I. WHAT IS PROPERTY?

That the way it is/You gotta roll with the punches
That's the way if goes/You gotta bend when the wind blows.

1. The Meaning of "Property"

1. **Definition:** That which is peculiar/proper to any person; that which belongs exclusively to one
2. **Legal sense:** An aggregate of rights which is guaranteed and protected by the govt (Blacks)
    i. **Bundle of sticks/bundle of rights theory:** Whether the concept of property is autonomous to other doctrines or not, the rights relating to it can be divided/rearranged/given away, etc…so people who have property rights, at least, have autonomy to set up their affairs
        a. There are certain pre-determined points at which you can re-arrange
3. **Two Competing Legal Idea:**
    i. Blackstone: Property is autonomous ("property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion f the right of any other individual in the universe")
        a. *Effect*: If X has a property, then X wins the case
    ii. Bentham: Property is a dependent relation; that is, property and law born together – before laws were made, there was no property; take laws away, property ceases to exist
        a. *Effect*: Property rights come after other doctrines of law are examined
    iii. Difference: What the law is saying (Bentham) and what the law is doing (Blackstone)

2. Composition:

1. *Ad Coelum Rule (So, so you think you can tell/heave from hell)*
    i. *He who owns the soil owns up to the heaven (solum) and down to the deaths (inferos).*
        a. Operational consequence: If someone dug a hole under your boundary line or had a tree branch hanging over it, you could stop them.
    ii. **Ad solum** (air) amended: Not all the way to the heavens
        a. Rights to air immediately above the land; however, the right does NOT extend to more than is necessary for the ordinary use and enjoyment of land/structures
            1. **Hinman v Pacific Air Transport**, *D plane flies of P property*
                i. The higher boundary is only to the point that a reasonable person would need to protect your interest on the surface (not 40,000 feet high)
    iii. **Ad inferos** (hell):
        a. **Edward v Sims**, *P runs a cave operation in which people pay to visit; cave starts in P's land, but crosses of to D's property*. Majority allows a surveyor to go underneath and see if the land is part of Sim's property
2. Owner owns things attached to the land, which are sufficiently stable (tree, rock, etc.)
3. No such thing as "un-owned land" in America (if not a private citizen, then the government)

II. PROPERTY ACQUISITION

Is ownership against everyone else or just against some?

1. Possession

1. Possession is the controlling or holding of personal property, with or without a claim of ownership.
    i. *Mental dimension:* Intent to possess on the part of the possessor
    ii. *Physical dimension:* His or her actual controlling or holding the property (key)

2. Theories of Ownership

1. Blackstonian Ownership: Ownership that is good against everyone else (exclusion)
    i. If a legal system only decided case based on this theory, nothing will be settled!
    ii. If you have BO, you can do what you wish with the property against anyone

2. Property's Theory of General Relativity (IRVING PRINCIPLE): No longer interested in who has *the best claim* in the entire world, but rather who among the parties has the worst claim.
    i. *"141 could draw faster than he/but Irving was looking for 143"*
    ii. You may have legal rights relative to the people below you; however, that doesn't mean the rightful owner can't come along and claim the property
    iii. Principle: In the absence of a Blackstonian claim, the next concept to consider is **possession**

3. **Possession**: Absent Blackstonian ownership, the person with the better claim is the one who first possessed the property (**first-time time rule**)
    i. This is the physical fact in the world as opposed to actual ownership (a legal concept)
    ii. Not equivalent to Blackstonian ownership, but decent place to start.
    iii. Title = The piece of paper has a stronger connotation than possession

4. **Bradshaw v Ashley, 1901 (Supplement)**: *For many years, B had been in actual, continuous possession of a lot of land, though he did not have clear title. A tried to take control of the land, arguing that, for ejectment, you needed the strength of your own title (not relatively to another).* B wins.
    i. **Rule:** Traditionally, P must recover upon the strength of his own title, not the weaknesses of D's claim; however, presumption remains that the person in possession is the owner in fee and, if there be no evidence to the contrary, proof of possession is sufficient to prove title.

3. Capture, Find and Conquest

1. **Wild Animal** *(Fox on the run/you scream and everybody comes a'runnin)*
    a. Ferea Naturae: Historically, wild animals could not be "owned" because they were transient
    b. Effect of land-ownership
        i. *Owner of the land generally wins* (unless it's public land or you can prove the item's yours).
            1. Blackstonian Ownership – your claim is better than everyone else
            2. Trespass: For 100s of years, you had a right to chase and kill vermin, even in trespass
        ii. If the animal is on your land, you can do whatever you want to turn it into an object of ownership: this is the right that shifts as the animal moves from one property to the next
        iii. *Exclusive right to hunt animals on your property*
            1. **Keeble v Hickeringill, Eng 1707 (p 92)** *K set up a pond to attract ducks; his neighbor, H, stood on the property line and shot the ducks.*
                a. You don't own the animals, but you own the exclusive right t hunt on your land
                b. Everyone has the right to use his property for his pleasure and enjoyment

