simple Absolute

Transferring a future interest to someone else does not change the name of the future interest. Along with the label, all the legal rights that go with that label also are transferred to the new owner.

- If you're creating a future interest in a third party, such as a vested remainder, that future interest takes over automatically; the third party future interest holder cannot choose when the grant will take effect, it takes effect as soon as all conditions for the grant are met.
- If the grantor wants to give the third party future interest holder the ability to choose when the grant will take effect (assuming all conditions are already met), then the grantor has to create a fee simple subject to condition subsequent future interest in himself and then TRANFER that future interest to the third party. The third party would then have a fee simple subject to condition subsequent future interest.

Comment [EMS3]: What?

The 4 Requirements for a Remainder

- **REMEMBER:**
  - Gilbert's, pg. 112: a remainder is a future interest created in a ***grantee*** that is ***capable of becoming a present possessor estate on the expiration of a prior possessory estate*** created in the same conveyance in which the remainder is created. It is called a remainder because on the expiration of the preceding estate, the land "remains away" instead of reverting to the grantor. A remainder never divests or cuts short the preceding estate; instead it ***always waits patiently*** for the preceding estate to expire.
    - Ex.: O conveys Blackacre "to A for life, then to B if B is then living." B has a remainder because B's interest is capable of becoming possessory upon the termination of the life estate.
  - Must meet 4 Requirements:
    - (1) Created by a grantor in someone else, i.e., in a 3rd party;
    - (2) It must be possible for the future interest to become a present interest as soon as the prior present interest expires.
    - (3) Cannot divest a prior interest (not kept by the grantor)
    - (4) Cannot take possession immediately after a fee simple (other than the one kept by the grantor)

Requirement #1:

Created by a grantor in someone else, i.e., in a 3rd party:

- Gilbert's, pg. 113: a remainder can be created only by ***express grant*** in the ***same instrument*** in which the ***preceding possessory estate*** is created. Unlike a reversion, it ***cannot*** arise by operation of law.
- Ex.: O conveys "to A if A marries B." No preceding estate has been created by O in anyone; thus A does not have a remainder.

Requirement #2:

It must be possible for the future interest to become a present interest as soon as the prior present interest expires:

- "To Z for Z's life, then to Steve and his heirs"
  - Steve will DEFINITELY take possession at the moment Z's interest (the temporally prior interest) expires.
- KEY QUESTION: whether the Future Interest in a 3rd party can take present possession **IMMEDIATELY** after the expiration of a temporally prior interest
- *"To Z for Z's life, then one day later, to Steve and his heirs"* or *"To Z for Z's life, then after Z's funeral, to Steve and his heirs"*
  - OBVIOUSLY, these grants FAIL this requirement.
  - It is absolutely IMPOSSIBLE for the Future Interest to take present possession IMMEDIATELY after Z dies (i.e. his interest runs out)
  - No matter what, S will have to wait to take possession
  - So in both of these grants, S has an EXECUTORY INTEREST (since it's not a Remainder).
  - Also, Grantor technically keeps a Reversion for the period of time before S can take present possession
    - Under the fudged definition of a Fee Simple in Restatement of Property § 14(a)(3), it's a Reversion in Fee Simple subject to a Springing Executory Interest
    - Called "springing" because it "springs out" and takes possession away from the Grantor
- "To Z for Z's life, then to Steve and his heirs, if Steve passes the bar exam"
  - (1) if S has passed the bar when Z dies → S gets immediate possession
  - (2) if S hasn't passed the bar when Z dies → S doesn't get immediate possession
  - So there is only a chance that S will get immediate possession on expiration of Z's prior present interest
  - BUT THIS IS OK!!
    - **S's interest only has to be capable IN THEORY of taking possession immediately after Z's interest expires**
    - As long as there is one conceivable scenario where S can take immediate possession – this prong is satisfied

Requirement #3:

Cannot divest a prior interest (not kept by the grantor):

- Remember:
  - Remainder: sits and waits patiently for prior present interest to run its natural course.
  - Executory Interest: will reach back into time and snatch away a prior present property interest before it has run its "natural" course.
- Can fuck-up by putting a comma in the wrong place
- "To Z for Z's life, but as soon as Steve marries Bitch, then to Steve and his heirs"
  - This DOES NOT meet the Requirement #3t: S has an Executory Interest
  - As soon as Steve marries Bitch, Steve divests Z's estate → he cuts it short and snatches it away.
  - Future interests that snatch property away before the prior estate has run its natural course CANNOT BE REMAINDERS.

- "To Z for Z's life, then to Steve and his heirs if Steve marries Bitch"
    - This MEETS Requirement #3
    - Note how its all about where that damn comma is
    - Here, S's interest can never become possessory until Z's interest runs out; it CAN'T jump out and snatch Z's estate away
- "To Z for Z's life until Steve marries Bitch, then to Steve and his heirs"
    - This MEETS Requirement #3, too
    - The condition of S marrying Bitch is part of the grant to Z (it flows from it) – it's part of his estate – so Z's estate will naturally end
        - (1) When Z dies, or
        - (2) when S marries Bitch
    - Thus, S's future interest waits patiently for either event to happen, at which point S will take present possession
- Another Ex.:
    - "To Anthony for his life, but if Anthony wears a suit of armor, then immediately to Blaze and his heirs."
    - Anthony still has a life estate; Blaze still has a future interest. What kind does Blaze have? Meets the first two criteria. But we have that comma after life…what does this do?
    - The defeasibility requirement doesn't flow as one thought. You determine the natural life span of an interest not by reasoning, but rather by reading the grant and playing grammatical games. The law says given this grammatical formulation, Anthony's interest is only Anthony's life. The other part is merely an afterthought. Now, if the armor part happens, Blaze reaches out and grabs the property.

Requirement #4:

Cannot take possession immediately after a fee simple (other than the one kept by the grantor):

- Gilbert's, pg. 114: a logical consequence of a rule that remainder is an estate that becomes possessory on the natural termination of the preceding estate is that ***there can never be a remainder divesting a fee simple***, which has an infinite duration. Any interest divesting or following a fee simple ***must be an executory interest***, not a remainder. This rule applies to all fees simple, including a fee simple determinable.
- Ex.: O conveys "to A and his heirs, but if A dies without issue surviving him, to B." B has an executory interest, not a remainder.
- "To Z and his heirs so long as no booze is served, then Steve and his heirs"
    - Looks like a future interest in Steve
    - But, it's actually malpractice
    - Facially looks like an Executory Interest, but this actually violates the Rule Against Perpetuities, so it's nothing – only Z's grant is effective.
    - No way for this to be a Remainder

Summary of Remainder Requirements (from Gilbert's)

- To summarize:
    - A Remainder must ***follow a preceding estate***—if there is no preceding estate, a future interest can't be a Remainder.
    - A Remainder ***can't follow a Fee Simple***—if you see a Fee Simple, a future interest can't be a Remainder.
    - And a Remainder must be capable of becoming a possessory ***on the natural termination of the preceding estate***—if the future interest cuts off (divests) the previous estate, it can't be a Remainder.

Dissecting the 2 Requirements for a Vested Remainder

- Remainders are classified as either "vested" or "contingent."
    - A ***Vested*** Remainder is a Remainder that is ***both*** created in an ascertained person ***and*** is not subject to any condition precedent. (generally the holder of the future interest WANTS the remainder to be vested because it gives him certain additional rights)
    - A ***Contingent*** Remainder is a Remainder that is **either created in an unascertained person or subject to a condition precedent**.
    - If a Remainder is not a Vested Remainder, then it is Contingent Remainder.

Requirement #1

At least one ascertainable taker of the property, i.e., one ascertainable beneficiary (Is there some actual person in the world at the time of the granting that can be pointed to as the future beneficiary?)

"The question is literally whether you can point to someone who is alive and identify them as a beneficiary. In the case of A's heirs, in a case in which "heirs" really does constitute words of purchase, there is no one who meets that description until A is dead and leaves no will. An heir is, in technical legal jargon, someone who takes property in the absence of a will. (It is possible that the grantor intends the word "heirs" to be used

in a non-technical sense, in which case it might have a different meaning.) As long as A is alive, there is no one to whom you can point and say that he or she is a beneficiary of the grant. The existence of kids is irrelevant, because kids are not heirs until and unless their parent dies without a will AND there is no one higher on the chain of intestate succession (such as a surviving spouse).

In the oldest living child example (which I assume you meant to be "To A FOR LIFE, then to A's oldest living child", it all depends on what the grantor means. Does the grantor mean "oldest living child when this grant takes effect" or does the grantor mean "oldest living child when A's interest ends"? In the latter case, we obviously cannot point to anyone so there is no ascertainable beneficiary. In the former case, we can point to someone. "

"To Brock for Brock's life, then to Brock's kids and their heirs." This grant meets all the requirements for a remainder. What if, when the grant takes effect, Brock has no kids. The grant does NOT take effect as soon as it is written down; the grant needs to be properly conveyed to the grantee. The law allows the grantor to create property interests in people that do not yet exist. When the grant takes effect in this scenario, there is no ascertainable beneficiary as to the future interest since Brock has no kids. However, it is possible that Brock will have kids in the future, so the law will not simple disregard this future interest. Since there is no ascertainable beneficiary, this is NOT a vested remainder.

:

- "To Z for Z's life, then to Steve and his heirs"
  - This is OK – meets Requirement #1
  - Specific People are identified
  - When Future Interest is created – we KNOW who holds the remainder – S or his heirs
  - Vested Remainder
- "To Z for Z's life, then to Steve's oldest then-living child"
  - This DOES NOT meet (1)
  - This is a BONA FIDE REMAINDER → But the issue is that there is no one you can point to and say "you are the owner of this interest"
  - If you can't point to someone, IT'S NOT A VESTED REMAINDER, but it's still a remainder – it's a Contingent Remainder
  - "oldest then-living child" makes this interest not vest until Z's estate runs out – only then will we know who S's "oldest then-living child" is
- If there are people or a person who meet the abstract description at the time of the grant – then it's vested (although can be Vested **Subject to Open**- i.e. have at least one ascertainable taker, but additional takers might be added down the road)
  - "To Z for Z's life, then to Steve's kids"
  - Assuming S has at least one kid – it's vested – we can POINT to someone alive when the grant was made and say "this remainder belongs to you"
  - But, if Steve has no kids at the time of the grant – it's contingent

Requirement #2

There ***must be NO*** **condition precedent to possession other than the expiration of prior interests** (Does anything have to happen in the world besides the prior interest running out? If the answer is no, then the remainder is vested)

- A Remainder needs to wait patiently for prior interests to run by definition
- If this is the ONLY and a SUFFICIENT condition for the future interest to become present, it is a Vested Remainder
  - i.e., if the only requirement is that the future interest wait patiently for a prior interest to run out in order to become a present interest, it is a Vested Remainder
- "To Z for Z's life, then to T and her heirs."
  - All that has to happen is the prior interest run out
  - Vested Remainder
- "To Z for Z's life, then to T and her heirs if T graduates from law school"
  - Now TWO things have to happen for T to get present possession
    - (1) Z's estate has to run out; AND
    - (2) T must graduate from law school
  - (2) is a condition precedent
    - T has to wait for something else to happen besides the running out of Z's estate in order to get possession
    - Running of Z's estate is a NECESSARY, but not a SUFFICIENT condition for future interest to become present
    - Flowing language – the condition is part of T's grant
  - Thus, this is a Contingent Remainder
  - What if T satisfied the condition before Z's estate has run out?
    - i.e. T graduates from law school before Z dies?
    - The Remainder becomes VESTED
    - Contingent Remainders can become Vested
  - What if T dies before graduating from law school?

        - i.e. she never satisfies the condition?
        - The future interest DISAPPEARS – it Definitively Fails to Vest
    - EG: "To Brock for Brock's life, then to Celio and his heirs if May marries Max." The grantor created a remainder future interest in Celio on the condition that May has to marry Max. Since there is an additional condition on Celio's future interest other than the end of Brock's life estate, thus this is NOT a vested remainder.
        - During Brock's life, while May and Max are not married, Celio's future interest is a contingent remainder. HOWEVER, if May and Max get married during Brock's life (and thus before Celio's future interest takes effect), then Celio's future interest will become a vested remainder when it finally does take effect.
        - If Brock's life estate ends and May and Max are not yet married, then the property will automatically go back to the grantor until the conditions on Celio's future interest are met (the marriage) at which time Celio's future interest will finally turn into a present interest and Celio will get the property.

Examples and Commentary

"To Brock for Brock's life."
Brock = present interest in life estate
Ash = reversion in fee simple absolute

"To Brock for Brock's life then to Celio and his heirs."
Brock = life estate
Celio = vested remainder in fee simple absolute

"To A for A's life, then to B and his heirs."
A = present life estate
B = vested remainder in fee simple absolute
B's heirs = "and his heirs" is legal code for fee simple absolute, the heirs don't actually have a future interest
Grantor = no future interest

EG: To A for life, then to B for life, then to C
Questions to ASK:
1. Where is the present interest? (is it defeasible?)
2. Is there another grantee? – then remaineder or executory interest?
3. then ask 3 criteria for remainder
4. then ask for which type of remainder

A = Present Interest: Life Estate for A's Life
B = Future Interest: (first name, last name; FI, PI): Vested Remainder in Life Estate for B's Life
C = Future Interest: Vested Remainder in Fee Simple Absolute

IF B dies before A, then his FI fizzles out…so for B to take possession of the property, B needs to live longer than A.. SO, there is a condition on B getting property- A needs to die first….BUT we don't consider this a specified condition in the grant, so remainder still gets the "vested" name… (if Grantor specified "to B for life if B outlives A" then it would be contingent remainder since grantor specified the condition.. although it has the same overall meaning….)

Since Grantor just says "to C" almost every jurisdiction has presumption that grantor gives away as much as he can- i.e. if grantor starts with fee simple, he gives away the fee simple…. (thus to C might as well say to C and his heirs)

SINCE B and C have future interest, the rule of waste applies so the present interest has to use the land reasonably.. although the degree of protection of the future interest depends on how likely B or C will take possession of property….

IF both B and C die before A, C future interest lives on- i.e. his heirs or will dictate possession once his future interest becomes present, albeit posthumously

EG: To Christina for her life, then to Haley and her heirs if Britney stays bald one year from now, and then to Jessica and her heirs if Brittney does not stay bald one year from now.

C: Present Interest: Life Estate for C's life
H: Future Interest: Contingent Remainder in Fee Simple Absolute
J: Future Interest: Contingent Remainder in Fee Simple Absolute
Grantor: keeps reversion (possible conditions for other future interests (H or J) to never get possession) in Fee Simple (don't specify absolute or defeasable unless know definitively which once it is- depends on the condition – i.e. B dies, then would become fee simple absolute; C dies in 6month- fee simple defeasable since have to wait 6 month to resolve condition)

(B is a conditions and not a beneficiary in the grant)

IF C dies before either of these conditions be satisfied, neither one gets the property, so reverts back to original grantor
IF B dies before either of these conditions can be satisfied, the grant reverts to original grantor

EG: To C for life, then to H and heirs, but if B does not stay bald a year from now, then to J and her heirs.

C: Present Interest: Life Estate for C's life
H: Future Interest: Vested Remainder in Fee Simple Defeasable (-subject to Executory Interest)
J: Future Interest: Executory Interest (can snatch property away) in Fee Simple Absolute

PAST EXAMPLES:
To A for A's life, then to B and his heirs if B [ever] obtains the age of 21.

- A: Life Estate
- B: Contingent Remainder in Fee Simple Absolute
    - Need TWO things in order to take possession
    - But – does he need to be 21 BEFORE A's estate run out, or can A die before B turns 21 and B still get the interest at the time he turns 21?
        - Such a stupid ambiguity can be cleared up by better drafting
        - Probably meant if B EVER turns 21 – can be fixed with one word → see brackets
    - Begs the Question: What happens to the property between A dying and B turning 21?
        - Grantor must have kept whatever is left of the timeline – so should A's interest run out (by death or Waste) before B turns 21, the grantor will be entitled to possession from this REVERSION
        - But how can a Remainder divest a Fee Simple Absolute (which is the Reversion the Grantor must have kept)?
            - Remainders aren't supposed to divest prior interests
            - Remainders aren't supposed to come after Fee Simples
            - Old Days: had the Destructibility of Remainders – if the remainder didn't become vested before the holder of the remainder was entitled to possession – it got blown-up; we don't have this today
            - But today we don't care – we still call it a remainder and the holder is entitled to the property when the remainder vests even though its acting like a Springing Executory Interest by snatching away the Fee Simple from the Grantor
        - If you're worried about the destructibility of remainders – which you shouldn't be – you can add the "one day later" language to it and make it an Executory Interest to start with → this can NEVER be destroyed

Gilbert's, pg. 114:

- An appropriate way to classify remainders is as follows: Take each interest ***in sequence*** as it appears in the instrument. Determine whether it is given to an ascertained person or is subject to a condition precedent. Classify it. Move on to the next interest and do the same thing. Classification of each interest ***in sequence*** is the key to correct classification.

O conveys "to A for A's life, then to B and his heirs if B survives A, and if B does not survive A, to B's children and their heirs." Take each interest in sequence:

- "to A for life": This gives A a LIFE ESTATE.
- "then to B and his heirs if B survives A,": stop at the comma, which ends B's interest, and classify it: B has a ***remainder*** because it is capable of becoming possessory on termination of the life estate and will not cut the life estate short. It is a remainder ***in fee simple*** ("B and his heirs"). It is a ***contingent*** remainder because it is subject to the express condition precedent, "if B survives A."
- "and if B does not survive A, to B's children and their heirs." The interest is a ***remainder*** because it is capable of becoming possessor on termination of the life estate and cannot cut the life estate short. It is a remainder to a class, B's children, ***in fee simple***. It is a contingent remainder because it is subject to the express condition precedent, "and if B does not survive A."

To A for A's life, then to B and his heirs, but if B dies before A, then to C and his heirs

- A: Life Estate
- B: Vested Remainder in Fee Simple Subject to Executory Interest
    - Condition is an afterthought – Not a condition precedent
    - If A lays waste to property and forfeits – B gets the present interest because no condition precedent to him taking possession other that termination of A's life estate
- C: Executory Interest in Fee Simple Absolute
    - C can snatch away B's interest if A lays waste and forfeits, B get possession, and then B dies before A – in this scenario C (or his heirs) can jump in and snatch the property away from B's heirs
- Gotta be careful in these scenarios where the Grantor keeps nothing

Point in Analysis: ALWAYS ask what will happen if a party lays Waste and forfeits → Life Estates can end by laying waste – this is a relevant consideration for labeling these things → so always have to ask what will happen in these "X dies before Y" scenarios if one has a life estate and that life estate runs out before death (by Waste)

To A and his heirs, but if booze is served, then to S and his heirs

- A: Fee Simple Subject to Executory Interest
- S: Executory Interest in Fee Simple Absolute

To A and his heirs unless booze is served, then to S and his heirs

- A: Fee Simple Subject to Executory Interest
- S: Executory Interest in Fee Simple Absolute
- Point of this one: Law doesn't care about A's interest being Subject to Condition Subsequent or Determinable
    - There is not future interest in a 3d Party that operates like a Right of Entry
    - ALL Executory Interest operate like a Possibility of Reverter: They are AUTOMATIC
    - Doesn't matter what grantor wants
        - If the grantor wants a 3d party to have an interest that operates like a Right of Entry, he can only do it by making 2 transfers
        - (1) To A and his heirs unless booze is served.
        - (2) Grantor transfers his ROE to S inter vivos
- So for these 2 – S simply doesn't care about what kind of defeasibility condition A has because Executory Interests always take-over right away → however there are Rule Against Perpetuities issues with these grants

To A and his heirs upon grantor's death

- Grantor ONLY creates a future interest
- Two Possibilities
    - Inter Vivos Transfer – absolutely binding; grantor can't rescind or change his mind during his life
    - Transfer by Will – in which case the Grantor can always change his mind by changing his will
- Assume grant made while grantor is alive: What has the grantor kept?
    - If Fee Simple: A gets Executory Interest
    - If Life Estate: A gets Vested Remainder
- Why does this matter?
    - Law of Waste cares about what the present interest is
        - If life estate or tenancy – favors future interests, can forfeit by waste
        - Holder of fee simple would never be subject to forfeiture by Waste, etc.
    - Does grantor want to give A power over present uses that the holder of a vested remainder does, or the more limited power of the holder of an Executory Interest?
- **Law Assumes**
    - **Grantor: Fee Simple Subject to Executory Interest**
    - **A: Executory Interest in Fee Simple Absolute**
- But, grantor can always draft explicitly and get around this

To A for A's life, then if S survives A to S and his heirs, but if S does not survive A, then to T and her heirs.

- A: Life Estate
    - Forfeits by Death
    - Forfeits by Waste
- If A forfeits by waste, neither A nor T can take possession because both interests are contingent upon who of A and S dies first
    - Grantor must have kept a Reversion; then it gets fucking complicated

Comment [EMS4]: ?????

- Grantor:
  - (1) Reversion for the Life of T or S; or
  - (2) Reversion in Fee Simple Subject to Executory Interest?
- Reversion for Life = S and T keep their remainders
- Reversion in Fee Simple = S and T have Executory Interests
- So we see same problem as above
- I would assume we continue to call it a Remainder (not sure though)

Grantor: -reversion, POR, ROE
Grantee: -RM – VRM –subject to owner
- indefeasible
- CRM
- EI

Future interests create uncertainty… future interests less marketable… if you have CRM where who the future interest will be is uncertain creates huge problem of marketability…

RAP asks smart questions and gets stupid answers…
RAP- says to grantors there are some future interests which mess up marketability too much so we will prohibit some future interests…

Rule Against Perpetuities

Reasons for the RAP, Generally

- Remember that the law of property has always been obsessed with marketability of land, particularly in the form of a Fee Simple Absolute, i.e., forming the whole time line in one person. Future interests by their nature reduce the marketability of land. Any time you divide up the timeline of a land, it becomes less marketable- (to get fee simple absolute have to then get hold of present interest and all future interests)
- Example: "To Paula for her life, then to Randy and his heirs when American Idol goes off the air."
  - Contingent remainder in Randy in fee simple. Randy doesn't get to the property until Paula's life estate has ended.
  - Life estates are hard to value; interests that turn on contingent events are also very hard to value.
  - All of the problems of marketability are here. The sensible approach to deal with this problem is for the legislature to come up with a time period saying how long land is allowed to be held. Some jurisdictions have done this: you have this law to create future interests, but if they don't sort themselves out in this time period, we will sort them out for you.
  - This is effectively what the common law RAP does: **it is a device to preserve the marketability for land by limiting the type of future interests that grantors can make.**
- The RULE: ***no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest***. (to calculate this time period: issue grant, a person's life + 21 years- how to determine which person? – TBD.. to resolve this, many jurisdiction have own statutes stating specific time frame)
  - Focus on what the rule is DOING:
    - It does it stupidly, but, it's trying to enhance the marketability of land.

RULE RESTATED: An interest is void if there is any possibility, however remote, that the interest may vest more than 21 years after some life in being at the creation of the interest.

How RAP Works

- Applies to financial bequeaths too – most common example – but we're going to talk about land because its easier to conceptualize and that's where the rule was born
- In last 15 years, there has been a stampede against the RAP
  - Pure Rule only in 15 States
  - Other jurisdictions have tweaked and modified the rule – typically in specifying a specific # of years, or just giving FI a chance and then seeing if can resolve itself
- **Common Law RAP Limits:**
  - **(1) Executory Interests**
  - **(2) Contingent Remainders**
  - **(3) Vested Remainders, Subject to Open**
  - No other interests are affected by the RAP

- Only have to think about RAP when we have one of these 3 interests
- Stupidly DOES NOT cover POR or ROE

Mistakes of RAP:

1. focuses on some wrong interest
2. weird way to calculate time period – rule going down the drain b/c of tech advances in reproduction

- **if a grantor has succeded at creating a real FI, it is b/c when that grant takes effect there is at least one person you could point to that after you are dead within 21 years we can 100% guarantee that this FI that grantor tried to create will either become posessory, disappear from timeline, or morph into a FI the law is not worried about… IF there is such a person when the grant takes effect, the person is called a validating life**. (if there is no such person, you have no FI)– although need to be alive when grant takes effect
- How to find this person? A measuring life is any person qualified to be a validating life…in theory, all 6 billion ppl in the world…In reality, its a lot smaller

Rules of thumb: 1. IF there is a validating life, it will come form 3 cat of ppl:
"to A for A's life, then to B's kids" -> CRM

a. beneficiaries named in the grant … A, kids (if alive when grant takes effect)
b. ppl who can directly affect the identity of beneficiaries B
c. ppl who can directly affect conditions in the grant (noone in this case, since no conditions)

THEN, can you point to one of these ppl and guarantee that 21 years after one of these ppl dies, we will definitely be able to identify the FI.

IF RAP wipes out FI, the grantor just gets the reversion.. so in the end, RAP changes the original intent of the grantor…

Consider:
1. be wary of conditional not obviously linked to a life span
2. beware of grandkids and subsequent generations
3. **collect 'em, count 'em, kill 'em** (a way of smoking gout invalid interests- assume all the ppl you collected from the above 3 ways of how to collect validating lives and then blow them up, can you guarantee 21 years from now there will be a valid grant? – all you need is one set of circumstances where you can't guarantee and the interest is wiped out)

Legal effect of RAP: take things in grants that look like FI and make them lose legal effects…How do you know if the FI will mess up marketability enough to cause problems?

Common law rule changed in some jurisdictions- **Wait and See statutes**- wait to see if FI will mess things up by decreasing marketability … common law does not- asks if there is a chance of mess up,

A FI can: 1. become possessory
2. fizzle out
3. transform (i.e. CRM becomes VRM)
4. hang out and wait

RAP kills some FI

EG fff:

To A for A's life, then to B and his heir if the Mariners win the WS.