    c. **Rule of Possession**: Only **kill, capture or mortally wound** of a wild animal will constitute **first possession**
        i. "Rational prospect of killing" requires a more extensive inquiry
        ii. **Pierson (D) v Post (P), NY 1805 (p. 81)** *Post chasing a fox in a hunt, Pierson kills it.*
            1. Post wants the rule extended to "rational probability" of capture; REJECTED.
            2. Normally, you own the things on your land; this was un-inhabited land
            3. Pierson wins on the capture/possession theory (Post's chasing insufficient)
            4. *Majority takes a doctrinal approach to resolve this novel questions; Dissent takes an instrumentalist approach and wants to create new rule for this issue.*
        iii. **Ghen v Rich, 1881 (p. 88)**, *G bombed a whale, R found it onshore and sold it…G wins.*

1. If you use the fox rule, you own it; however, the link is broken between killing and possessing. **In fishing**: the taker must make an act of appropriation (killing) that is possible in the nature of the case; it is sufficient for the fisherman to take all measures needed to make the animal his own.
    a. Fast-fish-loose-fish rule: Whale belongs to the first harpooner, so long as the whale remained attached to his boat (right whales)
    b. Iron-holds-the-whale rule: The first harpooner had exclusive rights to the whale as long as he was in fresh pursuit (sperm whales)
    c. if the fisherman does all that is possible to do to make the animal his own, that

d. **Issues of Escape…***will it return?*
    i. An animal is considered "domestic" if it has a tendency to return; if so, your claim remains regardless of whose property they wander onto
        1. They'll either habitually return or you leash them
    ii. Wild animals, however, are presumed to remain wild if they are released (*not return*)
        1. Kill, capture, mortally wound is the best way; you must confine their natural liberty
    iii. **Reese v Hughes, 1926 (Supplement)** *Fox raised on farm escapes and is killed; killer wins.*
        1. Applying traditional CL rules, plaintiff must prove that the wild animal was so tamed that it would return after escape; this was not so proven in this case.
        2. **Standard:** You retain NO claim over a previously confined wild animal once it escapes
            a. **Colorado Minority Rule:** Evident the fox wasn't native to the area, fox farming is a big industry, retain rights in owner

2. **Wild Minerals**
    a. Late 19th/early 20th centuries: people figured out that oil isn't bad; needed precedent to regulate its use
        i. Traditionally compared to animals: move among boundary lines and can't be confined!
    b. Today, jurisdictions will have relevant statutes on point

Progression of "Mineral Law": From "Capture Rule" to Reality

c. **Hammonds v Central Kentucky Natural Gas Company, KY 1934 (Supplement)** *Gas co. captured gas and needed to store it before sale; they bought an underground cavity to store it, but messed up with the boundaries – H owns a piece of the land over the reservoir! She's mad they did it w/o permission*
    i. Under the rule of **capture**, you "own" gas when you reduce it to actual possession through extraction; however, natural gas as a tendency to escape, so it is no longer owned when it's released into the ground. (Hence, the Gas Co lost exclusive control over the gas when they put it underground, and so they are not liable to H)
    ii. **Rule:** Gas must be brought under the dominion and into actual possession at the surface in order to gain title to the gas (and be held liable for its movement)

d. **Lonestar v Murchinson,TX 1962 (Supplement)** *I DRINK YOUR MILKSHAKE: Reservoir under L's land emptied of natural gas and filled with gas for storage. A bit goes into M's land and M pipes into it.*
    i. Under Hammonds rule, M wins. However, if that happens, gas companies will be vulnerable to other parties *any* time they store gas and don't own all the land over the reservoir.
    ii. Growth of oil industry in TX
        1. TX courts knew if they applies Hammonds/traditional rules, they screw the oil companies (which they didn't want to do)
        2. In TX, it's also difficult to own *all* the land above the reservoir
    iii. Differentiates between gas and foxes

iv. **Rule** Gas company which produced the natural gas does NOT lose title by storing the gas in underground reservoirs (opposite of Hammond)

e. **TX American Energy Co v. Citizens Fidelity Bank & Trust Co., KY 1987 (Supplement)**
   i. Suggests that **H** missed the difference in the confinement: *they saw a forest, not a cage*
      1. Meaning – gas was released into a reservoir from which it couldn't escape, as though the fox had been released into a private confinement zoo
   ii. **Rule: Natural gas/oil previously extracted and stored underground – *capable of being defined with certainty* – does not become subject to rights of owners of surface above fields**

4. Finding Property

1. Actions to Goods:
   i. Replevin: Get the item back (has its own SOL)
   ii. Conversion: get $$$ for the goods that are damaged or stolen
2. Actions for land
   i. Trespass: Action for physical possession of land (no injury needed)
   ii. Nuisance: Inquiry into use right
   iii. Ejectment: Get off my land (only need possessor, not owner)
   iv. Quiet title action: Any interested person can seek a declaratory judgment resolving a dispute over title to land (effectively getting a Ct to proclaim you the Blackstonian owner)

3. **Wild Wallets, Wild Things**
   i. *You've got to give it to me…I'm a loser, I'm a winner…Baby, even the losers get lucky sometimes.*
   ii. **Rule:** Prior possessor wins against all subsequent possessors, with exceptions
      a. **Exceptions to Prior Possessor Rule**
         1. TIME: Universal statute of limitations requirements on **replevin actions** (actions to reclaim personal property)…is SOL elapses, it's a *complete defense*
         2. UCC 2-403 If you give an item to a merchant, who then sells it to an innocent 3P, the 3P can keep the item and you can only sue the merchant for damages
         3. ABANDONMENT: TO parts with the intention of parting with item permanently; if, in fact, TO had the appropriate mental state, the law will honor his intention and break him from the chain of title.
            i. If you abandon it, then, want it back, you must be the first finder to reclaim possession (loss your ability to step in at any point as "TO")
      b. **Ganper v. Capaloff** *D stamp-collector left some stamps in a piece of furniture they sold to P. P tried to argue "finder's keepers." Since D had proof of ownership, D won.*

5. Determining the Finder

1. ***Potential Parties:*** **True Owner, Prior Possessor, Finders, Landowner/Locus Owner**
   i. *Law:* The finder of lost property has greater rights to the found property than the whole world, except the TO, PP or rightful Pr, or a person holding through the rightful owner or rightful possessors.
      a. Originally CL doctrines, now generally ruled by **statutes**
   ii. Prior Possessor (True Owner) > Subsequent Possessor
      a. Not "possession" that's important, but the 1st person who satisfies the legal criteria for possession

2. **Found Possessions**: *Look to PP's INTENT (mental state)*
   i. Categories
      a. *Lost*: When PP parted with the item, she didn't know it happened
      b. *Mislaid*: PP knew he was parting with item, but didn't intend for it to be forever

c. *Abandoned*: PP knew he was parting with item, and intended it to be forever

ii. Factual Deterination of "mislaid/lost/abandoned" (JURY QUESTION/TRIER OF FACT)

a. **Benjamin v. Lindner Aviation, Iowa 1995 (Supp)** *B repossessed a plane from its defaulting owner; they take it the Linder to have it examined; Benjamin (L's employee) finds a ton of $$ in the wing*.

1. Original suit declaring the bank the locus owner (the hanger tried); now, Benjamin trying to assert his rights as current possessor (finder)
2. Indiana Statute: Lost possession goes to the finder if the TO isn't there
   i. **Issue:** Interpretation of lost - may mean "lost" or "lost, abandoned, &c."
   ii. Court found $$ was **mislaid** (Bank wins)
      1. Not very likely the $$ was "lost" – someone had to go into the wing and leave it there. *Dissent* argues it was abandoned drug money.

iii.

Claims to Ownership: Finder v. Landowner		
	Finder	**Landowner**
Lost: General presumption for finder, can be overcome if tresp.	XXXXXXXXXXX	XXXXX
Mislaid: LO always wins; goal is to maximize the chances that the PP will find the item		XXXXXXXXXXXXXXXXX
Abandoned: General presumption for finder, can be overcome if tresp.	XXXXXXXXXXX	XXXXX
If the "finder" is a trespasser, he always loses to landowner!		

3. **Eads v. Brazelton, Ak 1861 (p. 102)** *D is in the business of finding and drudging shipwrecks on the Mississippi; D finds a ship and marks it with a buoy. When he returns, P is drudging the ship*
   i. **First-in-time/first-in-right possession**: P technically had his hands on the boat first
      a. D had only marked the spot, insufficient for possession…
      b. When we're dealing with **inanimate objects that can't move themselves, we're stuck with the ordinary possession language** (that you actually have it in your possession)

4. **Home Run Baseballs/Popov v Hayashi, 2002 (p. 108):** *Who owns Barry Bonds' 73rd home run ball? P caught the ball, but lost control of it when attacked by a mob. H (outside the mob) picked up the ball and kept it.*
   i. Baseballs used in professional baseball games are consider the property of the home team; however, once they leave the playing field they are considered abandoned property.
   ii. Solomonic Decision: Sell the ball and split proceeds between the two parties.