A: life estate
B: CRM

RAP would kill B's interest so grant is just to A for life

EG hhh:

To A and his heirs until the mariners win the WS

A: Fee Simple determinable
Grantor: Reverter in FSA

Common law RAP does NOT address this condition which is just as problematic as EG fff.

Statutes have fixed this problem by superseding common law RAP and enacting statutes…

EG kkk

To A and his heirs so long as no booze is sold on the property, ~~then to B and his heirs.~~

Easy way to get around RAP- just have the grantor retake the grant and then transfer it a second time to a different interest…

Co-Tenancies: The Law of Concurrent Interests

General Framework

- Gilbert's, pg. 167: the preceding discussion dealt with ***successive*** ownership (e.g., a life estate in A, followed by a remainder in B). Property can also be owned by two or more persons concurrently. For example, A and B can be ***concurrent*** owners of a possessory fee simple, a life estate, or even a remainder.
- Division of ownership across persons over the same period of time
- Co-Ownership of property across the same slice of time
- Distinguish: Future Interests = division of ownership across different periods of time
- 5 Forms of Joint Ownership In American Property Law
    - (1) Marriage ownership
    - (2) Partnerships
    - (3) Condominiums
    - (4) Joint Tenancy (JT)
    - (5) Tenancy in Common (TC)
- We only care about JT and TC → the rest is for other classes
    - Also – no consequences at all depend on the number of co-tenants: can be 2 or 2,000

Legal Differences Between JT and TC

- **Definitions, Gilbert's, pg. 167**:
    - **Tenancy in Common**: two or more persons own the property with no right of survivorship between them; when one tenant in common dies, her interest passes to her heirs and devisees.
    - **Joint Tenancy**: two or more persons own the property ***with a right of survivorship***; when one joint tenant dies, the survivor(s) takes all.

When the Owners are Alive

- There is absolutely NO DIFFERENCE in the operation of a JT and TC when all the owner are alive
- The ONLY difference between JT and TC occur when one of the co-tenants dies
- Use Rights
    - **Every co-owner, regardless of his financial stake in the property, has an absolute, unconditional, 100% right to use and possess co-owned property.**
    - Disputes regarding use CANNOT be solved with reference to respective financial stakes: even if its 99% to 1%.
    - This is the major dispute that arises during the lives of co-tenants
        - When people enter partnerships, its generally a voluntary undertaking, Thus, most usage issues are vetted out in advance and become part of a contract that all the partners sign (so can resolve problems in advance)
        - Co-tenants can do the same thing if they know they are going to enter a joint-ownership relationship
        - But the problem is that 1. its expensive to make such pre-arrangements and 2. many people get involuntary thrown into joint-ownership agreements by grandpa's will
- Financial Obligations
    - **Your use and possession rights are totally disconnected from your financial stakes.**
    - Your responsibility corresponds to your proportion of ownership in the property
    - 80% Stake = You pay 80% of the costs and get 80% of the income from the property

When One of the Co-Owners Dies

- This is where JT vs. TC matters
- Assume for the sake of argument that you have co-owners A, B, and C

Tenancies in Common

- Assume A dies
- A's interest either goes

    - (1) to a designee in her Will; or
    - (2) passes by the law of intestate succession
- The designee or the heir then takes over A's interest and becomes a Tenant in Common with B and C
- A may also make an inter vivos transfer of her interest too
    - A sells to D
    - Now D is a Tenant in Common with B and C
- A's 100% right to use and possess the land also transfers to the buyer, designee, or heir
- Gilbert's, pg. 168: when a tenant in common dies, her interest passes to her devisees or heirs. It does ***not*** go to the surviving tenant in common. There is not right of survivorship among tenants in common.

Joint Tenancies

- **All Joint-Tenants have an EQUAL stake in the property – if they don't it's not a joint-tenancy, it's a Tenancy in Common**
    - A=1/3
    - B=1/3
    - C=1/3
- Assume A dies
    - A's interest DOES NOT pass by Will or Intestacy to ANYONE – even if her will says so – **Joint Tenancy interest CANNOT pass by Will or Intestacy, period.**
    - A's interest SIMPLY VANISHES INTO THIN AIR – IT CEASES TO EXIST
        - Financial Interest essentially gets redistributed
            - Now you just have a joint tenancy between B and C
            - Since joint-tenants must, by definition, have equal shares, B and C each now have a ½ financial stake in the property
        - 100% Use and Possession Rights provide the KICKER
            - These vanish into thin air too – they don't get redistributed at all – they just cease to exist
            - **Thus, ANY encumbrances upon the land that A made simply disappear and cease to exist**
                - Mortgages
                - Easements
                - Etc.
                - ALL FUCKING VANISH
            - If it were a tenancy in common, these encumbrances would pass to whoever inherits the interest
            - This is the difference between having the property pass by Will or Intestacy or having it go *poof* into thin air
- While people own property interests, they can do all sorts of things in the property, including creating rights in third persons. Co-owners since they own 100% use rights, can do all things to the property as if they were sole owner w/o getting consent form other co-owners… Typically when property is passed, like when someone dies, whatever requirements regarding the land go along with the transfer. These "requirements" are called encumbrances (right to use, mortgage etc…). But, with a JT, encumbrances are not transferred. If A dies, the encumbrances that A allowed vanish. **The TIC encumbrances pass along with death, the JT ones do not.**
- Joint Tenants CANNOT pass their interest on AT ALL
- JT Example:
    - JT with 4 people, so each person has a 1/4th interest. A dies, so A's share vanishes. The remaining interests expand to 1/3rd to fill the void, and one more dies, so the remaining interest expands to ½. When we are down to two, and one dies, the final joint tenant has 100% interest- becomes sole owner. When this person dies, it goes to his or her successor. Ex.: A, B, C, D have a JT. All die, in that order, until we just have D. At that point D has 100% ownership, and when he dies, it goes to D's successor.

Creating a Co-Tenancy Interest

- **Law assumes that a Co-Tenancy arrangement is a Tenancy in Common**
- **You must defeat this presumption to get a Joint Tenancy (which has certain administrative advantages)**

Creating a Joint Tenancy

- You MUST work at creating a JT → the assumption in the law is that you create a TIC; if you want something else, **you have to do six things, and you have to do all of them. Screw up one, and you have a TIC.**
- **6 Requirements to Create a Joint Tenancy**
    - (1) **Property must be in the right State**

        - Not all states allow you to create a JT, i.e., some states have done away with JT.
    - (2) **Manifest an INTENTION to Create a JT**
        - Remember, the law presumes that your want to create a TC, so you've gotta be super-explicit
        - "Joint Tenants" won't do it because its too ambiguous – have no way of knowing whether you mean in the technical legal sense, or in the general sense as TC
        - "as joint tenants and not as tenants in common" is not foolproof either
            - A Virginia court said this wasn't clear enough (See *Smith* case in Supp.)
            - So it might not work 100% of the time
        - **"*as joint tenants with a right of survivorship and not as tenants in common*"**
            - This works 100% of the time and you will get sued for malpractice if you don't use this phrase
            - "Right of Survivorship" is what we call the vanishing of the use interest and the redistribution of the financial stake
        - Both of these are necessary conditions – but they are not sufficient – the 4 Unities must be present too for there to be a Joint Tenancy, i.e., the 4 things that have to be the same among all of the co-owners.
    - (3) **Unity of Time**
        - All of the co-owners had to have gotten their interest in the property at the same moment in time.
        - For example, suppose that O conveys Blackacre "to A for life, then to the heirs of A and the heirs of B as joint tenants." The heirs of A are ascertained at A's death, and the heirs of B are ascertained at different times, the heirs of A cannot take as joint tenants with the heirs of B. They take as tenants in common.
    - (4) **Unity of Title**
        - All have to get their interest in the same piece of paper/legal instrument (Will or Deed)
    - (5) **Unity of Interest**
        - All have to have an identical percentage share of the concurrent estate
        - Equal financial stake in the property (doesn't have to be this way in T/C – could divide up however you want in T/C)
    - (6) **Unity of Possession**
        - All of the co-owners have possessory rights across the same part of the timeline
        - Must have same , temporal property interest: So can't give A & B a FSA and C a Life Estate and have the 3 of them be in a JT – can be T/C, but not JTs

Keeping a Joint Tenancy – moving from JT to TC

- **ALL OF THE CONDITIONS OF A JOINT TENANCY HAVE TO REMAIN FOR THE DURATION OF ITS LIFE, once a unity is violated, JT turns into a T/C**
- Assume JT of A-B-C; **What happens if A sells his 1/3 share to D?**
    - D gets 1/3 financial stake and 100% use and possession rights
    - No death = D keeps encumbrances; have to have someone die for the encumbrances to disappear
    - D flunks (4) and (5) → got interest at a later time in a different document – so two of the unities are violated…NO MORE JT between B, C, and D.
    - **Thus, B and C are JT with each other and are TC with D**; all retain a 1/3 Financial Stake in the property
    - **As far as B and C are concerned, the 6 requirements are still holding. They can be JT with each other at the same time that they are TIC with someone else.**
- When a JT turns into a TC, it is called a **"*severance*"**
    - Call it this because it severs the JT
    - Since D's interest has been severed-off from the joint tenancy, thus his 1/3 interest can now pass by Will or Intestacy with all encumbrances
    - Now say B dies
        - All the encumbrances vanish on B's interest
        - The surviving JT – C – absorbs B's financial interest
        - Thus: C=2/3 Financial Interest and D=1/3 Financial Interest -> so now they're just TC
- JT can be transformed in to TC, but want to try to do as little damage to the JT as possible

1. Renting/ Leasing?

- Assume A leases to D, rather than selling to D – now what?
- Two Approaches:
    - (1) Conceptually – a lease (especially a long lease) must sever a JT since the unity of possession is violated (you now have a FI, other JT have a PI)
    - (2) Intentions of the Grantor – DEPENDS
        - Selling shows an intent to sever the JT
        - A lease, per se, doesn't show an intent to sever the JT – but then again it depends on the length of the lease

        - Short enough lease – JT stays (looks more like use rights)
- Weight of Authority
    - Only 2 cases in the last 1,000 years to present this issue
    - MD (1969) → took conceptual route
    - Cal. (1976) → took intentions route
    - *Tehnet v. Boswell* dealt with this issue

2. Effect of a Mortgage/ Sale (sale definitely moves JT to TC, does a mortgage?)

- **TITLE THEORY** – Theory #1: Sell Property to the Lender and Buy it Back over Time
    - This view holds that you don't actually own the property until you have paid off the mortgage.
    - On this theory, the Mortgage is a sale and a JT turns into a T/C
    - Half the states think of a Mortgage like this
    - Here, mortgage passes by will or intestacy
    - **So, under this theory, the JT IS SEVERED – the mortgagor is now a TIC**
- **LIEN** THEORY – Theory #2: The Lender gets a Lien on the Property while the Owner Keeps Title
    - Creates a legal right in the lender – a conditional right to sell the property and take the proceeds if there is a default of the debt later on
    - Doesn't alter any of the unities on this theory – thus JT remains
    - About half the states think of it like this
    - Here, if A dies, Mortgage goes away → How does lender deal with this?
        - so you'd never grant a mortgage on property unless all co-owners sign, so all are on hook
        - Run to state legislature and get law passed preserving Mortgage interests in JTs → This is what has happened in most states – statute overrides common law

What about moving form TC to JT

A TC can become a JT by satisfying all 6 conditions- they can escape the 4 unities by going to lawyers office, generate a phony transaction by passing grant to lawyer who then passes it right back to the parties and satisfies the unities…

Eg: A and B have a JT
A sells title to his lawyer at which point lawyer and B have a TC….then lawyer sells back to A so now A and B have TC

- A and B no longer have a joint tenancy. When A transferred the title to his lawyer, it immediately became a tenancy in common. It remained a tenancy in common when the lawyer transferred the title back to A.
- A might do this so that when he dies he can decide what will be done with his interest in the land by giving it away through will or intestacy.
- B does not need to participate in the transfer or even know about it.
- A, of course, will lose out if B dies first because B's interest will not simply vanish to be subsumed by A's interest. Rather, B's interest will be given away through will or intestacy. If B did not realize that A had made the transfer and thus did not create a will because he didn't know his interest would survive him, then the government will try to determine what B would have liked to be done with the property.

Co-Tenancy Disputes in the Real World*: *Swartzbaugh v. Sampson

- Case Background
    - Husband and Wife who own as Joint Tenants
    - Wife – wants to look at walnut trees
    - Husband – wants to pave some of them over and let someone build a boxing pavilion
    - **Remember: Both have 100% use and possession rights**
    - H leases property to Sampson to bulldoze trees and build boxing pavilion; thus H will collect rent
- Procedural Posture
    - Wife is trying to invalidate the lease
    - Wife LOSES – the lease is valid
        - H didn't have to get the other party's permission to transfer – H can do whatever he wants.. he can give S use rights over W, and he can sell his share…
    - So maybe its time for a "divorce"
- So this raises an interesting question: **when co-owners have mutually incompatible plans, and the courts can't do anything, what do you do?** - W has 100% right to grow walnuts; H has 100% rights to boxing pavilion… so…..

Solutions to Problems Between Co-Tenants

PARTITION –

- -any tenant in common or tenant has the right to bring a suit in partition. This is an equitable proceeding in which the court either physically divides or sells the common property, adjusts all claims of the parties, and separates them. When co-tenants are squabbling and cannot come to any agreement, the judicial remedy of partition terminates the co-tenancy and divides the common property.
- This is the obvious solution: a co-owner can always go to a court and call it quits: divide this up. The ultimate end in this situation is to get out of the co-ownership arrangement. This is a partition. The court will literally divide the property among the joint owners and make them individual owners of their part.
- PROBLEM: it's not always easy to divide property and land is not fractal; this is especially hard when the parties don't agree as to who gets what.
    - Ex.: one part could have oil and the other may not
- **Partition by Kind**
    - the court may order physical partition of the property into separate tracts if that is feasible. Once the land is physically partitioned, each party owns her tract along in fee simple. If the separate tracts are not equal in value, the court will require one tenant to make a case payment to the other tenant to equalize values called an **owelty**. Easy in principle, very tough in real life- how to determine how big the check should be? – have to assess land… tough…ultimately very drawn out, very expensive process (paying lawyers and experts adds up)
- **Partition by Sale**
    - if physical partition is not feasible or in the best interests of the parties, the court will order the property sold and the sale proceeds divided equally among the co-tenants.
    - Basically, the court is **turning the property into money and then splitting it up.**
    - This is what happens with 99% of partitions.
    - This is far from perfect, though, because you don't know who is going to get what share. **A court can order the sale over the objection of one of the co-owners.** To divide up the money fairly, you go through an accounting.

Costs of Property: How to determine how to split the property value?

- Necessary: (necessary to maintain ownership of the property) -mortgage, taxes etc…
- Repairs: (maintenance, repairs, upkeep value) – determine if repair was necessary
- Improvements: (increase or enhance value) – first determine if improvement improved the property, the how much it in increased value… if it doesn't improve it, you eat the whole expense, if it does improve it, you get the whole increase (law treats this as if improver was sole-owner)
- When parties are getting along, then splitting these expenses is not a problem – everyone just splits it all. But when the parties are feuding about whether a boxing ring should be erected, it will almost certainly happen that one party will make a payment from some expense of the property and the other party will not be willing to repay their portion.
    - Can the paying party force the non-paying party to repay their portion? Yes, - can bring **action of contribution (only applicable to necessary expenses)** – force co-owners to contribute their necessary share, if they don't, can bring a lien on their share of property

Action for ACCOUNTINGS (usually will be motioned as part of partition to come up with all the exact #s)

- An equitable proceeding to legally decide and "take account" of who has done what and when to the property
- Generally relevant when the land produces some kind of INCOME
    - Income-producing walnut grove
    - Rent from Boxing Pavilion
- Parties go into to court and say I should get more money as a result of my efforts
    - In favor of Wife is she did all the work on the walnuts
    - In favor of Husband if his Boxing Pavilion takes-off
- ***So when we Partition property, it is also an occasion for an Accounting***
    - I did X and you did Y to the property and this is how we're going to equitably divide up the property (either real or liquidated)
- Lesson: All partitions are messy and costly proceedings → but often it is the only way out of the co-ownership for the parties
- Can Wife get a share of any rent Husband is collecting on the Boxing Pavilion? - "You're occupying a piece of the land that we co-own. You should be paying me rent."
    - If W had signed the lease – definitely YES
    - Intuitively – we would think NO if she didn't sign the lease, since it was Husband's 100% use and possession rights ...so any party can exercise 100% use, BUT

- Statute of Anne – if H has personally used the property, he would not owe one penny to W (and vice versa), **but anytime you do something with the property that brings money in from outside the ownership group (lease, selling off assets of the property), even if you're the one you did all the work on the deal, you have to split the proceeds with your co-owner – only have to split the profit….**
    - how does this coincide with rule of improvements? (where improver keeps improvement? - have to go to court and make action of accounting to prove this was just your improvement.. its a good arg but in the end the $ will just go to the lawyers)
- **Suppose Rent was way under market value**
    - **Can't make the argument for share of a reasonable amount of what profit should be**
    - Co-Owners are only liable for the ACTUAL income that is coming in – not for a reasonable amount of what it should be

What happens when two parties' 100% right to use and possess the property conflict?

OUSTER- theoretically interesting, but not really practical

- Affirmative act by one co-tenant that ***deprives another co-tenant*** of the right to possession and use ---one co-owner PREVENTS other co-owners from using their 100% right to use and possess the land.
    - It is not necessarily an ouster when there is only one co-owner using the property. To be an ouster, some co-owner must want and try to use the property but then be stopped by the ousting co-owner.
- one party must try to assert their right to use and prevent other party and the other party must take affirmative action to try to use it , like a lock on the gate.
- Examples: an occupying co-tenant refuses to admit another co-tenant into possession; the occupying co-tenant denies the tile of another co-tenant; occupying co-tenant refuses to pay an appropriate rental value demanded by a co-tenant out of possession.

- One who kicks the other out has to start paying a reasonable rent to the other co-owners. – becomes an adverse possession
- Situation isn't going to last for long – partition is about to be in the works.
    - Wife does not need to physically be restrained by Sampson to be "ousted." She may argue that Sampson's building of the boxing ring by virtue of what it is, necessarily forecloses her desired use of the land, namely growing walnut trees.
        - But this throws the doors wide open for abuse; every use of the land necessarily forecloses some other possible use of the land.
        - That's a big theoretical problem, but the law doesn't really deal with it very much because most co-owners would not resort to this because the costs are high and the remedy is very low. Instead most co-owners would go through with a partition before they would go through an ouster.

DEATH

- The wife, does, however, have one promising option: wait for her husband to die.
    - This works because this was a JT. The Mr. leased his JT interest, but she did not.
    - If this was in MD, the execution of the lease would have severed the JT and created a TIC. But, this was CA and the CA courts say the execution of the short-term lease does not automatically sever a JT.
    - So, if Mr. dies what happens to his interest? It vanishes into a legal black hole, and so does the lease.
    - Lease only signed by H, so lease only attaches to H's interest
        - Thus, Sampson's lease disappears into the legal black hole
        - Wife can then watch as Sheriff escorts Sampson and his pals off of the land
        - IF H and W had a TC, then this would not work, since when H dies, the lease would go on to whoever the H leaves it to….

Final Things on Co-Tenancy

- As a practical matter, **when people voluntarily enter into a JT, one of three things is usually true:**
    1. They have a document prepared that says what will happen if a disagreement arises;
    2. When you have a large number of co-owners: you appoint a small number of people as trustees and they can legally act on the behalf of the entire group;
    3. People are reasonably confident they are going into it with people they can work with. But, remember that typically people don't walk into these JT willingly.
- What about **obligations**, as opposed to rights, with co-tenancies?
    - Suppose we don't have a co-ownership situation, we have a present interest situation where there is a valuable boxing ring on the property. The present interest holder just decides to blow it up.
        - If he is the sole owner, he can do that, but with a future interest holder, **the question of waste will be raised**: the interests of the future holder are taken into account.
    - Now, imagine that we have a JT or a TIC. One of the co-owners blows up the boxing ring; the other co-owner is pissed off. What happens? In the case of partnership, partners generally do owe certain obligations to one another in the kinds of dealings they can make with the assets of the property.

- What about a JT or TIC? There aren't a lot of cases on this subject, but in the few cases that we do have, the courts are split. The general thrust is that **co-owners owe no obligations to one another**, they aren't partners…. However, SOME courts will say that, even though co-owners each have a 100% right to use and possess the land as they so choose, each co-owner has a fiduciary duty to the other co-owners not to economically wreck the property.
  - Strictly according to property law, however, this is not true.
- A more common kind of event is that everyone is enjoying the property, but **bills arise**: you have to pay taxes, you have to fix the roof, etc. There are things you must do to maintain the property in its current value. Who has the obligation to do this?
  - If it is a set obligation, like a tax bill or a mortgage, each party is liable for their financial share. What happens when one co-owner doesn't pay these obligations? Obviously you can sue: they have an obligation to pay.

Landlord-Tenant Law

Landlord-Tenant Law Generally

- When you sign a lease an interest in land has been conveyed.
  - Somebody, the tenant or the lessee, ***has acquired a present possessory interest in the land***. (renting out use rights is NOT a lease, it is a servitude.. to be covered later)
  - Anytime a lease is executed, the landlord, or lessor, has either kept the future interest (a reversion) or put a future interest in someone else (remainder or executory interest).
- There are all sorts of transactions in land that don't involve an on-going relationship between two parties. ***A lease is different because it involves two parties that will continue to be in a relationship***; **it is a CONTRACT**. Execution of a lease is simultaneously the creation of a present/future interest relationship and it is also a K. So, there are two distinct legal relationships at work in a lease.
- So, landlord-tenant law is a blend of property law and contract law. Thus, even though a lease is a K, it is also a transfer of a property interest; hence, depending on the particular facts, sometimes property law will prevail over K law, and at other times, the opposite will be true, or create a hybrid of laws.

The Lease

- Will be anywhere from 2-200 pages long

▼ ❑ ***How do you know the property relationship you are dealing w/ is a lease?***

- ▼ ❑ Process of Elimination
  - ❑ *Has there been a conveyance of a fee simple? No, A life estate? No, thus is must be a lease*
- Lessee gets **Present Possessory Interest**
- Lessor gets a **Reversion**, or the Lessor can create a Future Interest in a 3rd Party, i.e., a **Remainder** or an **Executory Interest**.
- Will always say when the lease ends – that's what creates the Present and Future Interests
- Same labels for Estate Law apply to Tenancies
  - Tenancy Subject to Condition Subsequent
  - Tenancy Determinable
- IF FACT: Every Tenancy is a "**Tenancy Defeasible**"
  - "If you don't pay rent, then XYZ"
  - **Almost always going to be Determinable or Subject to Condition Subsequent** → so, the Landlord will generally keep a Reversion as well as a Possibility of Reverter or Right of Entry.
  - If Landlord is dumb enough not to do this – he has an action for damages, but tenant doesn't lose his possession.
  - Most terms of the lease are going to be specifying defeasibility conditions; also terms for tenant to terminate lease, too.
- Have to look at what the parties say to determine when the lease comes to an end
- Transferability:
  - **This ain't a fee simple – so the grantor (lessor) can restrict transferability**.
  - You will never encounter a lease that does not contain restrictions on transferability – at minimum you need the consent of the landlord
  - Tenant can get landlord to promise not to transfer their reversion, too →tenant wants to keep the same landlord.
- All the parties have to do is write shit into the lease – but this is a necessary condition because the background common law assumption is that all interests in land are freely transferable.

Types of Tenancies …. Lease Types

- Labels are based on how you can terminate the lease
- **3 types: a. tenancy in terms of years; b. tenancy in terms of period c. tenancy in terms of will**
  - Fourth type, but not really: A Tenancy at Suffrage is really no tenancy at all – these are Holdover Tenants

- Notice of Termination of the Lease (where applicable)
  - *The Mailbox Rule of Contract Law does NOT apply in Property Law*
  - *In Property Law – **the governing day is the DAY OF RECEIPT***
    - This, of course, can be altered by statute or lease AND it usually will
- The Hierarchy of Landlord-Tenant Law
  - (1) The Lease
  - (2) State Statutes
  - (3) Common Law
  - **Look for answers in this fucking order – period.**
  - And remember that Contract and Property Law aren't always the same

(unless otherwise specified, lease ends at midnight of the day its due)

Term for Years

- a tenancy for years is an estate that last for some ***fixed period of time*** or for a period of time computable by a formula that results in fixing ***calendar dates*** for beginning and ending, once the term is created or becomes possessory. The period may be a certain number of ***days, weeks, months, or years***, but regardless of the period, the tenancy is called a tenancy for years or a term for years.
  - Since the parties know precisely when a term of years will end, a term of years expires at the end of the stated period ***without either party giving notice***. This is the chief difference between a term of years and a periodic tenancy, which required notification for termination.
- If you can write down the starting and ending date, it's for a term of years
- Can't terminate this type of tenancy unless (i.e. 3 ways for this tenancy to end)
  - (1) Time is up – calendar date arrives; or
  - (2) One of the defeasibility conditions blows-up; or
  - (3) parties agree to end lease (*novation*- parties decide to substitute new K for old one OR *relinquish*- term up K)
- Notice of Termination will do NOTHING except notify the landlord that you are going to breach the lease
- You can make notice a ground for termination in the lease → but then we ask whether this is a tenancy at will
- Ex.: suppose that Lawson leases me property for one year and I pay him $1K/month for rent. Now, for one year, I am the present possessor of property. Lawson has a right to collect the money from me. What if I don't pay? Lawson cannot kick me off the land; I have a present possessory interest and he can't do that. To prevent this from happening, every lease will be defeasible (it might be determinable, or subject to EI, etc…- you'll always have conditions written in): your present interest goes away if you don't pay the rent on time.