5. **Tele-possession, 1980s:** VA District Court found that, when you place the object through technology with intention to control, you satisfy the possession requirements. (Think of finding/seeing Titanic underwater)

6. Other Possible Relationships
   i. **Current Possessor v Landowner:** No universal choice regarding who wins
      a. **Hint**: If you find something in a specifically private place (ie bedroom), it may go to the landowner…maybe
   ii. **Relationship with finder**: Someone with a relationship with the finder, who has a K or some other claim about taking whatever it is the finder finds (employer/employee)
   iii. **Contractual Relationships**: Between current possessor and landowner (contractor) or as seen in "ii" – can always negotiation a contractual resolution to this dispute in advance

7. Responsibilities of Finders to PP
    i. Statutes usually dictate the requirements, such as reporting a finding, and reasonable efforts
    ii. At CL: if you find an item and fail to make a *reasonable effort* to find the PP, you have committed a larceny.
        a. Reasonable effort depends on nature of the item; if you don't want to deal with it, bringing it to the po-po will suffice.
    iii. *There is no obligation to be a finder, but there are obligations once you become one.*

6. Bailments:

1. **Bailment:** The voluntary entrusting (and assumption) of personal property
2. Technically, a species of contract and, in some cases, K law controls
    i. Bailment can occur without consideration, so it can be off-K
    ii. Lots of bailment are non-K, many are…K law w/ a backdrop of property
    iii. *Bailor owns the property; bailee watches it*

3. **Set of CL Rules, (p. 505-506)**
    i. *Baseline:* Bailee is supposed to care for the item and return the item upon bailor's request
        i. Where bailor is the primary beneficiary, bailee liable for gross negligence (must use slight diligence)
        ii. Where bailee is the primary beneficiary, bailee liable for slight negligence (must use great diligence)
        iii. Where the bailment is reciprocally beneficial, law sets a "regular due care/negligence" rule
    ii. Exceptions:
        i. Parties can K around this liability
        ii. **Modern Trend:** As a matter of doctrine, the general rule is negligence, taking into account the considerations that lead to CL categorizations (gratuitous bailee or not?); the reasonableness standard for negligence is considered in light of the surrounding circumstances ($$? Benefit?)
            a. *Bailee cannot be held strictly liable without a K*

4. **Measuring Damages**
    i. If possible, the bailee simply returns the item (**replevin**); otherwise, the damages in **conversion**
        i. **Note:** Cts are stricter about bailee who misdeliver good than those who lose, destroy the good
    ii. **Peet v Roth Hotel**: *Ring left at hotel for jeweler to pick up; desk clerk negligently loses it, and tries to argue that he thought the ring was fake...*
        i. **Rule:** Where the nature of the object is apparent, mistakes in value don't matter
            a. If, for example, there was a micro-chip in the ring, clerk wouldn't be liable, since he didn't agree to be a bailee of a chip (but he did agree to watch *a* ring)
    iii. **Ellish v Airport Parking CO** *Owner parks his car in the common airport lot, where he pays and leaves. O never actually delivers the car to attendant.* No bailment: Attendant never gained control of the car
    iv. **Samples v Geary**: *Expensive fur piece left inside a coat at a coat check, fur is missing but coat checkers not responsible* (like microchip in ring – no reasonable expectation to know fur was in the car)
    v. **Solari Parking** *Owner's belongings are in truck of car parked in a tourist district of New Orleans in a paid parking lot. Car stolen – lot liable for car and stuff inside because they should expect there would be stuff in a tourist's car*
    vi. **Allan v Hyatt Regency, TN 1984 (p. 497)** *Hotel garage gives patron a ticket; less control than having a key, more control than an open-air lot. Someone reported suspicious activity near the car, but nobody did anything about it…*majority treat this as a bailment, garage liable (NOT uniform rule)

5. **Bailee Bill of Rights**
   i. Controlled by the *Irving Principle*, has a right better than everyone but the bailor
      i. Bailor and bailee can bring a replevin action against a thief
         a. Bailor can bring action for loss of item; bailee can bring action for lose of use right for item
         b. Bailor > Bailee > Thief
   ii. If bailee gets the item through replevin or damages through conversion, then he must give the item or $ back to bailor.
   iii. Bailments work on the assumption that it's a **voluntary** transfer, *if there's an entrusting situation that's not voluntary, it's treated like a finder.*
   iv. **Jus tertii**: A defense in the context of bailments for an argument made by a third party which attempts to justify entitlement to possessory rights based on the showing of legal title in another person. These arguments usually imply that the present possessor's interest is illegitimate/a thief. A bailee may assert this claim when bringing replevin actions against another.
   v. **Govt immunity: The Winkfield Case, Eng 1901 (p. 513)** *Two boats (the Winkfield and the Mexican) collided off the shores of South Africa. The Winkfield was carrying mail, and is a government office.*
      i. Normally, bailees are liable to bailers (to the extent of their negligence); however, the govt is immune to liability to bailor (general proposition that you can only sue the govt when they let you)
      ii. Thus, if the post office is negligent and loses a package, or fails to deliver it, we cannot hold them liable as a bailee.

6. **Altering the Item**
   i. Returning Damaged Item:
      i. **Bailee***:* Analysis under a contract (levels of care, breach, etc.)
      ii. **Finder**: No contract; however, still maintains a standard of care.
         a. Little law to determine what happens if the TO shows up; rarely return within SOL and have enough stake in the item to make it work litigating
         b. Theory: Analogous to a gratuitous bailee, vague negligence question
            1. Statute that set a time frame also set a standard of care

7. Accession (Note: PP = prior possessor; SP = subsequent possessor)
   1. Situations in which one person adds value to an item produced by another
   2. Original remedy is **replevin** (if possible); otherwise, **conversion**.
      i. If finder sells the item, then PP is still entitled to FMV, not sale price
         i. Remembering **2-403** exception, TO may also be able to go after the GFP (good faith purchaser)
      ii. **Remember:** If SP allowed to keep the item, PP can still bring action for **conversion** and get $$

   3. If you **can separate the addition from the original**,
      i. If it's possible to separate the original item from additions, you do it:
         a. PP gets original item back, SP can keep the additions
      ii. Question of **"what is separation?":**
         a. Reasonable separation (don't want to harm the item)
         b. Considerations of good or bad faith (most of the time SP can keep the item if they acted in good faith; bad faith actors, however, do poorly in the law of accession)

   4. If you **can't separate the two**, then…
      i. You must determine which is the **principle good**: ownership goes with that
         a. Usually this is determined by relative value (fact-specific)
         b. If principle good belongs to PP, then:
            1. Undo improvements, giving improvements to SP and original to PP

2. Give back improved ring (property law will not make PP pay; restitution might)
3. Keep new ring, paying PP fair mkt value of item without improvements
4. When improvement is made by sheer labor, it usually returns to PP (with considerations for circumstances…see **Weatherbee** below)

c. If principle good belongs to SP, then:
1. PP gets paid the fair market value of the original good

ii. If PP's possession only improved through **labor**, the laborer is usually screwed.

5. **Land:** Land is always going to be the principle good
i. In most cases, the landowners get the building (trespassers build at their own risk)
ii. Minor rule says that landowners can pay for the building, or landowner has to sell the land
iii. If it's an honest-to-God true mistake, the improver may be able to collect for materials.
iv. If it's a labor-improver, then you're usually screwed (unless the labor increased the value tremendously)
v. **Remedy**
i. Replevin in land = **ejectment** (modern time, right to recover real property)
ii. Irving Principle still applies, so we're judging the better of two bad claims
iii. **Quiet Title**: way of announcing you have blackstonian ownership; show a chain of title

6. Case Example: Good faith considerations, labor input, gross increase in value
i. **Weatherbee v Green, 1871 (p. 165)** *Turning trees that you don't possess into barrel hoops (W technically a trespasser for cutting down trees; got a 3P's permission to be on land…a 3P who didn't have a valid lease for land). PP cannot reply wood (now barrels)*
a. Most of the time, subsequent possessor can keep the item if they acted in good faith; bad faith actors do poorly in law of accession
b. Difficulty of this case: W acted in good faith, but item is still recognizable (clearly wood); however, it's now 28X more valuable.
1. **Rule:** Transformation is an economic concept, cannot let landowner replevy the 28X economic value of wood.
c. **Remember: PP still has conversion rights:** All this finding does is allocate the title of the item; if the item isn't replevied, it just means the remedy is damages.

7. Restitution
i. If PP is awarded the item through replevin, then he doesn't usually have to pay SP (analogous to an officious intermeddler)
ii. However, **restitution** (outside of K and property law) still stands to prevent unjust enrichment
a. Theory: Possible that the innocent PP may be stuck with legal liability for the unwanted additions SP made on his property (unless something crazy happens here, PP should still come out ahead)
iii. **Bank of American v. JS Auto Repairs, AZ 1985 (Supp)** *Bank owns a junk car; JS puts an engine into it.*
a. Ct makes two considerations: whether an after-acquired accessions clause in a conditional sales contract ipso facto makes the motor and other added parts property of the seller (not in the case – the clause did not bind the third party repair shop) and whether the detachable parts were indeed accessions (if they can be removed without damaging the vehicle, detachable parts added to a car are not accessions).
b. Repair shop made repairs to an apparently abandoned van under good faith belief that they owned it, the shop has a viable **restitutionary remedy** for detachable parts it added to the van.
c. Bank alleges that engine has become part of the car and can't be removed; they end up able to keep the entire car. (**Lawson**: Can't they just take out the engine?)

8. Origins and Consequences of Land Titles:

1. The "Story"

a. All land in the US started with ownership by sovereign kings and queens of Europe
   i. Started with conquest, then went to discovery and first possession (or Pope)
   ii. Treaty of 1783: US became resident of all land not granted to private actors

b. Quiet title > Occupancy
   i. **Johnson v M'Intosh, US 1823 (p. 110)**: *Two claims arguing over better claim to land – J traced his grant to purchase from Native Americans; M'Intosh traced his to a grant from the US.*
      1. This case goes through a really awful history of American Indians and western expansion
      2. Finds that the US/states have clear title to all the lands within its boundary lines, subject only to the right of occupancy by the Indians, which the govt can extinguish.
      3. Sovereign rights win out over native inhabitant's occupancy; M wins.