Periodic Tenancy

- a periodic tenancy is a tenancy for a period of some fixed duration that ***continues for succeeding periods*** until either the landlord or tenant ***gives notice*** of termination.
  - Ex.: "to T for month to month," or "to T from year to year." If notice of termination is not given, the tenancy is ***automatically extended*** for another period. In this way the periodic tenancy differs from a term of years, which automatically ends on the day set.
  - Parties save money, transaction costs and this is a **manner of hedging risks** (renewable for one year makes sure if things go bad you only have to worry for a year but if things go well the landlord may want you to pay more for the next terms rent)
- The parties pick any period of time they want for a lease, but when the period is up, the Lease is automatically renewed unless the landlord or tenant gives proper notice of intent to terminate
  - If it were a Term of Years lease, then it wouldn't automatically renew – a new agreement would be required
- Thus, these tenancies are terminable by NOTICE
  - Of course, can also terminate by defeasibility
- How soon before the end of the period do you have to notify the other side you want out and in what form do you have to notify?
  - (1) **The Lease** – parties can stipulation whatever they want
    - Can specify length of time, form of notice, how to court days, etc.
    - Anything else besides what the lease says is just background law to fill in any gaps
    - **The LEASE is paramount**
  - (2) **Statutes** for the state in which the property is located
    - State statutes usually specifically regulate rules for termination
    - Most common law stuff has been superceded…- i.e. 2-week notice usually good enough to terminate (although of course can be amended by the lease)
  - (3) **Background Common Law Rules**
    - Only use these rules in the absence of Lease specification or Statute
    - Rule: **default** notice had to be provided at least one **period** prior w/ always an upper bound of 6 months

- Common Law says little regarding the form of notice **(parties can agree to provide notice via whatever ways and means)**
  - Note Statue of Frauds – terminating a Lease for 1 year or more needs to be in writing – grant in writing, terminate in writing (there is no otherwise presumed standard- parties work out in lease)
  - Short-term lease – grant orally, can terminate orally
- to terminate an estate from period to period, notice must be ***equal to the length of the period*** itself (e.g., month, week, etc.) with the exception that if the tenancy is from year to year, only ***six months*** notice is required. NOTE: K mailbox rule does not apply- determine date notice by when received not when sent… BUT statutes have superseded this- so check there or of course can specify in the lease

EG: monthly periodic tenancy, and tenant dies, what does this do to periodic tenancy? Unless the lease specifies that death is proper notice (a defeasible terminable event), ignore K law- in property law, Death is not a termination… succeeding party will take over present-possessor interest and all its obligations…(so can inherit lease and its liabilities- ALTHOUGH can decline inheritance in which case liability will simply go against the estate)

Tenancy at Will

- a tenancy at will is a tenancy of ***no stated duration*** that endures only so long as ***both*** landlord and tenant desire. Either can ***terminate it at any time***.
- May terminate the tenancy at any time by giving reasonable notice
- What constitutes notice AND when to give notice? Look at lease agreement…Common law does not specify , but some State statutes can still specify….alter this to 3 days or a week or 10 days or so OR parties can just write something in….
- This is rare- parties rarely chose this arrangement for all the reasons parties choose to have a lease in the first place…

SO, Tenacies are like JT/ TC- while they go on, all is fine/same- differences arise when they end… Principe Difference: termination method

TRANSFERS OF INTEREST

Tenant Transfers of Interest

So rather than terminate lease, isn't it easier to sometimes just transfer it? – yes- and you can even make a profit in the meantime…

Landlord (reversion in bunch of future interest) has conveyed to Tenant (present possessory interest) who wants to transfer OR Land lord wants to transfer (sell) his future interests and no longer be a LL

- Θ Note: Rights of entry being difficult to transfer are mainly only in relation to fee simples (not life estates or leases)
- Θ Common Law: Tenant can freely transfer his present possessory interest w/ one exception: **if the lease says otherwise (which they almost always do contain restrictions on the transferability of interests)**

2 ways for Tenant transfer (if LL transfers it's a SALE):

- **Assignments**
  - unless the lease prohibits it, a T or a LL may freely transfer his interest in the premises. At common law, if the T transfer the ***entire remaining term*** of his leasehold, he has made an assignment, and the assignee comes into ***privity of estate*** with the LL. (while **the original T get's out of POE with LL**, although maintains POK with original LL) Privity of estate makes the LL and the assignee ***liable to each other on the covenants*** in the original lease that run with the land. Similarly, if the LL assigns the reversion, the assignee and the T are in POE. - By simply selling/assigning an interest you can take yourself off the chain of possession
    - Ex.: L leases to T. T promises to pay $200 a month rent. T assigns the leasehold to T2. L can sue T2 on the promise to pay $200 a month in rent. They are in privity of estate with each other.
    - EG: Suppose you have landlord A and tenant A and tenant A assigns to assignee B and assignee B assigns to assignee C
  - ▼ ❑ Legal Consequence:
    - ❑ Does not affect the original contracts
    - ❑ Privity of estate transfers to Assignee C (so now Landlord A and Assignee C are in privity of estate)
    - ▼ ❑ *Where does that leave the landlord A and tenants A and B?*
      - ❑ Landlord A and Tenant A -> Privity of Contract

- ❑ Landlord A and Tenant B -> No liability (unless created a contract voluntarily)

- **Subleases**
  - the common law rule is that if a T transfers ***less than the entire remaining term*** of his leasehold, he has made sublease, and he becomes the LL of the sublessee. The sublessee ***is not in privity of estate*** with the LL and cannot sue or be sued by the LL. Since the sublessee has made ***no K with the LL***, he cannot sue or be sued on a K either. Creates a new tenancy- LL1 – T1(LL2) – T2… so no liability b/w LL1 and T2 99% of time, unless they choose to form a K or there is a 3rd party beneficiary (see below)…. T1(LL2) and T2 now have both POE and POK

- And don't forget most leases specify that you usually need the Landlord's consent for a transfer (lease can also specify that LL can't transfer his ownership, but this is rarer…); BUT most LL want to make sure the subleasee will be K obligated to the LL
  - Only limitation on this is that it cannot be discriminatory (see government stuff below)
  - There is also a minority rule out there exemplified in California saying that the withholding of consent must be "commercially reasonable"
    - Read in an implied obligation of good faith dealing regarding denying consent to transfer
    - Denying consent to transfer because of Tenant's refusal to let Landlord share in booty from increased rent is NOT commercially reasonable under this rule

Privity of Contract and Privity of Estate

- Landlord-Tenant Law is unique in that it is governed by both the doctrines of Property Land and Contract Law
- A Lease is
  - (1) A conveyance of land, governed by Property Law; and
  - (2) A Contract
- Privity of Estate
  - The Property Law relationship
  - **A lease carries with it all the background rules of Estates and Future** Interest
  - There is a Present Interest/Future Interest dichotomy created
  - Law of Waste applies
  - Defeasibility Laws apply
    - Possibility of Reverter vs. Right of Entry
    - Reversion in Landlord at end of lease
    - Co-Existence of POR/ROE and Reversion allowed
    - Terms of the Lease essentially provide the defeasibility condition
  - POR gives the LL the right to sue the assignee of the T on the covenants of the lease, and to give the assignee the right to sue the LL on her covenants.
    - Ex.: L leases to T. T promises to pay $200 a month rent. T assigns the leasehold to T2. L can sue T2 on the promise to pay $200 a month in rent.
    - After assignment, L cannot sue T2 on a theory of privity of K because T2 did not make the promise to L. To circumvent the lack of privity of K, the courts invented the concept of privity of estate. An assignee is said to be in privity of estate and is liable on the covenants in the lease. Similarly, the LL is liable to the assignee on the LL's covenants.
- Privity of Contract
  - The Contract Law relationship
  - A lease is a contract
  - Thus, it implicates reciprocal rights and responsibilities → The Lease contemplates an on-going relationship between Grantor (Lessor) and Grantee (Tenant/Lessee)
    - **This is not true of a regular property law relationship – a plain conveyance simply coveys land and then the parties are done with each other**
    - But a lease is BOTH a conveyance AND a contract
    - Thus, the lessee gets land as well as a reciprocal rights relationship with the Lessor
  - if there is privity of K (i.e., the P and the D have agreed with each other to do or not do certain things), their obligations bind them regardless of whether they are in privity of estate.
    - Ex.: L leases to T. T promises to pay $200 a month rent. T assigns the leasehold to T2. L can sue T2 on the promise to pay $200 a month in rent.
    - L can sue T on his promise to pay rent, because T made the promise to L. L and T are in privity of K. L can ***also sue*** T2 on the promise because L and T2 are in privity of estate.
- When it comes to one party suing the other – we don't care whether it's on a Privity of Estate or Privity of K theory when its between the ORIGINAL lessor and lessee; it's when the lessee transfers the land to a 3d party through assignment or sublease that PE and PK

start to becomes conceptually distinct routes to liability (Landlords can transfer their Future Interests too, but 99% of the time issues arise regarding tenant transfer of interests)

- **BIG IDEA WITH POE and POC: if a T's assignee breaches a covenant in the lease (e.g., fails to pay rent), the LL can sue the assignee because of privity of estate AND CAN ALSO SUE THE ORIGINAL TENANT because of privity of contract.**

Assignments – Legal Properties and Effect

- Privity of Estate
  - **An assignment ELIMINATES POE between LL and T and CREATES POE between LL and Assignee (if LL sells his future interest, then LL is no longer the LL and so no POE between old LL and T… although still in POK!- cant get out of POK by selling/assigning)**
  - There is now Privity of Estate between Landlord and Assignee
  - Its as if the Assignee "steps-in" and "replaces" the Tenant in the Privity of Estate (property law) relationship
  - **Thus, the Assignee assumes ALL Property Law (Privity of Estate) liabilities in the relationship with the Landlord**
- Privity of Contract
  - **An assignment DOES NOT eliminate Privity of K between Landlord and Tenant → the original Tenant is still CONTRACTUALLY liable to the Landlord for the terms of the Lease**
  - **An assignment DOES NOT create Privity of K between Landlord and Assignee → thus the Assignee is NOT contractually liable to the Landlord for the terms of the original lease**
  - **An assignment DOES create Privity of K between Tenant and Assignee → Assignee is contractually liable to Tenant for the terms of the assignment**
  - **Thus, an Assignment traditionally creates TWO levels of PK**
    - **(1) Between Landlord and Tenant**
    - **(2) Between Tenant and Assignee**

Can ONLY get out of POK by (1) release [voluntary relinquishment] or (2) novation [substitution] so even if POE changes (change tenants, sell ownership) POK till exists between original parties.

The Property Law relationship between Landlord and Assignee/Subleasee

- **Rule of thumb**: there is POE but not POK, BUT any import terms of the lease (K) travel with Privity of Estate
- If its something one party would sue about, the liability will transfer by the assignment (Rent is obvious example)

  - Exotic Theories of Contractual Liability to get PK between Landlord and Assignee
    - These are "exotic" because they aren't contracts in the traditional sense → Landlord and Assignee have not signed papers and have not bargained;
    - NOTE: parties can alwaus create K and become POK
    - (1) 3rd Party Beneficiary
      - You are not a party to a K and you have no obligations under it at all, but there is a 3rd person who benefits from the K
      - Parties can agree that the Assignee will be a 3rd Party Beneficiary of the original Lease
        - Thus, they agree to allow the Landlord to sue the Assignee for a breach of a term of the original lease
        - **But, this is one-way liability – the Assignee CANNOT sue the Landlord for a breach of the original lease**
      - Usually Try to find these as implied
      - Gilbert's, pg. 284: if an assignee or sublessee expressly ***assumes the covenants of the master lease***, the assignee or sublessee is directly liable to the LL, who is a third-party beneficiary of the K between the T and his assignee or sublessee.
    - (2) Assumption
      - Assignee can agree, in the assignment, to assume all liability for the terms of the original lease
      - Assignee does this because the Landlord's consent to a transfer of tenancy is often conditioned upon such an assumption of liability
      - This is still one way liability with the Assignee being liable to the Landlord
      - These are usually explicit
    - **There is NO difference, in effect, to an assumption and a 3rd party beneficiary.**
  - The only way the Landlord will ever be liable to the Assignee is if they actually sign an agreement
  - Landlords want some form of Privity of Contract just to cover their bases – anything important in the original lease is going to transfer with Privity of Estate

- **EVEN IF the Landlord and Assignee come into Privity of Contract someway, that DOES NOT mean that the PK between the Landlord and Tenant is eliminated**
  - The Contract (Lease) between the Landlord and Tenant remains in effect until
    - (1) They execute a RELEASE (generally for $ consideration); or
    - (2) The term of the original lease expires

- **Summary of the Legal Effect of an Assignment:**
  - PE between Landlord and Assignee; no PE between Landlord and Tenant
  - PK between Landlord and Tenant, unless Tenant gets a Release
  - NO PK between Landlord and Assignee, unless we can prove an exotic contract theory

Subleases – Legal Properties and Effect

- Privity of Estate
  - Essentially: creates two levels of PE; Sublessee doesn't "step-into" the PE between Landlord and Tenant, a new level is created
  - PE between Landlord and Tenant (remains)
  - PE between **Tenant and Sublessee** (new)
- Privity of Contract
  - Same analysis as an assignment

Why it matters: calling it an ASSG or SUBLEASE:

Real Life Operation of Assignment: First American National Bank v. Chicken System of America (Tenn. App. 1980)

- FACTS: the P leased the property to the D, Chicken Systems, who was the original tenant. The lease is a term for years, for 15 years, for $1050/month. There is a provision in the lease, which expressly prohibited any assignment or subletting without the consent of First America.
- LL (Bank) → T (ChickenSys) → T2 (PSI) → T3 (Pizza)
  - L-T = $1050 rent/month
  - **Everyone agrees that Chicken-PSI is an assignment (and not sublease) and it was in flagrant violation of the consent to transfer term of the original lease**
- No one cares about Assignment to PSI until they default on their Rent
  - Banks sues everyone- CS in PK under original K; also sue PSI under POE
  - PSI claims that they are not on the property legally, so Bank can't sue them for rent
  - **Court say fuck no → Bank chose not to enforce the consent term – waive the breach, so it was a valid Assignment**
- PSI then claims they are not liable given the multiple assignments
  - After PSI defaulted, Bank effectuated an assignment to Pizza and made a separate contract with them for a $600/month rent → remember, even with the new K, it's still an a assignment in the law (treat this as if PSI assigned to pizza)
  - Thus, Bank thinks its better off not having a vacant place and just trying to get the extra $450/month its owed – purpose of suit against PSI
  - Have to do the Privity of Estate/Privity of Contract analysis to determine liability of PSI
- **Privity of Estate:**
  - **No POE between Bank and PSI because the property got assigned to Pizza, thus no liability for original rent on PSI's part on the terms of the original lease – the POE is now between the Bank and Pizza**
  - So only POE here is Bank-Pizza (but Pizza signed a new K with the bank → there is POC between the Bank and Pizza)
  - **The effect of an assignment is the substitute POE and make the previous Tenant (PSI here) no longer liable under Property Law**
  - **Bottom Line: PSI (the assignor) assigned the lease to Pizza (the assignee), when PSI did this, the POE between the Bank and PSI was transferred to Pizza…NO POE BETWEEN THE BANK AND PSI**
- **Privity of Contract:**
  - Bank-Chicken for $1050/month
  - Bank-Pizza for $600/month
  - **BUT...there was never any K (NO POK) between Bank and PSI**
    - Bank sure as hell tried to prove an exotic contractual assumption of liability for the original lease with letters and documents, but the Court said the evidence wasn't good enough (it was foreseeable that Bank would lose on POE, their intent was always to go after the POK arg…)
    - Bank only tolerated PSI's presence on the property – rent is better than no rent; but because the assignment from Chicken to PSI was made without Bank's consent, there were not Assumption clauses or anything in the Assignment

- **THUS → PSI is not liable for a damn thing**

- It seems like Chicken is shit-outta-luck in all of this since they still have a contractual liability (PK) for the $1050/month rent and never got a release, but they are FUCKING BROKE – so it would do no good to sue them (explains why the Bank goes after PSI in the first place… Cherokee Principle)
  - ❑ Basic Landlord-Tenant law: Breach by one party does not terminate the lease unless the lease says that it does; A breach creates a suit for damages (if you want otherwise you must make a provision a defeasibility condition); Most leases do create reversion/power of entry rights for breaches
  - ❑ Note: ChickenSystems could still indemnify/seek contribution from Performance Systems
- ▼ ❑ ***Why do we care?***
  - ▼ ❑ *If dealing w/ a transfer the question arises if there is any ground of liability that binds the parties - must look to both the property and contract side*
    - ❑ Sublease none
    - ❑ Assignment yes (probably)

Book Examples, P.561-562

- 6A: **L → T → (assignment) T2**
  - L can sue T2 for unpaid rent because they are in POE → rent is a covenant of the lease, and because they are in POE, the L can sue on a covenant of the lease.
  - L can also sue T under POC → T still liable under the K.
  - Even if L and T2 had a K or exotic K, L can still sue T for rent because T needed to get a release to not be liable, i.e., L and T are still in POC.
  - How can T protected himself
    - (1) Get a release
    - (2) Be Judgment Proof
  - If L sues T and wins, can T sue T2 for indemnification/compensation?
    - You bet
    - Unless some provision in Lease saying T won't come after T2
- 6B: **L → T → (assignment) T2 → (assignment) T3** (this is like *Chicken Systems*)
  - T3 is in POE with the Lessor, L
  - Can L sue T2 for failed rent payment of T3?
    - Not on POE grounds; L and T2 are not in POE, because T2 assigned that away to T3.
    - Need some exotic thing for POC to occur between the L and T2.
      - In absence of this, there is no POC, unless of course there was a K signed between L and T2.
  - L can sue T3 → The two parties are in POE
  - Say the K says that the landlord can sue T2; can the landlord sue both T2 and T3?
    - Yes and no: he can sue both of them, but he cannot collect from both of them, he can only get one recovery, but he can choose which party to choose from.
- 6C: Suppose now that L breaches its duty to make repairs (this is a lease covenant); can T2 or T3 sue L for specific performance or damages?
    - REMEMBER: POE is a **mutual liability arrangement**: each party is liable to the other for the relevant provisions of the lease. As the lease gets assigned, the obligation travels with the assignments.
    - T3 can sue in POE;
    - T2 cannot sue because there is no POE or POC (would have to be explicit here).
    - T can sue under the original Contract:
      - But problem is damages
      - T no longer has present possessory right in the premises
      - So how does not repairing hurt the original T?
- 9A: **L → T → (sublease) T2**
  - L can sue T for rent – all original shit still in place, i.e., they are still in POE and POC with the L; however T2, the sublessee is NOT in POE OR POC with L.
  - Can L sue T2 for rent?
    - Not on anything traditional → have nothing to do with each other.
  - **The ONLY way that L can sue T2 is if T2 assumed contractual liability with L.**
  - Ex.: what if T2 promised to pay rent to T?
    - T can sue S on PK and PE
    - Can L sue S?
      - It depends on whether T → S is strong enough to constitute a 3d party beneficiary on part of landlord on PK BUT, I'm right in saying that L and T2 can create a K where T2 is contractually liable to L for rent.

- 9B: **L → ($400/month) T → (sublease at $500/month) S**
  - Who gets the extra $100? The T! T can transfer the present possessory interest, unless the lease prohibits it or has some other kind provision regarding it
  - All L gets is $400 on original lease!
  - What happens if T stops paying the $400 rent (remember T is not living there, S is now subleasing)?
    - If no defeasibility condition on nonpayment of rent, i.e., if you don't pay rent, L can kick you out, all L would have if T fails to pay is an action for damages, not recovery of property.
  - **If the original lease makes nonpayment of rent a defeasibility condition, once that condition is breached, L becomes present possessor the property and can bring ejectment action against the S** → all T could covey away was his interest that contained a defeasibility condition → one that condition blows up, S is shit outta luck → this is why S usually pays L directly (L doesn't care where the money comes from)

Determining Whether the Transfer is a Sublease or Assignment

- At common law, a transfer by a tenant is a sublease if the tenant ***retains a reversion*** in the property after the transfer. If the tenant does not retain a reversion, the transfer is an assignment.
  - Ex.: L leases to T for 10 years. One month later, T transfers a one-year term to T2. This is a sublease, because T retains a reversion (T will be entitled to possession after T2's year is up). T is T2's landlord. L is not in POE with T2. L cannot sue T2 on covenants in the original lease, and T2 cannot sue L.

- Two Approaches
  - (1) Traditional Common Law – still the dominant approach
    - If Tenant transfers the entire remaining term of the lease: ASSIGNMENT
    - If Tenant "keeps" anything: SUBLEASE
      - "Keep" = ANY part of the timeline: POR, ROE, Reversion for a day
      - **Thus, defeasibility conditions in the transfer means that the Tenant has "kept" a Future Interest – a POR or ROE**
      - Strict Approach: Keeping ANY future interest makes it a Sublease
      - Lenient Approach: keeping a future interest doesn't necessarily make it a Sublease – depends on how court views "keeping"
    - suppose that the tenant transfers the leasehold to another tenant and does not retain a reversion, but retains a ***right of entry*** if a covenant is breached.
      - Ex.: L leases to T for 10 years with rent of $200/month. Five years later, T transfers the remainder of the term to T2 for a rent of $250 a month. T retains the right to reenter and retake possession if T2 does not pay the rent promised.
      - The common law view is that such a transfer is an assignment, not a sublease, because T retained no reversion.
      - A substantial number of modern cases hold that such a transfer is a sublease, and not an assignment.
  - (2) Intent of the Parties
    - Use language of transfer document as evidence of intent
    - But obviously open to arguments about whether the parties meant "sublease" or "assignment" in their technical, legal sense
    - Can also end-up turning on how much the Tenant coveys away and how much, if anything, the Tenant has kept as a future interest
    - a few recent cases have rejected both the common law rule that retention of a reversion is necessary for a sublease and the rule that retention of a right of entry is sufficient to create a sublease. These cases hold that the ***intent*** of the parties determined whether a transfer is an assignment or a sublease.
  - In most formal opinions, Courts recite the Common Law test (except Ark. – see below)
- What if the parties wanted to create a situation where the new T was in possession at the end of the lease term, but the parties wanted the legal consequences of a sub-lease?
  - Ex.: the T says I want to give you the whole term, but both parties prefer the legal consequences of a sub-lease.
  - The common law said you cannot do this; the intentions of the parties are totally irrelevant.
  - **UNDER THE COMMON LAW, THE INTENTIONS OF THE PARTIES ARE COMPLETELY IRRELEVANT!**

Real Life Application:

Jaber v. Miller (Ark. 1951) ***What is the characterization of the debt (installment payments (then assignment) or rent (then sublease)?***

- Jaber rents for 5 year term: March 1, 1946 to March 1, 1951 at $200/month.
- There is a provision in the lease specifying that if they place burns down, the lease is over—this is for the protection of the tenant and is a defeasibility condition. The L has a Possibility of Reverter in the property.