c. **Worcester v GA, US 1832 (p. 118):** *GA made a deal with feds that they'd give over their land if the government would make its best efforts to get the Cherokees off the land. Cherokee had declared itself an independent nation within the boundaries of GA; GA passes "Jim Crow"-like laws prohibiting people from going onto the land. GA arrested missionaries and Cherokees sue.*
   i. Cherokees lost in State Court; won on the merits in Supreme Court (holding = that Indians are entitled to federal protection against states trying to infringe upon their sovereignty)
   ii. SC orders release of missionaries, but nothing happens
   iii. **Cherokee Principle: Once you get a judgment in your favor, you need law enforcement**

d. So now, you search for the **root of title**: if you can trace it all the way back to the European sovereign who, under the conventions of the time, first established the appropriate claim, you're golden.
   i. **New Orleans Letter** *Lawyer trying to get loan, traces land back to 1803*. Lawyer says that in 1803, US got it from France, who'd gotten it through Spain. WRONG: Fact that France transferred it to US in 1803 doesn't mean that US acquire unambiguous title to LA land – US would still recognize personal property rights of private individuals with title.

2. Transfers of Ownership/Nemo Dat

a. *Baseline principle* regarding transfer of ownership is *nemo dat quod non habet* (you cannot give what you do not have)
   i. Relates to the **derivation principle** – the transferee's rights derive from those of the transferor
   ii. Relates to **first-in-time-first-in-right**
   iii. Rests on a vision of **chain of transactions**: Current owners must be able to trace their ownership back in time through a series of legitimate transfers (ideally) to an act of legitimate original acquisition

b. **Good Faith Purchasers:** The CL baseline s that GFP must return the item
   i. Exceptions
      1. GFP can keep the property but the PP who did have a legitimate right can bring an action against the seller (recording statutes with land)
      2. UCC exception only applies to goods and merchants

c. **Cases:**
   i. **The German Painting Case, NY 1982 (p. 885)** *Germany trying to recover paintings that disappeared during the Allied Forces occupation of Germany in 1945, and reappeared in 1966 in the possession of Elicofon (D), who purchased them from a US serviceman.* Ger gets painting.

1. Since painting was originally stolen, Elicofon is unable to trace his ownership rights back to a legitimate original acquisition: NY law is that a thief cannot transfer title, even if the purchaser buys the item in good faith.

ii. **Kotis v Nowlin Jewlery, TX 1992 (p. 891)** *Sitton used a forged check to buy a Rolex from Nowlin; he then sold it to Kotis for less than ½ the price. Kotis than called Nowlin to inquire about the watch (Kotis lied about taking possession of the watch).* K not a GFP (unreasonably low price is evidence that the buyer knows the goods are stolen; **willful disregard of suspicious activity**)

iii. **Hauck v Crawford, SD 1953 (p. 897)** *H is a farmer, C and two men came to him and offered H 25 cents an acre for lease; C and men gave him papers to sign, never explaining that one was a mineral lease. C then sold the mineral rights to a third party. Deeds upheld.*

1. This is **not a general exception** for the GFP/Nemo Dat rules; rather, see it as an instance in which the Ct was so put off by the idiocy of the original seller (Hauck) that they decided to benefit the GFP (even though the first deed was void).

d. **Transfer of Risk: Warranty and Quitclaim Deeds**

i. People usually want more than the Irving Principle – they want Blackstonian/quiet title

ii. There are two ways to deal with this problem:

1. A buyer may seek a **warranty deed**, in which the seller guarantees certain aspects about the state of the title (risk stays with seller)
2. **Quitclaim deed**: The grantor makes NO covenants that his title is good; he merely passes to the grantee whatever title he in fact has (risk goes to buyer)

iii. Issues: Is cost of reducing the uncertainty worth it? (Administrative costs may be high)

e. **American Law Today**

i. Seller must be honest with buyer about the extent of his rights

ii. "Anglo-American law assumes for the most part than an individual's interest in enjoying property that is acquired in good faith from someone else who appears to be the owner **is not** as important as recognizing the rights of the person who first owned it or last owned it…"

iii. American law attacks nemo dat from two directions:

1. **UCC 2-403**: If you give an item to a merchant, who then sells it to an innocent 3P, the 3P can keep the item and you can only sue the merchant for damages; hence, a limited set of transaction in which the GFP *can* get more from the seller than what he has to offer.
2. **Recording Requirements:** Law can legislate to protect GFP by requiring the filing of papers (so that if a GFP files first, he can claim true ownership)

3. Recording Requirements

a. Benefit of recording system is that it generates, as a matter of law, **constructive notice** to all subsequent purchasers in the chain of title (incentive for people to file deeds to block GFP taking property)

b. **Use recording statutes to test the legitimacy of multiple titles against each other**

c. A jurisdiction will enact legislation to dictate the type of recording they require:

i. **Race:**

1. The first of two property claimants to file has the better claim
2. This lead to great unfairness – in some circumstances, someone knowing of a prior transaction would 'purchase' the land from the grantor (who would have nothing to transfer under nemo dat) and then record it first.

ii. **Notice:**

1. In response, legislatures started to insert language requiring good faith or lack of actual notice on the part of the subsequent purchasers.