- Three years into the lease, Jaber goes out of business, and sells the lease to Norber. This transfer is either an assignment or a sub-lease.
  - L → J → N → M
  - **Transfer uses the term "assignment"**
- Consideration:
  - Subsequently, Norber pays Jaber $700 and gives him five promissory $700 notes, so the total payment is 6 payments of $700, $4,200 in total. Norber also agrees to pay the rent. Jaber is basically walking away with $4,200 and Norber will pay the rent.
  - J reserved right to retake possession if N defaults on rent or the notes (so this is a defeasible transfer too) → now have two layers of defeasibility → some where L and some where J take over → nothing about fire in this second transfer.
  - N transfers to Miller → isn't an issue → Miller just took on N's obligations; only difference is promissory notes are now monthly payment of $175 from M to J (rather than $700 every month).
- Then the place burns down → now L has present possessory interest and no one is liable to the landlord for rent anymore because the fire defeasibility condition blew-up, thus the lease (PE and PK) got terminated.
  - Also, everyone down the line has their interest terminated because Tenants could only give away what they had – a lease with a defeasibility condition in the case of fire.
  - Issue is whether anyone still owes J money (namely does M owe J money).
- **If the arrangement between J and M is a sublease:**
  - **REMEMBER: if the arrangement between Jaber and Norber was a sub-lease, then Miller has a sub-lease. And, if a principle lease is terminated, then the sub-lease terminates as well. (can only sublease as much as you have to lease)**
  - Can only last as long as the original lease – once original lease gets terminated, sublease goes too because Tenant can only transfer what he has to give away
  - On this theory, Miller is off the hook for $175/month because it is RENT and there is no longer any rent to pay
- **If the arrangement between J and M is a an assignment:**
  - **Assignees don't pay rent to assignors; assignees can pay the assignor a consideration for assigning the property (here consideration is just paid in installments)**
  - On this theory, Assignee (Miller) paid a $4,200 consideration for the Assignment and financed it in $175/month installments.
  - Now the Assignee (Miller) is liable to keep paying the Tenant (Jaber) because it was a financed payment for the assignment itself – not a monthly fee for rent.
  - Assignments are SELLING-OUT
    - "It's all yours, give me my money and I'm out."
    - Thus, payments are not rent, but installments on the purchase price of the assignment since M bought the lease and all the conditions that went with it
- **The traditional common law test would depend on whether keeping the future interest which Jaber kept was enough to make this a sublease**.
  Traditional Law: *Did Jaber keep anything?*
  - ❑ Yes -> Sublease
  - ❑ No - > Assignment

❑ Arkansas Court instead decides **to look at the intentions of the parties (can tell intentions by looking to language of deal)**
- ❑ Lawson: But assuming you a competent lawyer the traditional rule should be fine (simple, easy to apply)
- ❑ The one thing that common law does not allow is to say "I want a transaction that has all the legal consequences of assignment (moves the privity of estate from me to the next person done) but I also want to keep the last week of lease" -> Switching to a regime that looks at intentions allows this

- **Common law and this court approach will produce same results:**
  - ❑ **Helmholz:** Study showed that he could not find a case where courts applying the formulastic traditional test reduced a result contra the intentions of the parties
- ❑ **Traditional Rule is still the majority rule; Intentions Rule is the minority rule (but basically the same)**
- ❑ **Court: Jaber & Miller had an assignment, Miller still has to pay**
- Also note: cant have part assg, part sublease- want legal consequences of a sublease but fully transfer also…

Landlord's Ability to Restrict a Transfer (can be negotiated during lease)

- When a T chooses to transfer an interest in the lease, many times the LL says T cannot transfer the lease unless the LL agrees to it. (standard lease clause) Why would the LL do this?
  1. The LL wants to make sure the person who is leasing the land is a responsible person. Even if it is a sub-lease, you still want this…LL care about rent checks
  2. Suppose that you have a commercial lease (a term for years) (residential leases are usually for shorter time-spans) and market conditions changed and the lease suddenly becomes more valuable than when the parties signed the deal.
     a. If the parties are in a periodic tenancy the landlord benefits

b. the parties are locked in for years, and the tenant can transfer the benefits
    - Ex.: T signs a lease for $1K/year, then the market value of the property goes up to $2K/year.
    - It is understandable that the LL might want in on this action—if the T finds a new tenant to pay this price, then the T has to come get approval from the LL.
- Is there any reason why a LL cannot say he must approve all transfers?
    - **General law: No**: **by and large a LL can restrict the transfer of leases however he wants (usually, LL does not need to give a reason), as long as the provision does not violate public policy (anti-discrimination statutes).**
    - How far can these restrictions extend? It depends on the jurisdiction.
        - Ex.: CA in the case of *Kendall v. Ernest Pestana*, pg. 563: the LL did a sensible thing; leased hangar space at an airport and specified no transfer without the LL permission. The T finds someone else to pay more, and he goes to the LL, but the LL wants a cut of the increase.
        - The T sues and says this is against public policy because the LL is being unreasonable. By "reasonable" the CA courts mean that the LL cannot withhold consent just to make money (issue here is clearly not character of new tenant). This is the *minority* approach. (CA exceptionally concerned with good-faith in K law)
            What is "reasonable" in cali?
                Look at the tenant qualities (will they pay? stable?)
                - ❑ ***What could possibly be more commercially reasonable than saying I want my cut of the money?***
        - EG: LL --> pro choice group --> pro life group.. can LL restrict based on beliefs? In cali, will ask: is LL acting unreasonably by restricting?

Bottomline: KENDALLY is an outlier case and shows how landlords can and do restricts transfers, and tenants can try to renegotiate

Dirtbag Landlords: Landlord Obligations to Tenants

- When evaluating if the LL has an obligation to the T, look at, in order of importance:
    1. Lease
    2. Statutes
    3. Common Law
- **Rights the Tenant has:**
    - **(1) Everything in the Lease**
    - **(2) Covenant of Quiet Enjoyment**
        - **In General**
        - **Constructive Eviction**
        - **Minor extension in half the states for Holdover Tenants**
    - **(3) Implied Warranty of Habitability**

- How do you know when someone has screwed up?
    - First read the lease, which should contain a list of things the parties promise to do. A breach of some conditions may be a defeasibility condition that terminates the lease **BUT traditionally, unless explicitly listed in lease as deafisibility conditions, most promises were considered to be independent covenants**-> allow non-breaching party to seek damages from breaching party but w/o terminating K.
        - Ex.: if the LL promised to keep the roof from leaking, and the roof leaked, the T has to continue paying the rent, but can sue for damages.
- **traditional rule: Breach by one party does not trigger a right to breach by another (i.e. breach by one party does not cause K to fall apart)-** promises in leases were assumed to be ***independent of the other party's performance.***
    Independence of Lease Covenants (Independent Covenants Model): Assumption provides that all covenants must be performed w/out regard to whether other covenants have been or can be performed
    - Ex.: Suppose that L rents T a house for four years; L promises in the lease to paint the house, and T promises to pay rent. The performance of T's promise to pay rent is not dependent on the performance of L's promise to paint. L's promise to paint is viewed as merely an incidental promise, enforceable in a lawsuit by T against L for damages

Exceptions to Independent covenants:

1. Covenant of Quiet Enjoyment – a DEPENDENT covenant

- **Remember:** at CL covenants in leases were INDEPENDENT, i.e., if a covenant was violated the T can not break the lease, he can only sue for damages. (non-performance does not imply the other party's obligations were terminated)
- However, there was one big exception to this rule at common law, i.e., there was one thing the LL could do that was considered such a fundamental breach that allowed the T to terminate the lease: breach of the covenant of quiet enjoyment.
    - **This is the LL's promise that the LL owns the property.**
    - If someone comes along with a better claim to the property, then the T can sue for damages, and can terminate the lease immediately and not suffer any breach of K claims. **-thus can sue the landlord and cannot be sued for rent by the landlord - implied and dependment provision (one that excused subsequent breach by the tenant)**
    - Under the common law, this is implicit in the lease. If not expressly provided in the lease, the Covenant of Quiet Enjoyment is ***always implied in every lease***.
- This Covenant is a DEPENDENT Covenant (breach excuses non-performance by other party):
    - the tenant's covenant to pay rent, at common law, was always dependent on the LL's performance of the Covenant of Quiet Enjoyment. Thus, if the LL breached this covenant, the tenant's obligation to pay rent ceased.

2. Responsibility for Holdover Tenants (although courts are split)

- Question: *who has the responsibility for ousting a holdover tenant? The Landlord or the new Tenant? (only applies when tenant assumes possession.. once tenant is already there and then trasspassers show up, then clearly tenant is responsible) NOTE: question is who, tenant or LL, responsible for dealing with this and hiring lawyers.. no doubt that either LL or T will win…*
    - Issue: whether without an express covenant there is nevertheless an implied covenant for LL to deliver possession- is there an IMPLIED Covenant to oust a holdover tenant in the absence of any express covenant in the lease?
- In most jurisdictions, the LL has the duty to deliver to the tenant ***actual possession***, as well as the ***right to possession***, at the beginning of the term. If the previous tenant has not moved out when the new tenant's lease begins, and the LL does not remove the person within a reasonable period of time, the LL is in default. This is known as the **"English Rule,"** and is adopted by the Restatement.
- **The Default Rule**
    - **(1) Half of Jurisdictions say Implied Covenant**
    - **(2) Half of Jurisdictions say NO Implied Covenant**
- Jurisdictions with the Implied Covenant
    - Duty only applied to
        - (1) Holdover Tenants
        - (2) On the day a new tenant is to take possession
    - If a holdover tenant left on the day of transfer, and then returned the next day, the landlord's duty would not apply – now the "holdover tenant" really isn't a holdover tenant, he is a bona fide trespasser and it's the new tenant's duty to deal with him
    - Point: Even where the duty is recognized, it is a LIMITED DUTY – very small window of time

3. Constructive Eviction – is property simply uninhabitable?

- where, through the fault/responsibility of the LL, there occurs a ***substantial interference with the T's use and enjoyment*** of the leased premises (type of eviction), so that the T can no longer enjoy the premises/ renders property unusable as the parties contemplated, the T may terminate the lease, vacate the premises, and be excused from further rent liability.
- **A constructive eviction gives rise to an action for damages, BUT it also lets the T terminate the lease; it is a dependent covenant.**
- **Tough to prove: Need to Prove 4 Things**
    - (1) Landlord must wrongfully perform or fail to perform some obligation that the landlord is under some expressed or implied duty to perform
    - (2) As a result of the landlord's commission or omission there must be a substantial interference with the tenant's use and enjoyment of the premises
        - Can argue over "substantial interference"
    - (3) The tenant must give the landlord notice of the interference and a *reasonable* opportunity to remedy the interference
    - (4) If after such notice the landlord fails to remedy the interference, the tenant must vacate the premises within a reasonable time
        - Mass. has moderated vacate provision by having a procedure for getting an advance determination (declaratory judgement)→ "is it a good idea for me to leave?" proceeding → taking risk for T out of the equation (otherwise if T leaves and signs lease elsewhere thinking he will win the constructive eviction, but then he loses, T is now liable for 2 leases…)
- Going one-step further: **can the LL indirectly do something that makes the property uninhabitable?**

- Ex.: the LL hates the T, and he knows he cannot just evict him, but he wants the T to leave. What if the LL owns the property next door and he rents it to people next door who throw a rock concert?
- The next door neighbor has committed a tort (so you can sue the neighbor), but does this let the T get out of the lease with the LL, i.e., is this a constructive eviction by the LL?
- The LL didn't actually do anything—all he did was rent to the person who threw the concert.
- **If the T can show that the LL has control over the actions of the other party, or some kind of conspiracy to piss you off, then this is a constructive eviction.**

Landlord will argue that he had no idea; *Is he still under obligation to control?*

- ❑ **Common Law:** No
- ❑ **Mass. Court in BLACKETT: Yes, where landlord has some capacity to control and does not this might create a constructive eviction**

- EG:
  - L leases an apartment to T, and also rents a cocktail lounge next door to X. The lease to X provides that L can terminate the lease if the noise disturbs the neighboring tenants. T complains to L of the loud noise of X. L does nothing because he hates T and wants T to leave. Since L can control the noise of X by terminating the lease, the noise is a constructive eviction. **This is NOT universal clear, black letter law.**

❑ What happens if you rent office space to put a printing business and it turns out the electrical capacity does not support the equipment, and the landlord knew your intentions and that the property would not support - If the landlord know what the tenant wants the land for is he implicitly promising that it will do so?

- ❑ (i.e. Is there an equivalent of merchantibility in rental property)? – NO
- ❑ Can write everything into the lease:

If the parties do not say anything at all: - **Traditional Law: Landlord is not promising anything unless expressly done so in lease (aside from 2 dep. conditions listed above)**

Increase in Statues Governing LL/T Relationships

- Bottom line: the T has very few circumstances where they can use a breach by the LL to get out of the lease, that's not a whole lot.
  - If T's want to get out of the lease more often, then they have to write it into the lease, but LL's will not want to agree to this. Where else are you going to go?
  - Statutes—see if the legislature has said anything about LL and T relationship, especially where breaches are dependent and not independent.
- Prior to 40 years ago, you wouldn't find any of these statutes. They did have statutes dealing with rental housing, but they didn't regulate the relationship between the LL and the T; they were merely housing codes.
  - In the last 40 years, this law has been transformed. Basically, all of the changes happened in a 10 year span from the late 60's to the 70's.

Implied (actually much of it is express) Warranty of Habitability

- a large majority of courts have, since the 1960s, implied on the part of the landlord an ***Implied Warranty of Habitability*** in leases in urban dwellings. They have also held that the dependent covenant doctrine of K law applies, and thus a violation of the covenant by the landlord is a defense to an action by the LL for payment for rent.
- The Implied Warranty is not a single doctrine; it's the name we give to a whole set of transformations in LL/T law that began in the 1960s and continues to dominate the field today.-courts and legislators decided there was a big problem in the American housing market and that one of the solutions (particularly for the low-rent, urban areas) would be to make it the law that every landlord would promise to meet a certain minimum quality
  - 3/4 of the states by statute or common law had adopted some legal doctrine that amounted to landlords agreeing that anything they rent reaches a **certain minimum level of quality**
  - "Implied Warranty of Habitability" is "code" for these changes

- Why did so many changes, including the Implied Warranty of Habitability, come about in housing law during the 1960s, i.e., why do T's have so many more legal claims than they would before the 1960s?
  1. During the 1960s there was a war on poverty: people don't have nice places to live. Because of this, there was increased attention paid to low-rent, low-quality rental housing in big urban areas with large minority populations.
  2. Jurisprudentially, this period was the Warren Court: more generally, jurisprudentially, ***the status of courts as institutions of social change has never been higher***.
  3. The Vietnam War and the general protest environment. The result of all this is **an attitude of activism.**
- So what did the judiciary do?
  - They make the bad housing better by ordering LL's to make it better.

- If at common law and the statutes ensure that the LL will only own the property, then the courts must do more: they are going to make the LL provide a decent unit.
- *This has two parts to it: one substantive, one remedial.*
  - *The substantive part was that now, the law reads into the lease things like the roof won't leak, the gas will work, etc. These used to be written into the lease, but now they don't have to be written in; they are there no matter what.*
  - *The remedial side says that these new breaches are dependent covenants: if they are breached, the T can terminate the lease if he chooses, as well as be awarded damages.*

- The Changes in the Law
  - Came from the Judiciary, and some statutes → started in mid 60s and was completely in place by early 70s
  - Massive revolution in property law encouraged by climate of judicial activism
- Policies Underlying Habitability
  - Understanding policies here is VITAL to understanding the operation of the law
  - History
    - Issue was poverty and slum housing
    - This was the crusade

5 Dimensions to Warranty of Habituality:

1. Source- Where do these changes come from?

a. Judicial activism – common law
b. Statute- Uniform Residential Landlord Tenant Act – URLTA
c. local regulations

- often times all three of the above play role….

2. Type of leases effected:

-What leases do I want to change because not all leases are created equal?

- (a) All leases?
  - **Not for commercial leases** – (concern with residential) John Hancock and the Law Firms can figure it out for themselves (covenants of habitability have in few cases been implied in commercial leases when it appears that the commercial tenant has bargained for continuing maintenance by the LL)
- (b) Residential Leases?
  - (1) All?
  - (2) Urban?
  - (3) Urban Multiunit?
  - (4) Urban Large Multiunit?
  - (5) ***Urban Large Low-Rent Multiunit apts?***

- How to structure changes will determine how broadly you want to affect these different categories
- Mostly worried about Urban Large Low-Rent Multiunits, but that doesn't mean that's all the changes ended-up applying to.. may vary by jurisdiciton

- **Effect of IWH → Landlords incur obligations no matter what the Lease says – these are obligations implied in law (could, but does not regulate what tenants do – it's a one way street…)**

3. CONTENT: defining the Scope of the Implied Warranty of Habitability

- It is not an exact science – there are several different approaches – remember that this is more of an idea than a concrete legal doctrine. - the specific laws that govern in a specific jurisdiction may be different from place to place
- Courts differ on what standards are used to measure the LL's duty. Generally they fall into different categories:

1. ***Look to the Housing Code – health and safety specifications – type of materials used in construction, engineering specs etc…design/structure of building (statutory, not common law)***
   - some courts hold that the standards are those of the housing code. If there is a substantial violation of the housing code, the LL's warranty is breached. AND using housing codes as enforcement has a huge advantage- they're very cheap to enforce/ easy to distinguish!
   - BUT *Housing codes are not typically enforceable by private parties*- code is regulatory- only enforceable by agencies, and penalties were usually fines payable to the government.. so why not just make housing code privately enforceable?
     - These breaches are relatively easy for people to discover, but it doesn't match up with what people were trying to make changes about.

- But this will be wildly over and under inclusive, depending on the problem you are trying to address
- *Over-inclusive: Codes filled with a bunch of minutia that the T doesn't care about – to call them breaches of the lease are not calibrated to problems people worried about*
- *Under-inclusive, i.e., none of the things that people complained about were included in building codes. They were developed with focus on structure of the building – not on workability of the stove and roach traps*

▪ So, if literal application of the building codes does not make sense, why not say that it's the spirit of the building code that matters? Just make everything a part of the lease that makes life unpleasant.
- With this approach you are getting closer to what the advocates have in mind, **but it's getting less and less clear, it's becoming harder to determine, i.e., the standard is more vague**.
- How about this to clarify: ***it's not just anything that makes life unpleasant***; maybe we are only interested in things that make it **uninhabitable**.
- New Jersey decision: whether the defect would make the premises uninhabitable to a reasonable person. But is uninhabitable the wrong word? Maybe we should say that we want the premises to be habitable, anything below that standard is inappropriate.

▪ some courts require that the premises be "fit for human habitation" or use similar language in respect to the standard. A violation of the housing code is compelling evidence of breach, but not conclusive. The standard as applied may be higher or lower than the housing code requirements.

o **(2) *Whether the defect would render the premises uninhabitable in the eyes of a reasonable person***

Advantage: good standard – what ppl really want
BUT:
Disadvantage: *Test of "habitability"* if the goal is ease and cheapness of enforcement, this is really far off- hot to tell what is habitable? Could pay lawyers and still have inconsistent results…

▪ How does this change law of constructive eviction?
- If REALLY uninhabitable – it's essentially Constructive Eviction – just eliminates the first requirement of the doctrine

▪ Virtue of application to slums → seems obvious to developers of rule
▪ But what does "uninhabitable" mean?
- Broken stove?
- How many roaches are too many?

▪ Framing in positive terms
▪ Suggests obligation to provide a nice and happy place to live
▪ PROBLEM: how do you specify in advance what "habitability" is?
- Cherokee principle comes into play: it does you no good whatsoever to have a legal right if you cannot enforce it.
- How are you going to determine if there has been a breach? It will probably take litigation, sometimes of substantial duration. And this litigation will cost money. - The paradigm cases for this doctrine, basically slum housing, are not going to be for a lot of money… so not worth to litigate

▪ ***Hybrid:* we want the ease of the housing codes, but the benefits of the habitability standards, so why not create a hybrid?**
- Allowing private actions for those provisions of the housing codes that directly apply to habitability
  - This takes care of the overinclusive problems of the housing codes, but it doesn't help the underinclusiveness
- Create a set of specific standards of habitability so that the court has some sort of checklist that they can go through to easily and cheaply say that the housing is or is not habitable
  - This may still be a little underinclusive. The more we specify what standards will make housing habitable, the easier it is for some problem to get left off the list. The less specific the list of standards is, the harder it is to quickly use it as a checklist and the more expensive the investigation will be.

4. Waiver of Dependent Covenants

- Remember the Doctrine of Quiet Enjoyment, a dependent covenant. What if the LL doesn't want to promise this?
  - At traditional common law, the LL *could* waive this covenant via a quitclaim lease.
  - If the law comes in with the Implied Warranty of Habitability, can the LL say that everything the state says might be true, but the T is getting exactly what the T sees? Can the LL do this if the T signs this? (i.e. parties K around the requirements)

- If this is really a warranty, then yes (warranties are waiveable); however, jurisdictions are not in agreement over this (usually the answer is no).
    - **So technically this is not a warranty! – Property law wins out over K law here….**

- Now what?
    - The standard common law rule is that the breach of the lease by one party gives rise to an action for damages, but does not excuse the injured party from his own contractual obligations (unless the lease specifies that the condition is defeasible or breach of dependent covenant)
    - The first thing that the implied warranty said was that the covenants became dependent. But, something happened with this. Why do people choose these places in the first place? Because it's all that they can afford.
    - So, they can terminate the lease because of the dependent covenants, but then where are these people going to go? Most T's are not going to choose to take advantage of this remedy by just walking away from lease….

5. Remedies for Breach of Implied Warranty of Habitability – tenant decides his unit breaches the policy….

(1) Termination of Lease and vacate Premises (makes the points in policy dependent covenants)

- Not the best remedy when underlying problem is that there are not many places to go – they're in the shitty unit in the first place
- Point of policy was not to allow the tenant to get out of lease, but to be able to stay and demand better unit

(2) **Damages –** Tenant can sue landlord for monetary damages -but how do we measure them? - a very contentious topic

- Civil action: tenant has to make the first move, go to court, draft the complaint, pay the filing fee, etc.
- Rent reduction: if the tenant can show that the landlord's breach of habitability cost him some certain amount of money, then tenant can deduct that amount from the rent check.
    - If landlord disputes the rent reduction, he can sue tenant in a civil action, but then landlord is required to make the first move (hire the lawyer, pay the filing fees, etc.)
- (a) **K-Market Differential: Fair Rental Value Approach #1**
    - ***Damages = Promised Rent – Fair Rental Value***
    - You take the promised rent under the lease and subtract what the unit was really worth.
    - The thing with this is that the amount that the unit is really worth is usually very close to the rent that is being paid. In this case, the measure of damages is too low. This is not what the law wants or it reasons
    - But most of the time "fair rental value" equals "promised rent," thus damages are ZERO
    - this measure has the purpose of making the T pay only for the value of what he is receiving (the premises as is). Damages are measured by the difference between the agreed rent and the fair market rental value of the premises ***as they are*** during occupancy by the T in the unsafe or unsanitary condition. This method results in no damages ***if the agreed rental is the fair market rental for the premises as is***, and thus it does not serve to goad LL's into rehabilitation. For this reason, it will probably be rejected by the courts.
- (b) **K-Market Differential: Fair Rental Value Approach #2**
    - Damages = FRV(if apt was as should be / w) – FRV(as is)
        - FRV(w) is fair rental value in hypothetical world if the apartment was in the condition it was supposed to be in (i.e., fixed-up and up to code and as impliedly warranted)
        - FRV(as is) is really just the Promised Rent, but could construct a hypothetical value too for a "fair housing market"
    - So, basically it's the difference between what it's supposed to look like, and what it does look like.
    - But, how do you know that the fair rental value of this unit if it conformed to what it should have conformed to? You can get experts to come in and do this for you.
    - Issue: The experts needed to construct these hypothetical values would cost more than what the judgment would be worth
        - Thus, you would need potential damages in the 5 or 6 figures to make the litigation even worth the filing fee
        - Not amenable to low-income protection policy behind this doctrine

(c) **Repair and deduct**

Tenant can fix reasonable problem himself and then just deduct from rent payment, this does work sometimes…. (go to home depot, fix stove burner)

Problem: unfortunately many problems are not individual unit issues- problems are central to whole building with huge costs so individual tenants can't fix/afford (can't fix 100 grand AC unit for the whole building)

(d) **Percentage Diminution Approach** (DOMINANT APPROACH)–

- Damages equal the promised rent (this is a good thing because it is easy to discover—you read the lease) multiplied by the percentage of the use lost by the breach, i.e., figure out *how much of the usefulness of the unit was lost as a result of these things.* This is then your damage measure. (instead of taking a feature-by-feature analysis of the problems of the housing unit, the court will look at the overall problems of the housing and determine how much of the total value of the housing the problems, in aggregate, depreciate)

- Damages = the promised rent multiplied by the percentage of the use of the premises lost as a result of the breach
  - Why is this a good measure?
    - It puts the T more in the position he would have been in had the property been up to minimum standard.
    - What about the practical problem, i.e., creating a damage figure without having to use experts? **The court said the need for expert testimony is reduced with this approach.**
  - No economists or statisticians here – won't know what to do – will just construct a FRV – a "layman" can do it
    - Need for expert testimony is greatly reduced as the determination in "percentage of reduction in use" of a residential dwelling is a matter within the capabilities of the layman
    - "Layman" approach is a joke though – it's a farce because we can actually hire people to figure this shit out → it's looking the other way to construct a damage remedy to allows these kinds of cases to go forward… in reality how on earth is anyone supposed to make a determination like this with any consistency across situations?
  - But, none of this obviates you from having to pay the lawyers
    - So still an issue for it being crazy for the lawyer to litigate when talking about low-income housing
    - Thus, the net result for defining breach, due to the remedies only being economically feasible in high-rent situation, is that you have a body of law developing to govern high-rent leases – NOT the low-rent slum housing the doctrine was originally envisioned for
    - The remedy end of the doctrine just hasn't played-out the way the framers wanted

Best remedy is to assert breach of implied warranty of habitability as a defense to an ejectment action
(a) Tenant can stop paying rent (or pay less rent) and refuse to leave the property, making landlord file an ejectment action
(b) If Tenant loses subsequent ejectment action and there is no breach found by the court:
- Worst Case scenario – pay back rent
- Best Case scenario – Tenant is judgment proof (will cost more to collect than the judgment is worth) or insolvent

(c) Result: Tenant gets to maintain possession of the property without paying full rent when the Landlord is a dirtbag

Point: once your focus is low-cost housing, you run into the problem of costs of litigation
- Under the American Rule you have to pay your lawyer, so if you're not talking about a 5 figure damage award its not even worth the filing fee (Rule of Thumb)
- Unless there is a spite figure – in which case you'll be out $ in the end
- Thus, doctrine becomes useless for $50/month housing disputes because the damages are never going to get to an economically feasible point where affirmative litigation will be undertaken to vindicate one's rights… **in the end, this whole doctrine – huge transformation of law- the actual practical effect of change has been minor**

Assuming the doctrine did accomplish its goals- what would be the effect? – presumably it'd increase the value of low-rent housing, so in the end you fuck the poor over anyhow… you'll wipe out low-end housing! What do the proponent of the doctrine say about this? – they didn't think much about this beforehand!!! BUT perhaps wiping off low-rent housing is good- will force government to better deal with issue of poor- provide housing…

Landlord's Tort Liability
- Suppose you have an obvious case that the Implied Warranty of Inhabitability has been violated.
  - Can you go after the LL for punitive damages? Yes, because the LL has committed a tort.
- So, what is the Implied Warranty of Inhabitability: tort doctrine, contract doctrine, regulatory measure? Yes to all.

Deadbeat Tenants: Landlords' Rights against Tenants

In General

Generally leases are written in the landlord's favor and allow the landlord to walk away from the lease when tenant breaches one of two conditions:

1) failure to pay rent
2) some other rare conditions that make up about 1% of defeasible conditions

- You have a breach by the T, there are two scenarios of interest to the LL:
  1. The T is still in the unit, i.e., the LL wants damages and wants to kick them off.
  2. The T is not still on the premises. Why would the T not be on the premises? This is a common situation. When the T leaves the property, but the lease is still in existence, the law calls this **abandonment**, which does not alter the legal rights and obligations of the parties. This is an offer to the LL to terminate the lease, or at a minimum, to terminate possessory rights…. If, the T is god-knows-where, LL must weigh the interest of trying to track down the T (Cherokee principle)
  - Tenant's obligations come from (easy to figure out tenant breach- look to lease)
    - (1) Lease
    - (2) Law of Waste (although 99% of the things tenant could do to bring in law of waste, will be explicitly forbidden in the lease)
  - **No statutory or common law duties on the Tenant – these all generally put restriction on the Landlord**
  - The only breach we're really concerned about is NON-PAYMENT of RENT

Non-Payment of Rent

- Assume that the Tenant is just a piece of shit and doesn't feel like paying the rent
- Two Situations
  - (1) T on property
    - L wants $ and possession
  - (2) T not on property
    - L just wants $
      - LL knows where deadbeat is
      - LL not know where deadbeat is
        - If Tenant just wants to scam and leave – he can do so and landlord will not be able to find him – will be too expensive to hire a PI
    - But – there are the honest deadbeat Tenants too
      - Sommer v. Kride
      - T cant pay rent but says there is nothing he can do, just asks LL to let him off the hook…no question of liability, no question of locating T, question is- what is appropriate remedy???

Tenant leaves property w/o interest to return- T abandons the lease: (can't unilaterally break K (lease) - so in breach…)

- **Abandonment, Surrender, and Release**
  - if the T has no right to vacate the property but abandons it, the LL may have several options:

(1) ACCEPT and ***terminate*** the lease;

- ***ABANDONMENT*** → **T leaves the property with an intent NEVER to return**
  - This is only an OFFER to terminate the lease (T can't unilaterally rescind K); **the landlord can accept it or reject it just like any other offer**
  - If Landlord doesn't accept the offer – Tenant is still bound by the terms of the lease, whether he's on the property or not
- ***SURRENDER*** **– get out of POE**
  - Landlord accepts the offer of abandonment: the LL may terminate the lease on the T's abandonment; this effects a ***surrender***. BUT The T is liable only for rent accrued and for damages caused by the abandonment up until surrender…
  - **So, abandonment and surrender is just basically tearing up POE – T no longer has possessory interest in the property; LL takes up present interest- parties have no further obligation to each other…**
- ***RELEASE*** **– get out of POK**
  - **This is how the Tenant gets the Contract Law relationship terminated**
  - Even after the Surrender – the Tenant is still bound by the terms of the Lease in Contract Law
  - Thus, the tenant has to obtain a release from that contract
  - The document is usually titled "Surrender (escape POE) and Release (escape POK)" – it's possible to only have surrender w/o the release, so the T has no obligation to L on property law (no POE) but is

nevertheless obliged to LL on K law (still has POK)….usually not a problem, since one of the two (surrender and release) is usually inferred from the other…but to be sure, need to explicit on both….

- *Important b/c K law dictates that always must mitigate damages; P law not always…. So if you have a surrender, but the K remains, then you're guaranteed to have to mitigate…*

When the landlord accepts the abandonment, he normally will not send his lawyer over to have all of the proper paperwork drawn up. Thus, the law has created two types of surrenders so that the landlord can accept the abandonment without being required to go through all of the legal hoops.

- Surrender can be either:
  - a. formal agreement
  - b. operation in law – how it actually works in real life

Surrender by Operation of Law(its expensive to pay lawyers to do it formally)

- This principle recognizes that while there might not be a piece of paper signed saying that the T surrenders the property, the court will infer, from the conduct of the parties, that they intended for this to be a surrender – but this might not work.
- **Need To Prove Two Things**
  - **(1) Specific Intent of the Tenant to Abandon**
  - **(2) Specific Intent of the Landlord to Accept the Abandonment**
- Either Proof Condition can raise problems
  - Tenant can come back and claim that he was just on vacation or something
  - Landlord can accept keys, change locks, and rent out the property and claim that he was just keeping the place in good repair, needed someone to look after it, and intended to give it back to the Tenant if he ever returned
- Thus – this is generally a Question of Fact for the jury

Surrender by Operation of Law

- The interesting thing arises when the parties don't terminate the lease, but they do things that would look to an outsider like they had terminated the lease.
- Ex.: the T mails the LL the keys and says that he is done with the property.
- From a LL standpoint, having property vacant is bad for a number of reasons:
  - (1) the LL is not making any money;
  - (2) vacant property is asking to be vandalized;
  - (3) property must be maintained.
- Suppose a T abandons the property, but the LL mails the keys back to the T.
  - This is a clear rejection of the T's offer of surrender—no one would doubt the T is still obliged under the lease.
  - But, suppose the LL just keeps the keys for safe keeping: he's not putting anyone else on the property, but he is holding onto the keys. Is this a manifestation of intent on the part of the LL to terminate the lease? Probably not. It would be hard to infer from this hypothetical that the LL meant to terminate the lease.
- Suppose the LL holds onto the keys, but hands them to someone else: my tenant isn't there, so you go stay there. Can the LL do this and still maintain that the original tenant is still bound under the lease?
  - On one hand, it looks like the new party is asserting possession of the property. On the other, the LL can say that he is not trying to terminate the lease, he is just trying to make sure his property is safe and well-kept.
  - So the question here is whether the LL, by conduct, agreed to the surrender of the T.
- Suppose the LL takes it one step further and puts someone else on the property and collects a rental. Can he still maintain that the original T is still the T?
  - He will claim that all he is doing is mitigating damages because he is now collecting money to off-set the T's breach.
    - Tenant would not have any claims against either the landlord or the new tenant for being on Tenant's property, which he apparently still holds possessory interest over, because an abandonment includes an intention not to return to the property. The landlord then has the legal right, and in some jurisdictions the legal duty, to try to mitigate the damages.
- All of these hypotheticals seem reasonable on the part of the LL. But, also these could be construed as terminating the relationship with the original T. Has the lease then been terminated? - jury time….

- *Keeping the Tenant on the Hook*
  - Landlord is never obligated to accept an abandonment; thus the lease doesn't end until the end of the term
  - But what can or must the Landlord do with the property in the meantime to keep the T on the hook for rent, i.e., that the original T remains the original T?

(2) ***let the premises lie idle and sue the T for rent*** **as it comes due**

- Option (1) → sit back and wait for lease to run out and then sue the T for damages, i.e., DON'T MITIGATE YOUR DAMAGES

- under the older view the LL does not have any duty to mitigate damages by finding another T. Rationale: the T has bought a term in the LL's land. If the T chooses not to use it, it is not the LL's fault. The T still owes the rent as it comes do. (under property law, LL don't have to mitigate damages, under K law they do… for years property law won out….this is bad for T, but property law also helps the T b/c property law does not have doctrine of *anticipatory breach,* so LL would need to sue one month at a time or have to wait until the very end (K's doctrine of *anticipatory breach* – suing for future damages i.e. cant sue for lost rent for future months of lost rent need to wait for the lost amount to actually happen- does not work in property law…. Although LL can try to use property law's (in some jurisdictions) *acceleration clause* - if tenant's rent payments become excessively in default, then tenant's entire rent obligation (monthly rent x number of months left in lease) becomes immediately due and Landlord may sue Tenant for the entire lump sum. to try to sue for entire amount)
- EITHER WAY, all this is kinda irrelevant since now K law just won out in majority of jurisdictions (albeit not universally) and LL needs to mitigate
- Besides, a judgment can't be deposited in a bank account -So there's a risk to this that T has no assets, is judgment proof, or can't be found later on

- Accelerated Payment Clauses
  - Suppose you have a 2 year lease for $1K/month, and six months into the deal, the T abandons and says he is done with the property. Can the LL then go to the court and say the T breached and he wants all of the money that the T will fail to pay because of the abandonment, i.e., the LL wants so sue for all of the $18K that will be due for the next 1.5 years?
    - **The LL CANNOT do this—he cannot sue for a breach that has not happened yet.**
- But, can a LL say, if you miss one payment of rent, then all of the rent immediately becomes due?
  - **This is an accelerated payment clause**.
  - Can the LL do this?
    - If your jurisdiction has a distaste for these, that's a problem, but **generally speaking, these clauses are allowed and widely used**.
    - But, there are some legal obstacles that a provision such as this might encounter. Could a court say this type of provision is unconscionable or against public policy? Sure.
- Suppose there is a provision in the lease that says liquidated damages will be the remaining rent under the lease.
  - **Liquidated damages cannot be penalty clauses**. But, something is only a penalty if it is indeed a penalty, not if it is a legitimate damage.
- But, we still have some problems:
  - We've established the T is a dead beat. If you get this damage against him for all of the rest of the rent, how are you going to get him to pay it? If the T does not have the money, he might not be able to pay.
  - The second problem is you might have no idea where the T is.
  - **We are dealing with the CHEROKEE PRINCIPLE AGAIN!**

(3) ***retake possession*** and attempt to relet the premises to mitigate damages.

- Option (2) → mitigate damages, rent out the place to someone else; **THIS IS WHAT THE LL SHOULD DO!**
  - The LL should find someone else, put them on the land, and make it clear that he is only doing that to mitigate damages (this is good for everybody), but this does not mean that the original T is not still liable under the lease.
  - a growing number of states, probably a majority, the LL has a ***duty to mitigate*** damages. A lease is treated as any other kind of K and is not viewed, on this issue, through property glasses. If the LL must mitigate damages, the LL cannot leave the premises vacant and sue for rent as it comes due.
  - This is the better part of valor and you can always theoretically sue the Tenant for any disparity in rent at the end of the day, assuming its even worth the filing fee
  - Only limitation on mitigation of damages is some term in the lease (which probably shouldn't be there)
- The landlord will never be forced to accept an abandonment
- The landlord will always be allowed to attempt to mitigate the damages
- **most landlords WANT to mitigate damages rather than take the risk of having a right without an enforceable remedy for a damages action against the tenant**

- ***Where does the Landlord get the authority to Rent-out the Tenant's property in the absence of a Surrender and Release?***
  - Ex.: you have a 2 year lease for $1K/month. The T leaves after 6 months, and the LL finds someone else to take over the lease who will pay $1,500/month. The LL then wants to accept the T's surrender, but the T isn't there to sign the surrender, and the state statute requires this. Does this mean the LL owes the $500/month to the original T?

- Property still technically belongs to the Tenant until the end of the term
- Two Conceptual Theories
  - (1) **L is acting as an agent for the T** – surely the T would want the L to mitigate damages – the more the L mitigates, the less T is on the hook for
    - Tenant would be entitled to extra money the Landlord rented his place for, i.e., in above example the T would get the $500
  - (2) If the T has actually abandoned – a permanent intention never to return – even though T is Present possessor – the T has effectively **waived (abandoned) any rights to enforce those present possessory rights and L is next in line for possession**
    - Tenant gets nothing because Landlord is just exercising his possessory rights as 2d in line for possession since Tenant waived any rights he had under the lease
- So who gets the money?
  - No consensus – cases split up the middle
  - This isn't surprising though given that we're fudging the law
  - Don't get to the issue of T subleasing for more because all leases generally contain a no sublease without consent clause

But all of the above deals with when the tenant has moved off of the property (but can still be found).
What happens when the deadbeat is still on the property?

- If the rent payments were a defeasible condition of the lease, which it likely was, the landlord regains the present possessory interest when Tenant defaults and Landlord can now eject the tenant.
  - But this is a long and costly process. During this entire time, Tenant is getting to live on the property. In theory, Tenant is liable for all of this time, but in reality Tenant probably has no money and is getting to live in this place for free. And surely the tenant will not be taking good care of the property.
  - Once Landlord gets his action for ejectment of the tenant, will the tenant actually leave because a piece of paper told him to? Landlord can go to the police, but depending on how busy/lazy they are, it may take quite a while for them to actually enforce the order of ejectment.
  - If the legal system is going to move so slowly that the tenant is going to get free rent for a year, then Landlord will likely take his own action

- Self-Help Remedies
  - the LL may wish to (i) evict the T ***during the term of the lease*** for non-payment of rent or for other cause or (ii) evict the T who holds over ***after the term expires***.
  - These are implicated when a Tenant remains on the property, but the Landlord wants him off for a legitimate reason (if T thinks its not legitimate, T can sue LL)- don't want to let deadbeat to stay on premises and not pay and cant rely on legal system to eject since it takes too long and don't enforce themselves – need to take situation into your own hands…
  - Most Leaseholds are Determinable upon non-payment of rent
    - Thus, when a Tenant fails to pay rent, *poof* the land reverts back to the landlord
    - Tenant: so-fucking-what? Make me leave
    - Landlord can file an ejectment action, but it could take anywhere from 2-24 months to get a judgment, and that's not including the time it will take to get the sheriff to execute the judgment
    - Thus – Tenant is sitting on your shit rent-free and is in all likelihood insolvent or judgment proof – thus Landlord is never going to see their Rent
    - Result: Landlord will engage in Self-Help remedies, like changing the locks, and gamble that he will obtain a favorable judgment later-on to validate his actions as a now-present possessor
  - **Traditional View of Self-Help**
    - **Go-For-It**
    - Landlords can take the gamble and risk getting slammed with damages if they're wrong
  - **Modern View of Self-Help**
    - **We don't like it because it could incite violence**
    - a growing number of states prohibit self-help in recovering possession and require the LL to resort to statutory remedy. If she does not, she is liable in damages.
    - We now have Summary Eviction proceedings in courts that deal exclusively with Landlord-Tenant disputes, thus the wait-time is only 3-10 days (3 months in reality), and Landlords can surely wait for that time period in the interests of public peace
    - **Not every jurisdiction has done this, some still allow for self-help if it is peaceful.**
      - some jurisdictions hold that the LL can enter only by ***peaceable*** means. But what is peaceable? Definitions vary considerably. Changing the locks and locking out the T has been held forcible, not peaceable. This effectively guts the self-help rule, as it is difficult to imagine circumstances that might be found peaceable if changing the locks is forcible.

- To help get landlords to go through the proper legal system channels, separate court systems have been developed to accommodate the large number of landlord/tenant disputes and to speed up the process.
- But the lazy police problem is a separate issue. You can't force the police to enforce the laws.

Berg v. Wiley (Minn. 1978) from Supplement – Modern Case Dealing with Self-Help:

- Parties enter into a 5 year lease, a term for years. Wiley, opens a restaurant, and midway through the term the LL and the T know they do not get along: the LL is concerned that the T is changing the property without the LL's consent. The LL claims that this is a breach of various provisions in the lease.
- The LL is also concerned about changes that are not being made to the property that need to be made to bring the restaurant up to health code, and the health code authorities agree.
- Wiley, still under the lease, shuts down the place, fires everyone, and goes somewhere.
  - Was this an abandonment? The LL wants the answer to be yes—if the T has abandoned, then the LL would be thrilled to get rid of this T.
  - The LL assumes it is an abandonment, and he re-rents the property to someone else.
  - The T said that she did not abandon—she closed for remodeling, and was planning to come back.

- The evidence here in favor of non-abandonment is that the sign on the window said, "Closed for remodeling." The evidence against is that the T fired everyone and left without telling anyone where she had gone
  - The jury found that the T didn't abandon the property.
- So, Berg could not claim possession of the property by virtue of abandonment and possession. But, Berg claimed that there were breaches of the lease.
  - There is a reference in passing to a "lease item 7" on pg. 147: this is probably a defeasibility provision. How would the LL get to enforce this?
    - Let's assume that the lease has been breached so that the LL is legally entitled to the property. How does the LL concert this conceded legal right?
    - **The common law has allowed LL's to do more than other contracting parties, namely kick-out the T and seize his property.** Wiley says this is what he did: there was a breach, he was entitled to possession, and he peacefully took the property back, i.e., he changed the locks.
    - **The MN court says, just like the modern court does, that they don't care if you do it quietly, you have to get the judicial order.** The LL doesn't decide that the lease has been breached, the court must do this. Then law enforcement has to enforce the judgment.
- But even with self-help – we still have the right without an enforceable remedy issue → God knows how long it will take the Sheriff to get around to kicking-off the deadbeat tenant → and Modern Self-Help Rules don't even allow for you to engage in self-help once you've got a judgment – the Sheriff must do it…**CHEROKEE PRINCIPLE**

Interesting symmetry between rights of Landlords and rights of Tenants

- **Tenants: Big expansion of Warranty of Habitability, but no economically feasible way for the class intended to be benefited to affirmatively enforce it**
- **Landlords: Can have slam-dunk eviction actions, but the Court system moves slow as shit and enforcement is far from immediate once you have the judgment**
- ***Point: Right is only as good as the Remedy***

Summary Eviction

- every state has a ***summary proceeding*** whereby the LL can recover possession quickly and at a low cost.
- With summary eviction, courts are just going to try the issue of possession: *is the LL or the T entitled to the present possessory interest?* Two **problems** with this remedy:
  1. The "highway theory"—if you make it easier to sue for eviction, more people will sue for eviction.
  2. Suppose that what a T claims is that the LL is trying to assert possession for non-payment of rent. What if they assert the defense of the implied warranty of inhabitability? Doesn't this make the summary eviction a lot more complicated?

Holdover *Tenants – Tennant at sufferance*

- when a T who was rightfully in possession wrongfully remains in possession (holds over) after termination of the tenancy, he is called a ***tenant at sufferance***. The tenant at sufferance is not really a T at all since he is not holding with permission of the LL. On the other hand, he is not a trespasser, either, since his original possession was not wrongful. (A trespass is an unauthorized entry onto someone's property, but in this case the entry was authorized because it was done under a valid lease. They are unauthorized "stayers") He is in a peculiar situation, called a tenancy at sufferance, which lasts only until the LL ***evicts*** the T ***or elects to hold the T to another term*** - **LL can say**

that by staying over the T has effectively agreed to renew the lease ""You're on my property after the end of the lease, this must mean that you want to be on my property. If you want to be on my property then you must intend to become a tenant of the property. Therefore the law shall imply a new lease." .

- The common law admitted ***no excuses*** for holding over. The T holding over was liable for another term regardless of extenuating circumstances.
- but of course it's been modified…..**Most modern cases give a T relief where the T does not intend to hold over but is forced to do so by circumstances beyond the T's control.**
  - At least one court has gone further and has relieved the holdover T even without extenuating circumstances where a dilatory T held over for a few hours, on the ground that the damage to the LL was de minimis. This is *Hirschfield*.
- In the period in which a T fails to leave, they are at risk for being held liable for renewing the lease, if the LL so chooses.
- When does the LL have to make that choice? – understandably landlord must be reasonably quick in enforcing this new lease… When does the clock run out? There is no clear answer.
- Typically would only apply to tenants of years (it at will can cancel any time anyhow…)

Government Regulation of Housing Discrimination

Background and Constitutionality

- historically, a seller or a LL was free to sell or rent to whomever he pleased. Federal and state statutes not prohibit discrimination in the sale or rental of property on various grounds—including race, religion, or national origin.

The Common Law

- The Common Law provides no protection against discrimination in the housing market
- If you don't want to deal with someone, you don't have to
- Common Law, of course can be altered by STATUTES
  - The State and Local statutes are the most important
  - **But we only care about the Federal Statutes because the Federal Law is uniform and it provides a minimum standard that all of the States must conform to**
  - State and Local statutes are often stricter than the Federal Law may provide more protected classes (i.e. sexual orientation, veteran status, etc.)
- **There are now four big categories where a LL cannot discriminate**:
  1. Race
  2. Sex
  3. Religion
  4. National Origin

Constitutionality of Federal Housing Discrimination Laws

- **Civil Rights Act of 1866: 42 U.S.C. § 1981-8**
  - 1865: the Civil War ends; the 13th A. ends slavery, but the southern states say that blacks cannot do a number of things, which basically reintroduce slavery without the label; these are the Black Codes.
  - Congress says you cannot do this, and passes statutes in 1866 to stop this. **This is 42 U.S.C. § 1981-8**.
    - Statute INITIALLY (for 100 years from 1866 till Jones in 1982) ONLY dealt with STATE LAWS—acts by private individuals were not subject to 42 U.S.C. § 1982 (§ specific to real estate).
    - So, a private person could discriminate against people on the basis of race.
  - **Although this Act was long thought to bar only racial discrimination by the states, the Supreme Court in *Jones v. Mayer* (1968), held that the Act barred "all racial discrimination, private as well as public, in the sale or rental of property."**
    - Where is the constitutional foundation for this? The Supreme Court said that the constitutional basis for this ruling was the 13th A., which abolished slavery in the U.S., and Sec. 2 of the 13th A. gave Congress the power to enforce the 13th A. So the reasoning was that the social conditions in the 1960s towards blacks were "badges of slavery." The 13th A. is the only provision in the Constitution which regulates directly private conduct.
  - However, this provision **ONLY COVERS RACIAL DISCRIMINATION**
- *Shelley v. Kraemer* (1948) – NOTE: this is before *Jones v. Mayer*, which said Congress could reach discrimination in the housing market done by private individuals.
  - A group of homeowners get together and decide they don't want any blacks living in their neighborhood. They do not bring their local government into play, but they do all sign a K saying they won't sell to blacks. The state comes into play when it

has to enforce the K when it has been breached. They only statute that comes into play here (remember we are in 1948) is 42 U.S.C. § 1982. And, the Supreme Court still hasn't said that 42 U.S.C. § 1982 applies to private conduct (this happened in 1968 in *Jones v. Alfred Mayer*).
    - Later Congress will pass the Fair Housing Act, but *Shelley v. Kraemer* used the Constitution. Can you get something like *Shelley* out of the 14th A.? The general theory is that with *Shelley*, the Supreme Court really wanted to say that 42 U.S.C. § 1982 forbids this, which they did in 1968.
    - Found justification in §1 of 14th A. – citizenship clause- declare: fed govt is not going to tell you what your rules for property are going to be like but whatever legal rules you adopt re: transfer of real property that apply to white citizens, apply to ALL citizens
    - Today, none of this is an issue: today we have an express, comprehensive federal statute expressly targeted to housing discrimination based on and similar to the Civil Rights Act of 1964 dealing with employment discrimination. Many of the questions that needed to be answered by the housing statute had already been decided by Congress in 1964 with the Civil Rights Act.
- **Civil Rights Act of 1964**
    - Important because it was the basis for the Fair Housing Act of 1968.
    - What did Congress hit on? Race, religion, and national origin, sex
- **Fair Housing Act of 1968: 42 U.S.C. § 3601 et seq.**
    - This is the comprehensive Federal Housing Code
    - We can generally base its constitutionality on the Commerce Power
- Limitations on the Expansion of State Fair Housing Statutes
    - There are some restrictions on First Amendment grounds → freedom of association and speech
    - Housing discrimination laws clash with freedoms of speech and association because they forbid you from saying shit and potentially require you to associate with people
    - Discrimination Laws generally win over the past 40 years over a wide range of cases

Fair Housing Act of 1968: 42 U.S.C. § 3601 et seq.

Generally

- in 1968, Congress enacted the Fair Housing Act. The FHA makes it unlawful to refuse to sell or rent a ***dwelling*** to any person because of race, color, religion, or national origin or for other unreasonable reasons. In 1974, the Act was amended to prohibit discrimination on the basis of sex. In 1988, the Act was further amended in two ways: (i) it prohibits discrimination against persons with children except in senior citizen housing; and (ii) it prohibits discrimination against handicapped persons.

§ 3601

- Declaration of policy to provide fair housing throughout the U.S.

§ 3603(b): Exemptions

- the Fair Housing Act provides that private clubs, dwellings for religious organizations, and certain specified persons are exempt from the Act. The purpose of these exemptions is to protect some types of close personal relationships from what is though to be an invasion of privacy.
- Note: exemptions are listed before the prohibitions.
- **Caveat #1: No matter what these say, § 1982 still is a bar to ANY discrimination based on race.**
- **Caveat #2: None of these exemptions applies to § 3604(c), the advertising restrictions.**
- **3603(b)(1)**: Single Family Dwellings
    - Any single family house sold or rented ***by an owner*** does not have to be done under the FHA. This means that the FHA really only applies to multi-family dwellings.
    - Conditions that must be met to use this exemption:
        - The owner owns/has interests(trusts) no more than 3 single-family homes, i.e., the owner cannot be a real estate developer.
        - The owner can only use this exemption once in a 24-month period.
        - The owner cannot use a realtor or salesman of ANY type, i.e., the owner has to do the sale or renting on his own.
        - The owner cannot use an advertisement that violates 3604(c).
- **3603(b)(2)**: Small Owner-Occupied Multiple Unit
    - a person is exempt is she is offering to lease a room or an apartment in her building of four units or less, one unit of which she occupies, and she does not advertise in a discriminatory manner.
        - This is known as the "Mrs. Murphy exception." don't want to force Mrs Murphy who owns the small building to live next to "them"… (today, this wouldn't work, but back in 1968 different time…) (although when Jones applied § 1982 to private individuals, Murphy exception dies for race…)
    - *Basically – can discriminate however you want as long as you're not a big developer and you don't advertise it and you don't use a real estate agent or broker, etc. or if you're essentially letting someone live in a small building/home that you occupy (i.e. the Ms. Murphy exception).*

Interaction Between Sec. 1982 and FHA

- *Sec. 1982 does not have any exemptions for a single-family dwelling or for "Mrs. Murphy." Sec. 1982 applies to sale or rentals by an owner of a single-family dwelling or by Mrs. Murphy. A person denied admittance to Mrs. Murphy's apartments must sue under Sec. 1982 rather than the FHA.*
- Sec. 1982 is broader and narrower than the FHA:
  - It's narrower in that it only applies to race discrimination.
  - But, with respect to the conduct that it covers, Sec. 1982 has no exemptions (so if dealing with race, all the FHA exemptions irrelevant).
  - One important legal effect that happened in *Jones v. Alfred Mayer*, (applied § 1982 to private) was essentially to repeal the Mrs. Murphy exemption if you are discriminating on the basis of race.
- These are FLOORS to state housing laws → state can't have less than these provisions, but certainly can have more/ broader statutes

§ 3604: Substantive Provisions

- **3604(a)**: contains basic substantive regulatory scheme of the statute.
  - It's unlawful to refuse to sell or rent, after the making of a bona fide offer, or refuse to negotiate the sale or rent of any dwelling on the basis of race, **religion, or national origin** (sex, familial status, and handicap were added later).
  - Discriminating on the basis of having children (under the age of 18) is against the act under the familial status section (which was added in 1988).
  - CAN discriminate on any other grounds unless you're using it as a pretext for discriminating on the basis of one of the protected classes.
  - But, don't forget to check local laws.
- **3604(b)**: it's unlawful to discriminate against any person in the terms, conditions, or privileges connected with selling or renting.
  - 3604(a) says you cannot refuse to deal with someone; **(b) says you can't refuse to give them things/ charge higher rent** .
    - Ex.: I will sell to a black person, but I will do it in a manner to limit the benefits. 3604(b) anticipates this move, and prohibits it.
- **3604(c)**: it's unlawful to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement that indicates any preference, limitation, or discrimination.
  - Hypothetical: you walk around school and see signs that say, "Male Roommate Wanted." Is this discrimination? Yes, absolutely—it violates the Fair Housing Act of 1968. The Dept. of Justice said they will not enforce expressing sex preferences in advertising.
  - Bottom Line: every flyer for a sublease or roommate or a particular sex violates this FHA provision; no one has brought a case that has reached the merits though.
- **3604 (d) & (e)**: deals with inducing sales and steering:
  - Bottom Line: you can't steer protected classes towards or away from certain areas
  - 1. (can't lie) You can't tell someone a dwelling is unavailable because of race, religion, or national origin.
  - 2. (can't steer) A real estate agent can't say, "You don't want to move there because there is a black family moving in."
  - Adds "handicap" to protected classes.
- **3604(f):** the handicap provisions:
  - 3604(c), the advertising section, is the first appearance of handicapped in the statute, and 3604(a) and (b) don't discuss handicapped. You have to go to 3604(f): this prohibits discrimination on the basis of handicap.
  - Why did this happen?
    - There could be circumstances where it's not someone being crazy and discriminatory; therefore, handicaps are treated systematically under their own rules.