2. Race statute creates an exception for the GFP; notice preserves the GFP rule in full force, with the modification that recordation provides constructive notice to subsequent purchasers.

iii. **Race-Notice:**

1. Requires that persons be both GFP and be the first to record to prevail

9. Time: Adverse Possession

1. Adverse Possession = the process through which a person who uses property for a statutorily determined period of time becomes the owner of the property and defeats all rights of the true owner
2. General Principles:
   a. Blackstonian/Record Title Holder may always have the best claim; however, if they wait too long to exert those claim, they may be out of luck
   b. Expiration of SOL is necessary, but not sufficient
      i. For all other cases, expiration of SOL is a complete bar to your case
      ii. For **land** they range from 5-40 years, Lawson's see 21 max
   c. Courts require more than the passage of time to transfer land to "squatter"
      i. Originates from the unique quality of land as a status symbol back in the day
      ii. Until claim for AP is satisfied, the possessor is a tortfeasor/trespasser
   d. You must satisfy the **ENCROACH** elements (see below)
   e. You only get the land you're occupying, not the entire property
      i. Exception: If you thought it was all your land under **color of title** (you had a deed that wasn't valid, but you thought it was) then you may get entire property
   f. Burden of proof: Whoever is trying to prove the passage of time and satisfaction of requirements
   g. If the original AP leaves the land, then comes back to find a new AP, the original one can eject the new.
   h. **When you win at AP, you win whatever estate you're taking over, and are subject to the same FI**

3. **Other Things to Remember:**
   a. Matter of Law or Fact?
      i. Hostile, Continuous and Actual = fact
      ii. Notorious and open = law (jurisdictional standards)
      iii. Claim of title/subjectivity may influence decisions

   b. Exceptions
      i. Fed Govt: If the fed govt owns the land, you can never get it through AP
      ii. Local Govt: Depends on local law…usually no AP acquisition (statutes will regulate this)

   c. Personal Property and AP
      i. Shorter SOL for actions related to personal property
      ii. **Traditional Rules:**
         1. "**Demand and Refusal**": SOL does not start running until the action "accrues" – that is, the last element of the cause of action must be in place; gives TO opportunity to discover the AP and demands it return.
         2. **"Due diligence":** after the item disappears, the TO may toll the SOL for the period of time that he searches for the item (TO bears burden of proof for this)
   d. SOL Issues
      i. **Tolling for disability:** SOL may not start with entry because someone's in jail, a minor or incompetent: we wait to start the clock until that disability is cleared
         1. Common elements:
            a. Disability must exist when AP enters

b. When TO under multiple dis, the one most beneficial to him may be elected
c. If TO under a dis when AP enters, and then suffers another, timing still from first

ii. **Relation Back**: once you reach the moment of AP, the law deems that ownership relates all the way back to the point of original entry
1. Works both ways: If during the time you were running out the clock, a tort happened on the property, you could be held responsible after your ownership is established.

4. **Requirements**: Courts use this as a checklist, you must satisfy them all!
a. **ENCROACH: you must prove these elements after the SOL has expired**
i. Possessor (D)'s occupation must be **E**xclusive, **N**otorious, under a **C**laim of **R**ights, **O**pen, **A**ctual, **C**ontinuous and **H**ostile
b. *Some parts of the country also require that you pay the property takes (notice)*
c. *And courts will consider good/bad faith elements*

5. ENCROACH ELEMENTS
1. **Actual**: You must use the land as would an average owner, given its characteristics
a. *Purposes*: gives notice, triggers SOL period
b. What functions as actual possession is a function of type of property, location and expected uses
i. **Ewing v. Burnett, US 1837 (p. 194)** *Lot adjacent to B; he claimed exclusive right, paid property taxes, took out trespass actions against others and leased to someone. E bought land from Williams, who knew of B's adverse possession. Burnett wins*
1. A person doesn't have to live on the property to acquire it; rather, he just has to use it as will be expected (walking over it to sell sand/gravel)
ii. **Jarvis v Gillespie, VT 1991 (Supp)**: *Waterville is the record title owner. J claims he adversely possessed a lot of land before the town govt gave a quitclaim deed to G (he used it in a variety of ways – grazing cattle, parking cars, logging operation, store slab wood). J wins.*
1. Possession is gauged by the **actual** state of the land (actual use appropriate in VT)
c. Must be engaging in this "use" throughout the SOL period
i. Sufficient use usually implies an **affirmative economic development** of some sort
d. Color of Title: thinking you have ownership through a written document, but it's invalid
i. Many states reduce SOL dramatically for persons taking possession via color of title
ii. Allows for **constructive possession** of the part of land not being used