§ 3607: Exemptions

- **3607(a)**: **Religious Organizations and Private Clubs Exempted**
  - Religious organizations that are housing people in a religious facility can use it as a religious facility and express a preference for members of their own religion.
  - Exemption limited to non-commercial housing purposes:
    - Ex.: seminary dormitories can be limited to that particular religion, but you can't turn around and rent-out a vacant room for commercial purposes.
  - *Exemption also limited to religious organizations and private clubs that DO NOT restrict their membership on account of race, color, or national origin (albeit sex not mentioned here- so religions can discriminate on the basis of sex)*
    - Ex.: can't get around the FHA by establishing the World Church of White People.

- **(b) Number of Occupants; Housing for Older Persons Exempted**
  - Can have reasonable federal, state, or local limitations on maximum occupancy → safety shit, fire codes.
  - Familial status stuff doesn't apply to housing for older persons:
    - Can keep the old folks homes
    - Have a narrow definition of "housing for older persons" (housing where primary focus on ppl 55+).
- § 1982 doesn't deal with religious and familial status discrimination → so § 3607 is a full exemption this time (unlike Ms. Murphy exception in § 3603).

Proving Discrimination

- to prove a violation of the FHA or Sec. 1982, the P must first establish a prima facie case. To make a prima facie case, the P must show that:
  1. She is a member of a statutorily protected class;
  2. She applied for and was qualified to rent the designated dwelling;
  3. She was denied the opportunity to inspect or rent the dwelling;
  4. The housing opportunity remained available for others.
- Second, if the P makes a prima facie case, the burden shifts to the D to produce evidence that the refusal to rent was motivated by legitimate considerations having nothing to do with the P's race, religion, ethnic origin, sex, disability, or family status.
- Third, once the D introduces evidence of his alleged legitimate reasons, the burden shifts back to the P to show that the alleged legitimate reasons are pretextual and not the real reasons.

Harris v. Itzhaki (9th Cir. 1999): Typical FHA Litigation

- **The Prima Facie FHA Case**:
  - What does it take to get into court? What does it take to survive 12(b)(6)?
  - (1) P rights have to be protected under FHA
  - (2) As a result of D discriminatory conduct, P has suffered a distinct and palpable injury (minimal Art. III "injury")
    - Just being "there" and aware of the discrimination is enough for standing
    - E.g., here the P only overheard racial remarks about renting, she herself wasn't actually injured

- Hypothetical: what if I said I will only rent to people who are huge pro-wrestling fans, and it happens that pro-wrestling fans are overwhelmingly white? Can you do this?
  - First say that you are trying to get around discriminating because of race or sex. This is a complicated question with several levels.
    - If the thought process that really went through your head was: I want to discriminate on the basis of race, but I can't do it directly, is there something I can use as a proxy? **If this is genuinely the process, then this is a violation of the FHA.**
    - But, what if you do not admit this? You really do love wrestling, it's just that your selection criteria just winds up excluding all applicants. Have you still violated the FHA?
  - This triggers one of the most fundamental questions in discrimination law, but mostly in employment.
    - **It raises the question, what does it mean to discriminate? Does it mean that you have to have the mindset to discriminate, or is it sufficient just to violate the statute, regardless of your mindset?**
- In the language of discrimination law: is the action due to disparate treatment (mental state) or because of disparate impact (consequences)?

Two Theories of Liability

- (1) Disparate Treatment – MENTAL STATE
  - Violates FHA regardless of intent
    - How can one prove the violation?
      - Normally the way we prove a mental state is by asking the alleged discriminator at trial and letting the jury decide
      - We can also look to surrounding circumstances, empirical findings, past history, disparate impact
- (2) Disparate Impact – CONSEQUENCES
  - (a) Prima Facie Case
  - (b) Title VII Burden Shifting
    - Prima Facie Case – Plaintiff
    - Defendant – articulate some legitimate, nondiscriminatory reason for the action

- Plaintiff – raise a genuine factual that the proffered reason is pretextual
- If at any point a party fails to shift the burden back, the opposing party can win a summary judgment; if there is a genuine factual dispute between pretext vs. no pretext, it's a question for the trier of fact

Consequences of anti-discrimination regime:

1) Bumps up against 1st Amendment rights:
- **RULE: Conflicts b/w antidiscrimination and 1st Amendment where race is involved, anti discrimination usually wins**
- **RULE 2: When anything other than race other when conflict w/ 1st Amendment, unclear how it will come out – case results in fed and state level very mixed.**
  - Difference b/w fed and state law can make huge difference
  - If under state – tradeoff b/w free speech and liberty v. housing
  - Any state can say that own constitution has a broader protection for freedom of religion than fed const, so there are things that fed const says laws can do w/o violating 1st A where state SC will say that it constitutes State const.
    1) Can't deny application of FHA of 1968 on the ground that application of statutes would violate state norms of freedom of speech/religion
    2) BUT wrt to local statutes or ordinances, every state can make judgment on how laws play out against Const traditions/provision
       - So balance may be diff one state than another
  - Huge range of problems/situations out there
- Nature of material limits how detailed we can be on this subject
- MA sets up a balancing test b/w the rights

STATE HOUSING LAWS:

Fed law is just the beginning to this inquiry- it is the Floor- States/Localities are often stricter (supplement sexual orientation etc.)
OR even if state law is same as fed in substance, can have varying remedial options:
- Fed laws provide really good remedial package: damages, attys fees, injunctions § 1989 (atty's fees)
- State law could provide better remedy than fed law (but can't take away)/ or resolve claim quicker

Some states have very broad statutes:

CA Statute = "no unreasonable discrimination" w/o defining what discrimination is and just leaves it case by case.

Case: L says that only want to have T that has income 3x monthly rent so that L doesn't run into Cherokee problems. P comes in and says that's overinclusive, there are ppl whose income not 3x rent, and can still pay the rent.
- 1) E.g. Possible to have a lot of wealth but not a lot of income.
- 2) Even if income low, can go to state apply for assistance.
- 3) Affects men more than women
- L would do this as a reasonable basis, can it be possible that CA won't allow this due to their statute?
  - State ct says yes!
  - SC overturns this

Property Torts: Trespass and Nuisance

- If you want to get somebody off of your land, the legal action you can take is an ejectment.
  - If the person you want to kick off is your T, you can use an eviction statute. But, suppose they aren't there anymore (the T)—you are trying to recompense for injury or damage that they did when they were there; or you might want an injunction to prevent them from coming back on your land. **It is at this point that the law of tort comes around.**
- When you are worried about ***protecting your land from injury by others***, the law of torts enters in the twin torts of nuisance and trespass.

	Nuisance	Trespass
Threshold	Diminimus threshold – at a minimum what you are complaining about causes significant harm to a reasonable person/property.	
Remedies	1. Permanent damages – into future. 2. Past damages and injunction	Harsher
Proofs		None necessary
Showing of harm		
Invasion	YES – decreasing land value usually not enough	YES

Nuisance vs. Trespass

- **Trespass and nuisance are mutually exclusive.**
  - Nuisance: interference with the use and enjoyment of the land
  - Trespass: invasion of the possessor's interest in exclusive possession
- *Trespass – vindicate possession rights*
- *Nuisance – vindicate use/enjoyment rights* (neighbor's mushroom house pisses you off)
- Two separate torts: Trespass and Nuisance
  - Trespass is the easiest tort to understand and apply
  - Nuisance is the most difficult tort to understand and apply
- Distinguish from, say, an Ejectment Action, which is designed to establish the PARAMOUNT NATURE of your property rights
- **If you can SEE IT, AND FEEL IT, AND TOUCH IT with the UNAIDED senses, it is a TRESPASS, if not, it is a NUISANCE (this goes to trespassory vs. non-trespassory invasion inquiries)**
  - Invasions by sound, smell, light = Nuisance
  - Invasions by tangible, physical particles = Trespass
- Trespass is more advantageous → automatic injunction, no balancing, all you have to do is cross the boundary, no reasonableness issue, absolute strictest liability
- So law creates two categories of invasions
  - (1) We don't want to hear about it – boom injunction (Trespass)
  - (2) Well, you know people have to live together (Nuisance)

Trespass

- a suit in trespass is any forcible interference with P's possession of land.
- Trespass is a "super tort": all of the normal tort law goes out the window with trespass.
- **Trespass: You will be liable even though you don't do any harm to the land, so long as you**
  - **INTENTIONALLY enter land of another or cause a 3rd person to do so; or**
  - **INTENTIONALLY remain on the land; or**
  - **INTENTIONALLY fail to remove from the land a thing which he is under a duty to remove**
  - RST, Sec. 158: Liability for Intentional Intrusions on Land: this section is not like other torts which say "no damage, no tort." This is not true for trespass: you can be liable even if you cause no harm whatsoever. Your damages may well be zero or minimal, but damages are not the only remedy, you can also get injunction. **So "super tort" aspect #1 is that trespass does not require a showing harm/damages.**
- Thus, the only requirement for liability is that you intentionally go on the property – and you don't have to know its someone else's property
- **You just have to intend to move your body physically the way that it moved.**
  - ***It doesn't mean that you intended to go onto someone else's land.*** – moving on your own volition
  - You might have reasonably believed it was your own land, but this is not important.
  - *The basic part of trespass is that you crossed someone else's boundary. All you have to do is cross the line—end of tort.*
- What is the line that must be crossed?
  - RST, Sec. 159: the trespass can be conducted on, above, or below the Earth. There is a line that marks the boundary or your property; someone crosses this and then there is the tort of trespass. (ad celium rule…)
    - Subsection (2): flight by aircraft is a trespass only if it causes harm and if it is close to the ground.

- Can they really mean NO HARM?
  - Sec. 163: yes, they really mean that—harm is not important.
- Surely there has to be some teeth to this tort. Should an innocent boundary crossing that causes no harm be a tort?
  - **Mistakes don't matter in trespass**, you can make the most reasonable mistake in the world – you could even think that the property belongs to you and a paper that you think confirms this belief – and you are liable for trespass
    - **ALL YOU HAVE TO DO IS CROSS THE BOUNDARY**
    - § 164 of Restatement (exceptions)
- Exemptions for Trespass
  - There are a whole series of provisions when it is OK to go onto someone's land.
    - Ex.: if you have someone's *consent*. Once you have someone's consent and are on the land legitimately you have certain rights. (consent to be in one part of the land, might also give consent to be in another part of the land—i.e. invite you to watch a game, you can be in living room AND bathroom etc…) This consent can be withdrawn, but you have to be given an appropriate period of time. There are also certain privileges about obtaining items.
    - Ex.: you buy a car, and it's on my land; I have to let you on my land.
    - Ex. Reclaiming your property….
    - Ex. Emergency….
- REMEDIES
  - **With trespass, if you ask for an injunction, you get it. (don't need to even show any damages.. trespasses may have even helped you!) (and you could get nominal damages- to specify your dignitary/right harm ; once have nominal damages, can tack on ton of punitive damages)**
    - The tort of trespass has attached to it one of the most powerful remedial mechanisms in the law- an injunction.
  - This is very different than other situations where the P wants an injunction. Normally, if you want an injunction, courts will only do so under two conditions:
    1. Court normally has to be satisfied that writing a check won't be adequate, i.e., when damages aren't adequate and won't do as a remedy;
    2. Even if you can show liability (that the other person was a wrongdoer), a court is not obliged to hand out an injunction, this is different than with monetary damages. Even if you've proved that money isn't enough, the court still does not have to give an injunction. The court will ask what the effect of the injunction will be on society at large.

BUT trespass, albeit very powerful, only applies to boundary crossings…

Nuisance

- a nuisance is an unprivileged interference with a person's ***use and enjoyment of her land.***

Restatement Approach

§ 821(d): Private Nuisance (public nuisance not important for us)

- (1) *A non-trespassory invasion*
- (2) Of another's interest in the private *use and enjoyment* of land (as distinguished from possession- that's trespass)
- There are two parts to this:
  - (1) something is only a nuisance if it is an invasion;
  - (2) it has to be non-trespassory (remember nuisance and trespass are mutually exclusive)
- a private nuisance is conduct that causes ***substantial interference*** with the private use of land and is either (i) ***intentional and unreasonable***, or (ii) ***unintentional but negligent***, reckless, or resulting form an abnormally dangerous activity (for which there is strict liability). A person cannot sue claiming a private nuisance unless she has a property interest that is affected or alleges bodily harm as the result of the activities complained of.

Other Differences Between Nuisance & Trespass

§ 821(e): Who can recover: Standing to Bring Nuisance Actions

- Only those with Use and Enjoyment privileges can bring actions
- (a) Possessors of the Land
- (b) Owners of Easements and Profits in the Land
- (c) Owners of non-possessory estates (future interests) in the land that are detrimentally affected by interferences with its use and enjoyment
- The only person who can recover for trespass is a possessor of land. Nuisance protects use and enjoyment, **so people who can bring nuisance acts have to have use and enjoyment**. Who is this?

- Possessors of the land, but also owners of easements and profits in the land. Also, the holder of a reversion might be able to bring a nuisance action.
- **So, the range of people who can bring a nuisance action is wider than trespass.**

§ 821F
- There is one very important limitation on the tort of nuisance.
- There is liability for a nuisance ***only to those to whom it causes SIGNIFICANT harm of a kind that would be suffered by a NORMAL person in the community***.
  - So, you don't have to show any harm under trespass law, **but with nuisance you have to show significant harm**.
  - The mere fact that you can say that this person has harmed me in my use and enjoyment of land, does not pass the threshold for nuisance liability. So many things are expressly excluded from the law. **You cannot be an ultra-sensitive person in bringing a nuisance action.**
- i.e., NO "Eggshell" Plaintiffs (your rare conditions not relevant) in Nuisance actions
- Nuisance is measured by the objective standard of a normal person or property in normal condition used for a normal purpose
- Objective inquiry into what average normal ppl do…

§ 822: General Nuisance Rule – When are you liable for a nuisance action?
- One's conduct must be the LEGAL CAUSE of and INVASION of another's interest in the private use and enjoyment of the land
- **The Invasion Must be**
  - **(a) INTENTIONAL and UNREASONABLE, or**
  - **(b) Unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities** (don't worry 'bout this for class)
- **Difference from Trespass: with nuisance you can only be liable for doing something UNREASONABLE → in trespass the reasonableness of your actions don't matter**

825. What is intentional?

The only thing that has to be Intentional is the act (volitional) – **you don't have to INTEND to create a nuisance**: (like trespass) an invasion is intentional if the actor acts for the purpose of causing it, or knows that it will result from his conduct.

§ 826: Unreasonableness of Intentional Invasion – How is an invasion unreasonable?
- under the RST, any intentional invasion of an interest in the private use and enjoyment of land is unreasonable, and therefore a nuisance, if (a)the ***gravity of the harm outweighs the utility of the actor's conduct***. OR (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 continuation of the conduct not feasible.***
  - Balancing the gravity of the harm against the utility conduct requires an examination of particular factors in each case.
  - Even if the utility of conduct outweighs the gravity of the harm, an activity can still be a nuisance if the harm is ***serious*** and the D ***can afford to pay*** those damaged.
- 826(a): the **gravity of the harm** OUTWEIGHS the **utility of the actor's conduct**.
  - A judge deciding how much good and how much bad is done by various actions has guidelines in the RST: (ex. Pig farmer vs bbq-ing neighbor)
  - § 827: Gravity of the Harm
    - **In determining the gravity of the harm, the following factors are important:**
      - The extent of the harm involved
      - The character of the harm involved
      - The social value that the law attaches to the type of use of enjoyment invaded
      - The suitability of the particular use or enjoyment invaded to the character of the locality
      - The burden on the person harmed of avoiding the harm
  - § 828: Utility of Conduct
    - The RST lists the following factors to be considered in determining the utility of the conduct of the invader:
      - The social value of the primary purpose of the conduct
      - The suitability of the conduct to the character of the locality
      - The impracticability of preventing or avoiding the invasion

Gravity vs. Utility – Severe Harm:
- § 829A: Unreasonable harm is harm resulting from the invasion that is SEVERE and greater than the owner should be required to bear without compensation
- § 830: Harm is unreasonable if it is significant and it would be practicable for the actor to avoid the harm in whole or in part without undue hardship

- § 831: Conduct Unsuited to Locality
  - Invasion unreasonable if the harm is significant, and
    (a) the particular use or enjoyment interfered with is well suited to the character of the locality; and
    (b) the actor's conduct is unsuited to the character of that locality.
- OR 826(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 continuation of the conduct not feasible

§ 840D: Coming to the Nuisance

- The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable.
- If the D's use was first, the P has "**come to the nuisance**" and has a less appealing case because she could have avoided the harm.
- Although some courts will take into account the P's coming to the nuisance, ***in no court will that fact be determinative*** – all other relevant factors will also be considered….it is a factor to be considered in determining whether the nuisance is actionable

Other Issues Regarding Unreasonableness

- Negligence is NOT required for a finding of unreasonableness
- Nuisance is a STRICT LIABILITY Intentional Tort
  - You can have the best run oil refinery in the world and still cause a nuisance
  - If there were Negligence, it would be an absolutely SEPARATE (and easier) action
  - So, in the absence of negligence, Nuisance steps in as a DIFFERENT tort that is measured by Strict Liability → A nuisance is a nuisance is a nuisance regardless of how much due care you exercised
  - (Morgan v. High Penn Oil)
    - Trailer park and refinery with fumes
    - Want injunction (shut down factory); damages
    - Pass 821D? nuisance? – invasion of sound/smell
    - Pass 821 E? – yes, present possessors
    - Pass 821 F? reasonable harm? – yes, P not being hyper-sensitive
    - Pass 826A? gravity of harm vs utility

    Claim are running perfect refinery- but doesn't have to negligent….

Distinguishing Nuisance from Trespass

- Suppose your neighbor has a hog farm. Nothing goes onto your land, but you can smell the hogs. Is the smell that you are experiencing a trespass?
  - **We know that smell results from particles, BUT SMELL IS NOT A TRESPASS!**
  - **Same thing goes with light and sound.**
  - **So, intrusions as a result of SOUND, LIGHT, or SMELL are classic instances of NUISANCE, rather than trespass.**
  - The trespass has to be a particulate (physical particles)—but obviously this doesn't deal with smell and the idea of breathing not being anything.
- How do we know what distinguishes the nuisance cases from the trespass cases?
  - **If you can**:
    - **SEE IT**;
    - **FEEL IT**; or
    - **TOUCH IT**
    - …with the unaided senses, it is a **TRESPASS**.
    - If any of these three things is false, then it is a nuisance. The only time this doesn't work is intrusions from water. But, this has to do with peculiarities with water law.
- So anytime you are dealing with an invasion:
  1. Ask if the thing is a particulate, i.e., a physical invasion, if yes, then it is a trespass.
  2. If not, ask if you can see it, feel it, or touch it. If you can then you are in the world of trespass.

Implications of the Restatement Approach

- The "gravity vs. utility" balance is PART OF THE INITIAL LIABILITY DETERMINATION
  - Can't have a nuisance without doing this balance of equities
  - But, in practice, this makes little sense because when you get to the remedies stage, you'll have to balance the equities all over again (first consider balance to determine liability, THEN reconsider balance to determine if should grant injunction - balance of equities… is it better or not to grant injunction? – compare harms of shutting down activity and harm to P, and consider public interest)

- And if you've already favorably balanced the equities to make the initial liability determination, it would be inconsistent to say the balance of equities is not met in order to deny an injunction and just give the victim damages
- And furthermore, Remedies for nuisance are supposed to be based on normal legal principles, not the automatic injunction issuing like in Trespass
- This leads to the way nuisance actually operates in practice

SO…. Create section 826 B….

Implications of the Restatement's Approach: Sec. 826(b)
Boomer v. Atlantic Cement Co.

- A cement company discharges pollution into the air, which prevented the P from grilling outside. But, the cement company is the largest employer in the town and pays the most taxes. Clearly, the P's ability to grill is less important than the huge tax revenue.
- So, the P clearly cannot establish liability under Sec. 826(a)
  - ***Here, the gravity of harm does not outweigh the utility of the actor's conduct***, i.e., the harm, the P not being able to grill, is a lot less important than the utility of the actor's conduct, i.e., the operation of a cement plant.
  - So, this means ***no nuisance***—the P gets nothing.
  - **BUT, if the P can show that the harm is extremely severe, then maybe they would hold the cement company liable.**
- But, then there is **Sec. 826(b):**
  - If you take 826(a) as the straight up standard for nuisance liability, then **you have to say it is a nuisance or it's not. And usually once determine that's a nuisance, grant injunction, which is too much recovery for P…**
  - But, this pissed off a lot of people. So, if the judge found that this was a nuisance, his only choice was to screw the homeowner or shut down the cement plant.
  - Wouldn't it be easier if the cement company would just write a check**? This is essentially what Sec. 826(b) of the RST does (give damages but no injunction since injunction allows P to grab D by the balls and sell it back at crazy prices)**: something that meets the standard for unreasonableness if it causes:
    - (1) Serious harm; and
    - (2) The financial burden for compensation would not make the continuation of the conduct unfeasible. (MUST consider financial burden on potential plaintiffs too… i.e. yes we can pay you, but can we pay 1000 ppl like you who'll come racing after we pay you?)… So in effect 826B works for discreet problems between individual parties…can always go to balance test in 826A if you need to…
    - **Basically, if you have to pay off everyone and you'd go bankrupt, this is not a nuisance. (i.e. going bankrupt is like passing 826a injunction- will this shut you down?) But, if you can write checks to everyone and you can pay everyone off and keep operating, then there is a nuisance and the tortfeasor will have to pay.**

RST 826(b)

- 826(b), strictly speaking, codifies *Boomer*.
- It was precisely to take into account cases *Boomer* that the drafters of the RST changed their approach to nuisance. **They left in the previous view on nuisance about balancing the harm, but they also made it less restrictive**.
  - The new view says that if the D could pay of everybody and still do what they are doing, then the D should pay them off.
- **The way 826(b) is written it is only triggered when the harm caused by the conduct is serious**.
  - **This presumably means that if the harm caused by the conduct is not serious, the only way you are going to get liability is by the old way: the gravity of the harm must outweigh the utility of the conduct.**
- Question about Sec. 826(b): once it is available to a P, why would a P ever use any other theory of liability?
  - 826(b) is a whole lot easier, why get yourself into the cost benefit balancing test? (wont shut someone down, but get a check…)

- Thus, **Nuisance Test in Practice**:
  1. Plaintiff has a private INTEREST in the use and enjoyment of the land – RST § 821(d) & (e).
  2. There must be a non-trespassory invasion – RST § 821(d) & (e).
  3. The harm is SIGNIFICANT to a NORMAL PERSON – RST § 821(f).
  4. The harm is INTENTIONAL – RST § 822.
  5. The harm is "SERIOUS" – RST § 826(b).
  6. Compensation through money damages will not put the D out-of-business or financially cause them to discontinue the conduct in question – RST § 826(b).

  THIS GETS YOU LIABILITY FOR NUISANCE **– Money Damages if you can prove them**
  - **(7) If you want an injunction, the "Gravity vs. Utility" Balance must be met (§ 826(a) et seq.)**

Hendricks v. Stalnaker (W.Va. 1989)
Nuisance problem occurs not with any one thing (most things independently are fine), but when two things are incompatible when put next to each other…

- One wants a septic system and one wants a well and there is a law saying that one can't be within 100 feet of the other and the only places to put the respective improvements on their respective properties is within 100 feet of each other
- The Well gets there first and the septic guy sues for nuisance
- Court says FUCK OFF → There is NO INVASION
- Nuisance IS NOT ABOUT GOOD GUYS AND BAD GUYS → Nuisance is simply about INCOMPATIBLE USES OF LAND

The Concept of the INVASION

- You just can't complain that somebody did something that damaged you- (competitor build gas station across from your gas station- that fucks with your enjoyment of your land BUT) the definition of a nuisance in the Restatements includes the concept of an invasion; a non-trespassory invasion.
- As a GENERAL RULE, something has to cross the boundary line of your property, whether it is smells, sound waves, or light waves, etc.
  - Note Hendricks above (or the competing gas station) – no boundary-crossing

EXCEPTIONS TO THE BOUNDARY-CROSSING/ INVASION RULE

- With these exceptions, courts are essentially going to say there is an "invasion" even though no boundary has been crossed.
  1. Situations where it is almost 100% certain that a boundary-crossing will occur if the defendant does or completes the conduct in question. This is an **anticipatory invasion**.
     - Ex.: the defendant is building a DUMP next-door → Court will enjoin this on a nuisance theory because it is 100% certain that, even if it is the best-run dump in the world, there will be smells and flies crossing your property boundary upon its completion
     - See Brainard v. West Hartford
  2. Embalming and undertaking services located (or sought to be located) in a residential district.
     - See Jack v. Torant
     - In *Jack v. Torant*, there is a residential neighborhood. D's bought an 18 room dwelling house, and make a funeral home out of it. The P's win a case for nuisance. How did they win? The court ruled that the immediate neighbors suffered an immediate effect: the D had a depressing effect on the P's, and they suffered loss of enjoyment of their property, and also a decreased market value.
     - Pretty much everywhere in the country, if you try and put a funeral home in the middle of a neighborhood, you are almost definitely going to be found liable for nuisance—it's all based on the "bum out" effect and the decrease in property values., regardless of how well they are run (BUT this only applies to funeral homes) (so don't build funeral homes in res. areas or face constant naissance litigation…exception is some states including IL)
     - Are there other things that have these effects?
       - Does NOT extend to cemeteries: for every state with an undertaker case, there is a Cemetery case where the P Loses and it is NOT enjoined.
       - Does NOT extend to AIDS hospices, etc.
  3. Half-Way Houses, but only SOMETIMES
     - Nicholson v. CT Half-Way House, Inc. (Ct. 1966)
       - Refused to enjoin the PROSPECTIVE operation of a half-way house
       - Bottom Line for Court: No Invasion = No Nuisance
       - Plaintiffs' Arguments
         - Evidence of decrease in property values with announcement of a half-way house to be located in the neighborhood
         - Anticipatory fears of invasions
       - Court's Response
         - **Sue when there's actually an invasion**
         - **Anticipation here is no where near as certain as with a dump**
         - **Falling property values are not an invasion**
     - Ark. Release Guidance Foundation v. Needler (Ark. 1972)
       - Enjoined the operation of a half-way house ALREADY OPERATING in a neighborhood
       - One sex offender got in, one person dismissed for boozing (but these aren't invasions)
       - Court bases nuisance decision on
         - (1) real and reasonable fear for safety; and
         - (2) demonstrated drop in property values
         - (3) inclusion of sex offender and alcoholic
       - Court tries to distinguish Nicholson, but court is wrong: Nicholson is indistinguishable

        - Nicholson sued prior to operation; but here it has been operating and there have been NO INVASIONS, so what's the problem?
        - Nicholson had no evidence of a decrease in property values: this is plain FALSE
        - Nicholson was anticipatory fear – yeah, well nothing has happed with this house, so this stuff is anticipatory too
    - West Shore School District vs. Cmmw. Pa.
        - Half-way House case and court goes with Nicholson and refuses to enjoin it
- **General proposition**: Need an Invasion, but in certain RARE events, you may be able to get a court to enjoin something as a nuisance without an invasion
    - Plaintiff's general objection is going to be a decrease in property value associated with the challenged conduct
    - NOTE: could have a local zoning ordinance restricting half-way houses so wouldn't need nuisance

Depreciation of Property Value as a Nuisance

- use of property in a manner that depreciates the value of surrounding property ***is not enough by itself*** (still need invasion) to constitute a nuisance. Even so, it is an important factor in proving that there is substantial injury to the P. In the case of "psychological" nuisances (cemeteries, funeral homes, halfway houses, etc.), depreciation of neighboring property values may be the underlying controlling favor.

Remedies for Nuisance

- (1) **Damages**
    - Find Liability
    - Prove your Damages like any other tort
- (2) **Injunction**
    - Need to do normal remedial balancing
        - Harm to P in not issuing vs. Harm to D in issuing
        - Public Interest
        - Administrative Burden
        - Money Damages not adequate
    - Get Gravity vs. Utility in there too
    - Violation of the Court Order is a Crime and you go to Jail
- (3) **Buy-Out-the-Plaintiff Option**: Boomer v. Atlantic Cement Co.
    - This is a cement plant giving-off dust, etc.
    - In essence, NY Court engineers a **buy-out of an easement** from all affected owners to make the claims res judicata
    - **Is essentially awarding "Total Future Damages" to all the homeowners**
        - Check for difference between property value with cement and without and that will be total and final remedy for anything
        - Damages cover past harms and capitalize all future homes with one big damage payment now to make any claims res judicata
    - Here, equitable balance is in favor of the Cement Plant buying-out an easement from the homeowners and not vice versa because the Plant employees 300 people and we don't want them to be out of a job
- (4) **Buy-Out-the-Defendant Option**: Spur Industries, Inc. v. Del E. Webb Development Co.
    - Building retirement homes that get closer and closer to a feed lot until it gets too close that you can smell it
    - That the feed lost was there first is NOT RELEVANT; *coming to the nuisance is not a valid consideration in liability*, it is only a valid consideration in the remedy → see § 840D
    - But, you see, Webb doesn't just want money damages, he wants an injunction so he can keep selling his houses and the court doesn't HAVE to issue an injunction
    - Court: **We'll issue you an injunction if you buy-out the feed lot** (i.e. compensate them for having to go out of business since you came to them – an injunction is equitable, remember?)

Law of Servitudes

- landowners often want to make agreements with their neighbors respecting the use of one or both of the parcels of land. These agreements can be divided into two broad categories:
    1. Rights arising from a ***grant*** of a right by one landowner to another (this is an ***easement***), and
    2. Rights arising from a ***promise*** respecting the use of land by one landowner to another (known as a ***real covenant*** or an ***equitable servitude***).
- Agreements landowners make with each other regarding their **uses of land**; can be unilateral ("I give you permission") or mutual

- **This has ZERO to do with possession – it is about USE**
- R3P → all about Law of Servitudes and was an obvious effort at law reform
- Law of Servitudes is stupid for identifiable reasons
  - Issue: there are 4 different categories of servitudes
    - (1) Easements
    - (2) Licenses
    - (3) Real Covenants
    - (4) Equitable Servitudes and Implied Equitable Servitudes
  - All of these are rights to do thing's to other people's land that otherwise would be torts.
  - Each have own unique sphere of application and they overlap
  - Each one of the 4 is a doctrinal disaster area, then we combine them – uh-oh

AAAAA Easements

- an easement is a grant of an interest in land that entitles a person to ***use*** land possessed by another.
- Definition: "*A Right to do something to someone else's property that would otherwise be a trespass or a nuisance*"
  - It's a use right on someone else's property and 1. **cannot be revoked at will and 2. can bind subsequent owners of that land**. (difference with license)
  - Now that you have the right to do it, it is no longer a trespass or a nuisance
- The Law allows you to break off use rights to your property without giving up possession
  - i.e. dumping grilling ashes on neighbor's lawn
  - Negotiate an agreement and then you have an easement
- Creation: *Easements are Created BY DEED –* It's a nasty piece of drafting, especially for Scope- tough to draft, costly
  - 1. What is being conveyed?
  - 2. For how long? (duration)
  - 3. Where? Location?
  - 4. What is the SCOPE? (i.e., do I have ad inferos use rights to mine minerals if they are there?) (if you overstep what easement says it will be a tort.. so careful drafting key)
    - **Bottom Line: Need to be Crystal Clear about the Scope of an Easement**
    - Courts are usually going to give the holder of an Easement any rights that are INCIDENTAL to the enjoyment of the use of the easement
      - Thus, drafters need to think of shit when writing this stuff up
      - Farmer v. Kentucky Utilities Co.
        - Utility Company had a prescriptive easement to overhand wires
        - But when they came on to Ps land to trim the shrubs, they got sued for trespass
        - Can't make the argument for a prescriptive easement to come on to the land every few years – its just not continuous enough
        - But they can make the "incidental to enjoyment" argument
      - So we have another example of how defining the scope of the easement is a bitch, especially when its just an easement declared by the court
  - 5. In who? First party or third party? - Is it created in 3d party (not part of the buyer seller transaction)?? This will make a difference depending on jurisdiction your in (church case).

Types of Easements

I. Private Easement

- authorize specific parties (individuals or enterprises) to use land for designated purposes

II. Public Easements (not relevant for our class)

- authorize the general public to use land for designated purposes

- **I. "Affirmative" Easement – use right- right to do something that otherwise would be a tort**
  - the owner of an affirmative easement has the right to ***go onto*** the land of another (the "servient" land) and do some act on the land. **Most easements are affirmative.**

        - Ex.: when O, the owner of Blackacre, grants to A a right of way across Blackacre, an affirmative easement has been created.
    - Right to do something affirmatively to another person's piece of land that would otherwise be a trespass or a nuisance
    - Proof: leaves traces behind (for 14th c.)
- **II. "Negative" Easement – right to force another not do something that otherwise would be lawful**
    - the owner of a negative easement can ***prevent*** the owner of the servient land and his successors form doing some act on the servient land.
    - This is a veto right → **a right to prevent a use of someone else's land that otherwise would be legal** (i.e. pay you to not put up gargoyles on your lawn)
    - *Negative Easements are GENERALLY forbidden* → why?
        - In the 14th c. there was no such thing as "document management" and thus really no way to prove the existence of a negative easement – just because something has been the way you wanted it for sometime does not grant you the negative easement…. Impossible to prove… too high of probability for fraud…
        - The Plaintiff's proof argument would be circular: can't prove you promise not to do something with your land by showing that you're not doing it to your land (i.e. Suppose you have two neighbors, and one doesn't want a fence on the boundary line, and for 100 yrs the neighbor hasn't put up a fence. Now all of a sudden they put up a fence, and the you say NO, I don't want a fence. He says, well stop me- wheres the evidence that there was an enforceable promise not to build a fence. The most likely explanation is not nec that there was a negative easement and we just don't have a record of it.)
        - And...the law never changed to reflect changes in society and document management (a few exception dealing with agriculture that we don't need to know about)

I. "Appurtenant" Easement

- if an easement ***benefits*** the owner of the easement ***in the use of another tract of land***, it is appurtenant to that land.
    - The land benefited is called the ***dominant tenement***.
    - The land burdened is the ***servient tenement***.
        - The servient tenement usually is, but does not have to be, adjacent to the dominant tenement.
    - Ex.: Whiteacre is located between Blackacre and a public road. O, owner of Whiteacre, conveys to A, owner of Blackacre, a right to cross Whiteacre to reach the public road. The easement over Whiteacre is appurtenant to Blackacre (the dominant tenement).
- The use requirement of the land is for the benefit of a specific piece of land that I own
- I pay you for an easement because I own a pig farm next door and I want to send smells onto your land → **easement is for benefit of property that I own and at the burden your property**
    - Piece of land *burdened* by a use right → **Servient Tenement** (Your Land)
    - Piece of land *benefited* by a use right → **Dominant Tenement** (My Pig Farm)
- TRANFERABILITY: *"run with the land*" → you sell or buy the land, you sell or buy it with the easement - The related rights and obligations become part of the land and carry-over with grants and sales, etc
    - when the dominant tenement is transferred, any easements appurtenant are transferred with it. Similarly, the burden of an easement appurtenant passes with the servient land when transferred. An easement appurtenant is attached to the dominant tenement and passes with the tenement to any subsequent owner of the tenement. Of course, the owners of the servient and dominant tenements may make a contrary agreement if they wish. By mutual consent, they can "detach" the easement and either "attach" it to other dominant land or convert it into an easement in gross, or just write in a defeasibility condition, but neither party acting alone can do this.

II. "In Gross" Easement (becoming obsolete- just get an appurtenant easement… if don't want transferability, just say so in the appurtenant easement))

- if an easement does not benefit its owner in the use and enjoyment of his land, but merely ***gives him the right to use the servient land***, the easement is in gross. "In gross" is the term used to signify that the benefit of the easement is not appurtenant to other land. An easement in gross usually can be assigned if the parties so intend.
    - Ex.: O, owner of Greenacre, grants to Heylook Billboard Co. the right to erect a sign on Greenacre. Heylook owns no land. The easement is in gross and can be assigned by Heylook if the parties so intend. If O sells Greenacre to A, the burden of the easement passes with the ownership to A.
- A particular **PERSON** is benefited rather than a particular piece of property
- I pay you for an easement to walk across you land every day to get to the public beach, **has nothing to do with any property I own, the easement is simply a PERSONAL RIGHT**
- A right that benefits a specific person or an institution is an in gross easement.

- **A good example is electrical wires that are strung above your house.**
- No Servient vs. Dominant because there are not two pieces of property in question
- TRANSFERABILITY : Personal vs. Commercial In Gross Easements,
  - Commercial ones – assumption of being transferable/ assignable
    - A commercial in gross easement/ profit easement is one that has primarily ***economic benefits*** rather than personal satisfaction. The large majority of easements in gross are of this kind. - "Commercial" In Gross Easements usually "run with the land" (of course subject to contrary express intent)
    - Ex.: railroad rights-of-way, gas pipe lines, and utility easements. - It doesn't matter where utility co. is, they have the right to put wires over your property.- if the business gets bought-out the new owners will take over the easements – so these in gross easements are certainly transferable
    - But, there are some sticky issues
      - What is Mom & Pop delivery service gets bought-out by UPS? Does their easement to drive over your pasture, which they never did more than a few times a week, now get to be used by UPS 5 times a day?
      - This can be solved by careful drafting – but it shows the bitch of the Scope again
      - Surcharge could be asked for the additional use
  - "Personal" In Gross Easements -assumption of not being transferable - ***don't*** "run with the land"
    If right truly is personal, parties probably don't intend for it to be transferred
    - But this can be defeated by express intent language – then can become assignable

Why do we care about this distinction??? Only Appurtenant easements bind successive owners.

- When only dealing with original two parties there is no reason, but once one party transfers his land, that's when you have problems, bc its not always clear whether they created an in gross or appurtenant easement (which is why many will spell it out in the grant). However, there are situations where there is some ambiguity in the construction of the easement→
  - E.g., grant of rights to connect to sewer system- they worded it as such "party of this part" and "party of this part"→ they talk about it in terms of person, but if you really think about it they were giving the other land a way to get sewer connection. Substantively- it looked like an appurtenant easement- bc no one would buy a unit that doesn't have sewer connection, but the language looked like it was in gross. (music)

Martin v. Music

- Music has sewer access: tells Martin you can build the pipes, but I want right for one intake valve in return → Deal
- Music sells off his lots and now he has 6 people who wants to use the intake valves; but Martin wants to control the use because he doesn't want back-up in his house
- In Gross Personal Easement or Appurtenant Easement? → Interesting Question that is the crux of the lawsuit due to the transferability restrictions on them
- Look at language of grant
  - "HIS" property → seems personal (not "the" property)
  - "point to be designated by HIM"
  - Martin: this is a use right granted to a specific person and not a specific piece of land
  - Of course, no one questions that Martin's right to lay sewer lines was an appurtenant easement
- Trial Court: Appurtenant Easement, C.A. affirms
  - If trial court had found an in gross personal easement, C.A. probably would have affirmed that too
  - Interpreting instrument → better for trier of fact
  - Small general assumption in favor of appurtenant easements
    - LAW PRESUMPTION: IN favor of appurtenant easements→ so if you want an in gross easement you should be pretty damn clear about it- that you want it to be personal to that person (bc in ambiguous circumstances, with no indication of intent otherwise- the courts will find an appurtenant.

I.. "First Party Easement"

- A party to the conveyance receives the use right
- **A First Party Easement occurs when I receive the use right myself**
- *Easement by Reservation*
  - an easement may be reserved by the grantor over the land granted. If the grantor conveys the land, reserving an easement, the land conveyed is the servient tenement.

II. "Third Party Easement"

- The person benefiting from the easement is not a party to the conveyance
  - Ex.: I'll sell you my land provided you let my cousin continue to pass across your land to get to the bus stop

- *Easement by Exception*
- **Common Law was originally Hostile to 3d Party Easements**
    - Modern Trend in the Law is to allow 3d Party Easements
    - **But you have to be careful because not all jurisdictions have changed their law** and if you go create a 3d Party Easement in one of those jurisdictions, you're going to get fucked with a big malpractice suit
- Willard v. First Church of Christ Scientist, Pacifica (Cal. 1972)
    - McG owns two parcels of land across from the Church and allows parishioners to park on Parcel #2.
    - McG sells Parcel #1 to Peterson and Willard comes along and wants to buy Parcel #1 and #2 from Peterson (remember Peterson only owns Parcel #1 now)
    - Peterson agrees, but first has to buy Parcel #2 from McG
    - McG agrees to sell Parcel #2, subject to the church getting an easement for parking on Parcel #2 (right now its just a license)
    - So McG transfers Parcel #2 to Peterson and creates a Parking Easement in the Church (notice how ***this is 3d Party Easement because the Church isn't a party to the transaction***)
    - Well, at the time Cal. law prohibited 3d Party Easements, but the church's lawyer got baled out by the Cal. S.Ct. changing the law
    - Two Other Options
        - McG could have given the Church an easement BEFORE transferring Parcel #2 to Peterson, then the Appurtenant Easement would just run with the land (land conveyances don't have to be for consideration)
        - Peterson could have contractually agreed to grant the Church an Easement AFTER the transfer (there would have had to be consideration for this, like a discount in price)
    - **So, this shows why the old rule is stupid – you can get around it**
    - Note how this is Appurtenant: Church land is benefited and Parcel #2 is burdened
- Knowledge of an Easement is not required for it to be in effect; it is up to a prospective purchaser to do a damn title search

4 ways to get an easement :Easements by Implication and Necessity

1. get easement via grant (99% of time)
Officially with piece of paper goes in public records office

2. Easements by Implication

- an easement by implication is created by ***operation of law***, not by a written instrument. – implication from previous unitary owner that such easement is implied to new owners… It is an exception to the Statute of Frauds. However, an easement can be implied only in very narrowly defined circumstances indicating that the parties intended an easement or that an easement is a necessity.
- **Distinct Legal Doctrine: If the Test is met – there is an Easement by Implication**
- Quintessential Fact-Set: **The Sewer Connection**: Romanchuk v. Plotkin (Minn. 1943)
    - One Owner owns three adjacent properties with houses, and only one of them has access to a sewer intake
    - Thus, the Owner runs a continuous sewer line through all 3 houses → no problems right now – he owns them all
    - The Owner then sells one of the houses without direct sewer access and the lawyer fails to put in an express easement to send sewage through the pipes underneath the other houses
    - What are we going to do? **THIS IS A FUCKING TRESPASS WITHOUT AN EASEMENT – ARE WE GOING TO ENJOIN THE NEW OWNERS FROM FLUSHING THE TOILET?**
        - Anyone in their right mind would have only bought subject to an easement to flush the toilet
    - Now remember, the dispute will likely come further down the chain of possession when someone else succeeds to the Owner's original interest or the Owner sells off the rest of his properties and then someone gets a knot in their panties
        - But, if it had been an express Easement in the land transfer – it would obviously be Appurtenant and run with the land
    - So what are we going to do?
    - This is where we end-up creating Easements by Implication

Threshold Inquiries to Determine an Easement by Implication

1. There Must be UNITY OF TITLE at the Time of Severance
    - At the moment one of the pieces of property was sold off without the express easement (i.e., at severance), there was common ownership of all the property
    - See example above.
2. The thing we want to call an easement by implication MUST BE IN EXISTENCE at the time of severance
    - We call it a "quasi-easement" → if there were not a common owner, it would have to be an easement or a trespass/nuisance.

- A quasi-easement is not a legal easement, because O cannot have an easement in his own land. It can arise as an easement only when O divides the land into two lots.
- Ex.: the sewer pipes and their use had to be in place; they couldn't be put in after the severance of the title

3. Easement you're claiming must be NECESSARY and BENEFICIAL to enjoyment of parcel number #2. (basically creating an easement for you out of thin air- relatively reluctant to do that)
   i. How necessary and beneficial does it have to be?
   ii. Cts more generous when original grantor still has title to land adjacent to #2. (grantor making a special plead)

The Test

1. A Separation of Title Must Have Occurred
2. The use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent
   - To have a quasi-easement the previous use must be ***apparent***. It is apparent if a grantee could, by a reasonable inspection of the premises, discover the existence of the use.
   - The previous use must be continuous, not sporadic. The requirement of continuity is based on the idea that the activities should be such that there is a great probability that the use was known to the parties at the time of the grant, from which an intent can be inferred that the parties wanted the use to continue.
3. The easement is necessary to the beneficial enjoyment of the land granted
   - What makes a use necessary? What would happen if you couldn't send the sewage away?
   - In most jurisdictions ***reasonable necessity***, and not strict necessity, is required. This is a flexible requirement. Relevant factors in determining reasonable necessity include cost and difficulty of establishing an alternate use, and whether the price paid reflects the expected continued use of the servient portion of the original tract.
   - The Plotkin Court takes a flexible approach.

- Issue: when a court declares an Easement by Implication (or any other implied easement, see below), what is the SCOPE of the Easement?
  - Easement by prescription and implication are *judicial creations* when parties hadn't written them down, and necessarily creates insoluble problem.
    - Temporal dimension, scope of easement (what exactly is use right?), physical location
  - We know the location and can pretty much assume that the duration is in fee simple
  - But the SCOPE is difficult: think, that's the bitch of drafting an easement
  - Parties end up perpetually litigating until the Scope is well defined

3. Easement by Necessity

- an easement by necessity is implied if the *single* owner of a tract of land divides the tract into two lots and by this division deprives one lot of access to a public road. – BUT the original grantor needed to have created the necessity- i.e. if the petitioners were dumb enough to landlock themselves (convey away their access) they can not then claim a necessity easement
  - Usually an implied easement of way by necessity must be strictly necessary and not just a more convenient access.
- Usually have to do with accessing landlocked property
- Usually governed by Statute
- Going to turn on how much you have to pay to buy your way out of your stupidity for buying this landlocked land without an easement
- Ex.: O owns Blackacre, the southern border of which fronts on a public road. O conveys the northern half of Blackacre to A. By this division, the northern half of Blackacre is deprived of access to a public road. An easement by necessity is implied over the southern half of Blackacre in favor of the northern half of Blackacre.

4. Easements by Prescription - Acquiring use rights/easment by wrongfully using for certain time ("**easement by prescription"**). Once SOL run + meet CL requirements, you get an easement (use right). (Similarities to AP- Conceptually: If people don't sue for too long, then too bad for them (punishing idle land owners).

- this is basically the doctrine that an easement can be acquired by prescription, *i.e.*, by an ***adverse use*** for a requisite period.
  - The doctrine of prescription has been developed as a matter of public policy by analogy to the law of ***adverse possession***. If the statute of limitations for adverse possession is 20 years, the prescriptive period for acquiring an easement is likewise 20 years.
  - Generally the same requirements for adverse possession are applied to an easement by prescription. Hence, the same period and same issues are generally involved in acquiring an easement by prescription as are involved in acquiring a fee simple by adverse possession.
- **This is essentially an Easement by Adverse Possession, we just don't call it that because we're talking about USE rights and NOT POSSESSION rights**
- **The Statute of Limitations for Use Rights is the same as the Statue of Limitations for Adverse Possession** → this is how long the continuous USE must be going-on before you can claim a Prescriptive Easement
- Being a rong doer long enough is necessary but not sufficient- also need Application of ENCROACH to Prescriptive Easements

- **Actual** → YES (otherwise not a tort)
- **Open and Notorious** → YES - (have to be able to see, feel and touch/ if satisfies nuisance, pretty much open and notorious.)
  - the use must be made without any attempt at concealment.
- **Exclusive** → NO
  - Use rights imply that you are not the only one who uses the land
  - Thus, this generally doesn't apply
- **Continuous** → YES, but differently than with AP
  - the adverse use must be continuous, but this does not mean constant. Indeed, the use of an easement ordinarily involved only periodic use. Continuity requires a continuous claim of right and periodic acts which, given the nature of the type of easement claimed, give notice to the owner that an easement is being claimed (so can get use right to do something intermittent) - *They can be intermittently continuous – acquire use right to what you have been doing sporadically* - such that they are geared to the use right, so you will acquire a permanent right to do something intermittently.
    - Thus driving or walking across another's land, whenever headed in that direction, is sufficient to establish a prescriptive easement, even though this is not done every day.
  - This Applies...BUT not in the same way as Adverse Possession
  - What does "continuous" mean in relation to USE as opposed to POSSESSION?
  - Use rights are by their very nature intermittent
  - The Easement will never give you any more use rights than you already have been enjoying
  - The fuzzier the continuity, the less use rights you're going to get
  - The Answer needs to be tailored to the nature of the use right in question and there are no clear cut rules
- **Claim of Right**
  - The law doesn't care about this in adverse possession and it cares even less here
- **Hostile**
  - This is the biggest difference between possession and use
  - In Adverse Possession, this means "non-permissive;" (SofL is running) so you would think it has the same meaning in Easements by Prescription → if you have permission for your USE, you at least have a license and the statute of limitations clock can't even start running
  - But, the problem is that most USE RIGHTS, by their very nature, ARE permissive
    - At the least, its neighborly tolerance: a wave of the hand, etc.
    - Otherwise, there would logically have been a trespass or nuisance action at some time in the past
    - However, this "permission" is often never memorialized anywhere
  - **Thus, the law creates the fiction that a Use is NOT PERMISSIVE for the purposes of establishing a Prescriptive Easement unless it is memorialized in writing**
    - **Thus, the permission must be memorialized in writing for it to be a valid defense to a prescriptive easement claim (conceptually makes no sense- comes from 1000 years ago)**
  - In practice, this creates a presumption of hostility because this permission of often never going to be memorialized in writing
  - IN the modern recording era, the only thing that makes sense is to say that if you don't have it recorded, it's a tort. However, property law keeps the old doctrine: In the context of use right, the fact that you appear to have permission form neighbor doesn't defeat your claim, but it actually HELPS it.
  - Modern Trend- clearly that you need to prove NO permission, but be aware of the old doctrine (that makes no sense in modern recording era) bc many states still apply it. SO need to check the jurisdiction to see what their rule is → some say memorialized permission, some say it doesn't have to be memorialized; have to see what level of permission is required to defeat hostility
  - How you deal with period of acquiescence is very diff bc the law is all over the place→ many courts will say you acquired a license by the permissive use, and that may be revoked by the owner.
  - Fischer v. Grinsberg
    - Of course driving on driveway was permissive → it was granted by the waving and absence of hostilities
    - But we have the fiction...

- HYPOS
  - 10 years of crossing one way and 10 year of crossing another way: Will this satisfy a 20 year SOL requirement?
    - Need to be able to define use with a sufficient particularity; can't just get a general grant to cross the land
    - Use rights have to be narrowly cabined
  - Any other theory for using the driveway?
    - Making expenditures is a case for irrevocable license (see below)
  - Hitting golf balls onto property of another and going to cover them
    - Not same people

- Not employees of golf course, kind of hard to make a case for it being the golf course and have them win an easement
- But case came out for golf course in real life

NOTE:
1. easements granted usually have a negotiated price b/w parties… easement arising out of implication, necessity, or prescription end up being FREE (some debate in law article to change this)
2. If new property owners move in not knowing about existing easement what can they do? – not much- depends on disclosure laws in state whether can sue previous owners for not telling… otherwise their obligation to check title etc…
3. With easement by grant there will be a public record, with an easement by prescription/ necessity/ implication, there *is none*.
The difference is, bc adverse possession requires continuous possession, you will probably see that when you go look at the land your thinking about buying (so while records don't disclose it, but public inspection will). HOWEVER, for easement by prescription, the use can be intermittent and thus you cant discover it by *either* publicly recording grants, or by investigating the land. Use rights by prescriptive easements can be very small and undiscoverable when you are considering buying a property. The same thing is true of easement by implication and necessity (though not as dramatically).

BBBB Licenses

- Legal definition of a **LICENSE**, **denotes an interest in the land in the possession of another.** If you are the possessor of land, i.e., a present possessory interest, you don't have a license.
- a license is a permission to go on land belonging to the licensor. Licenses are very common: the plumber repairing a stopped up drain, UPS delivering packages, and guests at a party all have licenses. A license can be oral or written. A license is ***revocable*** at the will of the licensor… no particular way about how permission must be given- can be a waive, a note, an oral agreement etc… disputes arise about what the permission actually permitted
- This is a use right that is not an easement - licenses don't survive the transfer of the property that license concerns- licenses don't carry over. This can be annoying if you need something to transfer – bc then you have to make arrangements everytime the property switches hands. This has huge transactions costs.
- Restatement § 512: **License is an interest in land in the possession of another which**
  - **(a) entitles the owner of the interest to a use of the land; and**
  - **(b) arises from the consent of the one whose interest in the land used is affected thereby; and**
  - **(c) is not incident to an estate in the land; and**
  - **(d) is not an easement**

No formality req for its formation- can be done orally, etc.
- Problem- ppl can disagree about whether permission was given, or what persmission was given for. However when this happens you can just revoke the license (bc you can't sue them or anything).

- A license can be oral permission or the wave of a hand
- Anything oral cannot be an easement because of the statute of frauds
- You can charge for a license if you want → cf. a movie theatre
- Licenses are REVOCABLE AT WILL
  - Easement → it is a legal right that you create in someone else; it is NOT subject to the will of the grantor
  - You can pull the license whenever you want → subject to reasonableness → like you can't revoke when you're half-way across the land
- **Licenses NOT Revocable at will (may be transferable- all depends on jurisdiction)**
  - (1) License Coupled with an Interest
    - a license coupled with an interest cannot be revoked. A license coupled with an interest is one that gives the licensee the right to remove a chattel of the licensee, which is on the licensor's land. Thus, if O sells A a car located on O's land, A has an irrevocable license to enter and remove the car.
    - § 513: A license coupled with an interest is [a license] which is incidental to the ownership of an interest in a chattel personal located on the land with respect to which the license exists
    - § 519(3): A license coupled with an interest can be terminated only to such an extent as not to prevent the license from being effective to protect the interest with which it is coupled
    - i.e. if I buy a car from you, you can't revoke my license to come on your property to claim it unless you drive it down to me
  - (2) § 519(2): In the termination of the license of one who has entered upon land under a license, the licensee must be given a reasonable opportunity to remove himself and his effects from the land
  - (3) "Irrevocable Licenses" (§ 519(4))
    - a license may become irrevocable under the rules of estoppel. If the licensee has constructed substantial improvements on either the licensor's land or the licensee's land, relying on the license, in many state the licensor

is estopped from revoking the license. The theory is that it would be unfair to the licensee to permit revocation after he spends money in reliance.
    - Ex.: O gives an adjoining property owner, A, oral permission to go on O's land and erect a tile drain thereon to protect A's property from natural water drainage. A does so at substantial expense and with O's knowledge. O is estopped now to revoke permission.
- *If you make representations regarding a license and I make expenditures in REASONABLE RELIANCE upon those representations, we put restriction on the revocation of that license*
- I am "privileged to continue the use permitted by the license to the extent reasonably necessary to realize my expenditures"
- It's a promissory estoppel kind of idea
- Many states don't buy this rationale though!
    - The oral nature of the license can fuck-up the statute of frauds
    - No Reliance on a license can be said to be "reasonable" because everyone knows that the license is revocable at will
    - Taken to logical conclusion, if we enforce an oral license based on reliance, it would destroy law of easements and licenses
- Shearer v. Hobnette (Ala. 1995)
    - D had Right to drive across driveway to get to house; and right is limited to him personally – it won't run with the land according to the WRITTEN agreement; used for 37 years then one of the owners pulled the license
    - This could be an easement in gross, but court leaps to the conclusion that it's a license
    - Apparently he made expenditures in reliance on this right: granting an easement to utility to lay some pipes
    - Perfect case to illustrate Irrevocable License → Court finds there is one
- If you screw-up an Easement, you probably have at least a license, but whether it is irrevocable is a shaky question

If you want an affirmative promise that transfers, any servitude works (although appurtenant easement is the easiest) …
If you want a negative promise, it's tougher- look to running covenants or equitable servitudes …

CCCC Real Covenants (Running Covenants) *– K obligations that bind successors*

- The whole source of this STUPID doctrine is the law's refusal to recognize negative easements 1,000 years ago and its stubbornness in refusing to recognize the realities of the modern world
- **It is called a running covenant because it travels with the property**.
- However, this is not an easement, it is an easement-like device that the law is willing to use in certain limited circumstances.
    - Circumstances where easements don't help you
        - ban of 3rd party easements (some jurisdictions)
        - licenses are revocable (for the most part)
        - can not make negative easements
        - K law is not transferable (can't make a 3rd party oblige)

Some Background on Running Covenants –

- Hypothetical: this shows WHY running covenants are necessary. You don't want your neighbor to put up ugly things in their yard: you can't stop them via nuisance, so what do you do?
    You can write a K: here is $50, don't put ugly things in your yard.
    The only problem is that K's only bind the parties who sign them: the K promise would be worth a lot more if it could bind other parties, as well.
    But, the law has said that it will not allow negative easements. So, the mechanism to bind other parties just doesn't work when you are trying to restrict your neighbor's use of his land.
- A covenant is a ***promise*** to do or not to do a certain thing. We are dealing with covenants that are promises relating to the ***use*** of land. Typically they are promises to do something on land (e.g., a promise to maintain a fence) or a promise not to do something (e.g., a promise not to erect a commercial building).
    - The promise to do something is an ***affirmative promise***.
    - The promise not to do something is a ***negative promise***.
    - If the promisee sues the promisor for breach, the law of K is applicable.

- If, however, a person who buys ***the promisee's land*** is suing or a person who buys ***the promisor's land*** is being sued, the law of property is applicable. These property rules determine when a successor owner can sue or be sued on an agreement to which he was not a party.

- If the promise is breached, the promisee or his successor may want one of two things: (i) money damage, or (ii) an injunction or decree requiring specific performance of the promise.
  - If the promisee wants money damages, he must sue ***in law***.
  - If the promisee wants an injunction or specific performance, he must sue ***in equity***.

Development and Basis of the Real Covenants Doctrine

- Real covenant defined: a real covenant is a covenant that runs with the land ***at law***. It is enforceable at law by a successor owner of the promisee's land and, concomitantly, is enforceable against a successor to the promisor's land.
  - If the P wants money damages, the P must show that the covenant qualifies as a real covenant. The P must satisfy the requirements for the covenant to run at law.
- A and B make a CONTRACT: A promises no mushroom house in exchange for B's promise to not put up gargoyles
  - This is a good Contract with consideration: Promise for a Promise
  - It is binding between A and B
- But suppose A sells to C
  - Is C still bound by the promise A made to B?
  - In order for A and B's agreement to have its full effect to maintain property value, their K has to be enforceable against their successors in interest
    - **If the law had allowed negative appurtenant easements, it would easily run with the land → but the law wouldn't allow that**
- ***So how do we make enforceable promises that act like negative easements and run with the land and are binding upon successors in interest?***
- We want promises between original owners that run with the land and are binding upon successors in interests → How do we do it?
  - (1) We have this in Landlord-Tenant Law
    - Law is perfectly willing to enforce the restrictions of the original lease against assignees (but not sublessees)
    - **So the idea of enforcing negative promises against successors in interest is not new to the law (**the special thing about LL-T law is that the parties to original K are in a special position- the LL hold FI, and T hold PI to the same land.).
  - (2) Bad News: Property law lets conceptualizations run away from the rationale that spawned them → law doesn't want to recognize negative easements
- A real covenant should be distinguished from a condition,
  - Land use may be controlled by a condition as well as by a covenant. A condition provides for ***forfeiture*** upon breach of the condition, whereas a covenant is enforceable only by an award of money damages (real covenant) or an injunction (equitable servitude). A condition is imposed when the grantor conveys a ***fee simple determinable*** or a ***fee simple subject to condition subsequent***.

Two Kinds of Privity of Estate

- Horizontal Privity: a specified relationship existing between the original promisor and promisee
- Vertical Privity: a specified relationship between an original party to the K and an assignee.
  Vertical privity means the party suing or being sued succeeded to the estate of the original promisee or promisor.

The English Solution

- Old English courts demanded that a checklist of criteria are met before making a promise between original possessors binding on their successors in interest
- Old English Checklist:

  Enforceable K between Original Parties

  Original Contracting Parties Must Be in Horizontal Privity
  - in England it was ultimately decided that the parties to a promise are in privity of estate only if they are in a LL/T relationship.
  - A and B each must simultaneously hold present or future possessory interests in the land burdened by the negative promise
  - Essentially, a L/T or present possession-reversion relationship; but 99% of the time it's a L/T relationship.
  - Such strictness is not a part of American law today, only old English law.

  Privity Between Original K Parties and Their Successors – Vertical Privity

  Law wanted successors to acquire exactly the same interest in the property as the original party
  - A and B's successors had to succeed to exactly the same interest → that's why LL-T -succeed to exact durational interest original party had law works, bc assignment transfers everything.

The Promise must "Touch and Concern" the Land

- early cases asked whether the covenant burdens or benefits a party in the ***physical use or enjoyment*** of particular land, but this proved too narrow a test. Some covenants, particularly negative covenants, merely ***enhance the value*** of the benefited land, but they have been held to touch and concern the benefited land as well as the burdened land.
- Only going to enforce a certain subset of negative promises
- Thus, successors only bound if the promise "touches and concerns" the land

Original K Parties Must INTEND to Bind Their Successors in Interest

Much of this does not survive into modern American Law

- In fact, the whole impetus of the Restatement (Third) of Property was to get rid of all the bullshit in the Law of Servitudes → Restatement as a conscious effort to change the law: we'll see if the Courts buy it
- In theory, in most jurisdictions, all of it survives
- **In PRACTICE: privity between original parties means something different, vertical privity has nearly disappeared**

American Law of Real Covenants

Modern, American Checklist

In order to create a real covenant, i.e., one that runs with the land, you have to do the following things:

1. **There must be an enforceable K between the original parties**
   Remember, with an easement there doesn't have to be a K.
2. **Original K parties must INTEND to bind their successors**
   the intention of the parties that the burden and benefit run is usually found in the language of the K. The instrument may read "those covenants shall run with the land, " or "the grantee promises for herself, her heirs, and assigns."
   In some jurisdictions, statutes say you must specifically mention the assigns.
3. **Privity**
   - **Meet the English Horizontal Privity Rule**, i.e., be the parties who made the original K; or
   - **The original promise between the original parties was made in the context of the transfer of a possessory interest in land**
     - Basically, the contracting parties must ***intend*** that successors to the promisor be bound by the covenant.
     - Essentially, the original parties must have a grantor-grantee relationship when they make the promise which they wish to be binding upon successors in interest
     - Loophole: A conveys Blackacre to B, B conveys Whiteacre to A, then B conveys Blackare back to A and A conveys Whiteacre back to B, and all the while they make reciprocal negative promises in their respective grants: This satisfies the American Privity Rule; it could be unilateral too with A to B then B to A.
       - Law IS stupid enough to allow this loophole
       - You still have to pay the lawyers and the transfer taxes
       - *The modern trend is to just allow a negative easement, but can't count on that*
   - **American law basically ignores vertical privity requirement from English Law**
4. **The Promise Must "Touch and Concern" the Land**
   - : early cases asked whether the covenant burdens or benefits a party in the ***physical use or enjoyment*** of particular land, but this proved too narrow a test. Some covenants, particularly negative covenants, merely ***enhance the value*** of the benefited land, but they have been held to touch and concern the benefited land as well as the burdened land.
   - General Idea: We want to make sure the promise itself has something to do with the land because of the extraordinary measures we are taking by binding non-parties to a K (i.e. successors in interest) to the terms of the K
   - ***We want the promise to have something to do with the land USE and NOT the personal relations between the parties***
   - TRUE ANSWER to what travels with Privity of Estate in Assignments:
     - Anything in the Original Lease that Touches and Concerns the Land
     - It's just that most important terms of the lease will touch and concern the land – that's the reason for the Lawson short-cut
     - So terms of the original lease that touch and concern the land are binding between landlord and assignee
   - EG: What else touches and concerns land: (1) When LL on vaca, T will feed LL's cats. Is assignee bound to feed LL cats? No its frivolous. (2) What about paying $35 for water a yr- if original party fails to perform, you can sue under K law→ but what if original party sells the land to someone else still have to pay $35 to other property owner for water they don't want? NO. its not binding. This isn't ruled out simply on grounds that its about $ (bc rent touches & concerns), and its not really frivolous, but the courts said this doesn't quite cut it. There is no real rigorous logical explanation for why not, bc touch and concern doctrine doesn't have one. You cant explain on basis of effecting value of land, bc EVERY promise will effect value→ no conceptual way to define touch & concern. …Most of the time its obvious physical stuff, and in those cases, touch & concern isn't an issue.
   - So how does RENT Touch and Concern the Land?

- On its face, it is just a promise to write a check every month

But Rent is so bound-up with the nature of the property relationship that we have to say it touches and concerns the land; **this is about money involved in the land in a fundamental way**

- So then we have to ask whether all things concerning the financial characteristics of the land touch and concern it
  - Candlewood Lake Association v. Scott (Ohio 2001); (other case with other similar issue may come out the other way…)
  - That is the issue being litigated in the MODERN case
  - Does a covenant to pay upkeep dues to the homeowner's association "touch and concern" the land?
    - Facially, again, its just a promise to write a check; but how far are we going to take the Rent concept?
    - Homeowners' Association Argument: Money paid is for upkeep of sewers, which touches and concerns the land, and upkeeping the sewers increases the value of the land
- But, **modern Bottom Line is that Homeowners' Association Fees are going to run with the land**
- So, this is the most ill-defined concept in property law
- Restatement (Third) Approach: GET RID OF IT
  - §3.2 – "Touch-or-Concern Doctrine Superseded"
  - Replacement for Touch and Concern: Invalidate the Servitude if:
    - It imposes unreasonable restraints on alienation (transfer);
    - Undo restraints of trade;
    - It is unreasonable; or
    - It lacks a rational justification

NOTE: ***notice to successor is not a required element to enforce any servitude*** (statutes re disclosure might have changed this in your jurisdiction) … that's why you need to do a title search before you buy… some servitudes a successor cant even discover (like potential prescribed or implied ones….)

DDDD Equitable Servitudes **–(not an easement (negative promise); not a running covenant (no privity) but still another way to bind successors) – so this is a running covenant with notice and without privity**

Tulk v. Moxhay (1843, England)

- T sells land to Elms on understanding that you will only maintain the property as a park
- Can't be easement because it is a negative promise
- Elms sells to Moxhay, who starts putting up a house
- Tulk-Elms meets American privity, but not English privity, so Moxhay thinks he's pretty slick
- So what about a court of equity? It is equitable to do this? NOPE, thus **we're going to smack you with an injunction**

Above:
1. not an easement – b/c negative promise
2. Can't be a running covenant – b/c not have privity (in above case enough privity to meet American stds, ut imagine case with even less privity)

Checklist for Equitable Servitudes

- (1) **Original Parties bound by K**
- (2) **Original Parties INTENDED to bind successors in interest**
- (3) **The promise Touches and Concerns the Land**
- (4) **The successor had ACTUAL NOTICE of the Restriction**
- NOTE
  - *No Privity Requirement (no need to meet even the loose American stnd)*
  - *But, conversely, Real Covenants don't require Notice*
  - *What you get out of an Equitable Servitude is an INJUNCTION (usually with other servitudes can also get damages)*
- *Law has 3 Ways to Bind Successors in Interest*
  - (1) Appurtenant Easements
  - (2) Real Covenants
  - (3) Equitable Servitudes
  - This is rather stupid – why we want to eventually get rid of it all - New restatement proposes to scarp all of this and substitute a single notion of servitude…… any agreement b/w 2 parties can bind successors so long as it not against public policy…

Neponsit Property Owners' Assn. v. Emigrant Industrial Sav. Bank (N.Y. 1938)

- Another case seeming involving Homeowners' Association fees and whether they run with the land
- Seemingly, all elements of a Real Covenant have bee met (working very hard to get this to meet the touch land req.)
- BUT, problem is that the Property Owners' Association is suing
    - They are not property holders
    - The Property Owners' Association is a CORPORATION and it owns no property, so how does it have standing to sue?
- Court: The association of property owners ARE the property owners so we'll let them sue: look through the corporation and reach to owners
    - The corporate Plaintiff has been formed as a convenient instrument whereby property owners can assert their common interest
    - This is a dagger through the heart of Corporations Law
    - A Key tenant of Corporations law is that Corporations are separate legal entities and thus you can't sue their share-holders personally; you must sue the Corporation and go after their assets; anything else is called "piercing the corporate veil" and it is VERY DIFFICULT to do
- So we can rationalize what the Court did he by calling it an Equitable Servitude
- Idea behind binding successors in interest is to raise your property value and make it more attractive to purchasers

Equitable Servitude with Implied Notice (in context of residential subdivisions - Implied Reciprocal Negative Easements) (still depends on jurisdiction as to how much they buy this and how they interpret "implied")

What counts as notice:

- actual notice (oral, written, etc.)
- implied notice (residential areas) (look at surroundings- totally residential areas prob would not allow you to build a gas station- so you are on notice you should need to look into this)

Mid-State Equipment v. Bell

- This is what we do if the lawyer fucks-up and doesn't put a negative easement into a few of the deeds
- This Case
    - Plots 1-10 and 13-15 had a "residential only" negative easement in the deeds
    - Plots 11-12 were on an intersection and did not contain the easements
    - Court finds for the Residents and says there is an implied negative easement based on the general character of the neighborhood, thus no commercial business there
- Reasoning
    - *A reasonable person would infer, looking at the general character of the neighborhood, that they were buying property which contained a negative easement guaranteeing residential-only use (so even if not explicitly told of your restrictions, you can still be restricted via implied notice)*
    - Thus, we will imply such a negative easement
- Thus, we get the idea of **Implied Reciprocal Negative Easements**
    - Reciprocal = all bound and all can enforce
    - Implied = some of the deeds along the line didn't contain the necessary restrictions
    - **COURTS ONLY EVEN THINK ABOUT DOING THIS IN RESIDENTIAL SUBDIVISIONS**
        - Otherwise, if you don't follow the rules, you're shit outta luck
        - Same idea in what's going in the fucked-up corporate law case
        - Same idea as funeral homes in residential neighborhoods being nuisances
        - RESIDENTIAL NEIGHBORHOODS/SUBDIVISIONS – THE LAW SEEMS TO BEND CONSISTENTLY IN THE DIRECTION OF PREVENTING OTHERWISE LAWFUL LAND USES

so the reasoning behind the last two cases to bend the laws is to protect residential areas/ promote residential subdivisions…

- As long as we're in the residential context, the rules of the game are different
    - Judges live in "residential" districts
    - Law turns doctrinal summersaults to get to their result
    - But not all courts does this shit
    - But the fact that some are willing to do it is noteworthy

If someone exceeds scope of easement and thus commits a tort (trespass or nuisance)

Getting rid of servitudes:

Stnd ways:
1. build into a servitude its own demise – defeasible (terminates if X happens or after Y time)
2. buy it out
theoretically possible, but very tough:
3. abuse easement (go beyond the scope) then start committing a tort… if you can't fit within the scope of the easement, it becomes irrelevant … but we're not gonna say that if you abuse your easement we will take it away… we'll just charge you with a tort action…
4. court nullifies servitude because of *changed circumstances* (court nullifies servitude) (servitude no longer useful to anyone.. so can get rid of it and not be forced to pay anyone besides the lawyers…)

Zoning

Rationale behind Zoning Laws

Consider….Barber Shop example (properties around the barber shop forbid barber shops in surrounding properties - restrictions on neighbors' land will increase the value of barbershop's land…. To get this done you could buy 1. your property and then create an equitable servitude/ negative easement/etc to get 2. Non-Competition Agreement (isn't there an easier way?)

- Thus, these restriction have a value on them
- Over a wide range of circumstances, it is easier to get the land-use agreement that we want by compulsion rather than contract
- Thus, we have the local **ZONING BOARD – governmentally imposed servitudes**
    - Specify which uses of land are and are not permitted in a given area
    - They make laws: no one owing land in this area can do anything with it but build a house
    - Cynicism: It may be cheaper to buy the zoning board than your neighbors
    - Tension between Cost and Benefits of a Zoning Board
        - If everyone in the neighborhood wants the same thing; its going to save all time and money to get those restrictions imposed externally than to go get everyone together and secure an agreement
        - But it could be a vehicle for a large scale transfer of wealth with local back-scratching
- All Zoning is done at the local level with ZERO federal involvement

Zoning in a Nutshell

Creation of Zoning Authority

- Enabling Act enacted by State Legislature directed a lower governmental agencies
- Local Government then has authority to enact Zoning Ordinances
- **Zoning Ordinances**
    - *Regulates how land can be used*
    - Usually designate certain geographical areas where only a certain use of the land may be made
    - They are NOT a defense to nuisance

Operation of Zoning Ordinances

- They are usually "general" in nature – going to be over/under inclusive classification
    - (1) reduces opportunities for strategic maneuvering on behalf of people who administer the system (i.e. cousin of zoning board member buys a piece of land, then it gets up-zoned next year)
        - More general = less of this maneuvering
    - (2) Every zoning scheme relies on mechanisms for implementation of ordinances – that's administrative law
- "Zoning Down" – the lower the number, the fewer permitted uses of the property
- "Up-Zoning" – giving more permitted uses to the land
- Some statutes can be more general though – you may ask the zoning board to make a change or an exception to a zoning ordinance to benefit a piece of land that you own – *variance*
- Can review zoning board decision in court – question is what is the scope of review

The Meaning of 14th Amendment Due Process in the Zoning Context

- Question is *how much process you are due from a Zoning Board?*
    - When Zoning Boards down-zone, they deprive you of property
    - So are Zoning Boards closer to Legislatures or Courts when it comes to how much process you are due?
- Legislatures – no procedure
    - When they act, the only process you are due are whatever lawmaking procedures the state constitution proscribes
        - Implication: If a state legislature down-zones you, you have no DP Claim
    - Legislators are NOT required to recuse themselves when they are biased or have an interest in the outcome of legislation

        - Implication: The Speaker of the House can vote for a zoning decision that benefits his cousin and you have no DP Claim
- Courts – lots of procedure
    - Courts just can't order something (like a down-zoning, like a legislature can); they are required to give you certain procedures
    - Judges are required to recuse themselves for bias
- **Zoning Boards**
    - They have characteristics of legislatures and of courts – they are somewhere in between
    - **General Form of Due Process Required by Zoning Boards**
        - Ordinances of General Application = no Process Due (as broad as legislature)
        - Individualized Determinations = we're not going require the amount of process required of a Court, but we WILL require some sort of formal procedures
    - Zoning Boards are in the twilight zone between Legislatures and Courts in terms of how much Process is Due