2. **Continuous**: Throughout the entire SOL period; still depends on type of land/expected use
a. Continuous does NOT mean that you can never leave the land
b. Focuses on adverse possessor's time on the property, not the amount of time TO has been away
c. Supreme Court has outlined perimeters of American Law
i. **RELAXED: Jarvis** "To constitute continuous possession of land, the law does not require the occupant to be present on the site at all times; the kind and frequency of the acts of occupancy necessary to constitute continuing possession are dependent on the nature and condition of the premises as well as the uses to which it is adapted."…be on and off the land for 39 years was ok.
ii. **STRICT Mendoza**: *Gas station put up a fence before its property line; neighbor became accustomed to using the extra land. The gas station renovated and wanted the extra 15 feet back….*the court found that a 3 week break (in which gas station used the property) in 32 years of use broke the continuity.
d. Seasonal use: juris split; some allow it as continuous (natural to circumstances), others don't.
e. **Tacking & Privity**

i. Possession by 2 APs, one after the other, may be **tacked** if they are in **privity** (that is, their periods of ownership may be added together for the purposes of meeting the SOL period)
    1. Tacking seems to require the voluntary secession between the two APs (that is, a sale of land rather than one's abandonment and the other's AP)

3. **Open & Notorious**: So visible and apparent that it gives notice to TO that someone may be asserting an adverse claim to the land.
- a. Except where it's one co-owner against another, the AP needn't actually notify the TO
- b. **Common indicators**: Buildings, fences, crops, animals (Fence or crops are sometimes statutory reqs)
- c. Two Situations were Actual & Continuous occur, but it's not open & notorious
    - i. **CAVES: Marengo Cave v Ross** *Cave goes under Ross' property; entrance on adjacent lot*.
        1. Not obvious cave-goers will end up in Ross' property; notice could be given through publicly available survey; not a huge leap to guess they're in your land
        2. Court Holding: Not putting land-owner to burden of inquiring about cave issues unless they had reason to think it went below his land; No AP.
    - ii. **PROP LINES: Manillo v Gorski** *G bought a house and redid the steps, so that they went over M's property line by 15 inches. Not AP?*
        1. No presumption of knowledge arises from a minor encroachment along a boundary line; in such a case, only where the true owner has **actual** knowledge thereof may it be said that the possession open and notorious.
        2. The structure itself is open and notorious, but the fact it's encroaching is not
        3. **Court**: willing to take the **"innocent improver"** doctrine and allow stair owner to buy the bit of land from the TO

4. **Exclusive**: AP holds land to the exclusion of the TO
- a. *Multiple APs*
    - i. Most states allow people acting in concert to acquire title through AP
    - ii. If two AP parties use the property adversely to the other's ownership, it is NOT exclusive
    - iii. If one AP has the superior right, he can oust the second AP and continue his possession

5. **Hostile**:
- a. *Objective View*: AP uses land without TO's permission, and inconsistent with TO's legal rights
    - i. A person entering the land with permission cannot claim AP; however, continued stay may *become* hostile; in most cases, wannabe AP must notify the TO of his intention to claim full ownership
    - ii. Hostile possession may suffice to put TO on notice
    - iii. Objective
- b. *Minority:* Some jurisdictions give weight to AP's state of mind; Mistaken possession not hostile

6. **Claim of Right**: Subject mindset of AP
- a. Complication of state of mind inquiry
    - i. Have to know what jurisdiction you're in
    - ii. How do you determine the mindset of AP?

- b. Three views on claim of right
    - i. **Iowa, minority:** Only allow title to transfer to people who actually think it's their land
        1. **Carpenter v. Ruperto, Iowa 1982 (p. 203)** *C (old couple) knew that the dimensions of their lot did not include a cornfield to the north; they still cleared the brush and planted flowers. R purchased the cornfield and asserted the boundary. No AP.*

ii. **Maine:** Reward people who know it's not their land; punish people for not asserting P rights
iii. **Modern Rule:** Objective non-permission interpretation of adverse under a claim of right, so that state of mind is irrelevant

c. **Helmholz Effect**: Formal doctrine may not affect actual practice: in looking through AP cases, there is a phenomenon in which lots of juris claim state of mind is irrelevant, but the Ct always mentions something indicating GFP (thinking its yours) wins and bad faith (knowing its not) tends to lose.

III The System of Estates in Land

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1. Introduction to Estates

1. Every ownership interest (and thus grant) contains the following:
   i. Identification (recipient)…**words of purchase**
   ii. Definition of the physical dimensions or space of interest
   iii. Time limit (how long you get the land)…**words of limitation**
      a. For some items, time limitations don't matter (an ice cream cone in July)
      b. Others, **durable items**, may have long life-spans
      c. Land and money have infinite life-spas

2. Allocation of Property over time
   i. Present owner controls present interest…but there may also be a future owner.
   ii. Problems:
      a. Mechanism needed so that people may carve up the property
      b. Identify and classify ownerships interests across time
      c. Determine how it is going to mediate between the owners
   iii. Ways to measure the temporal dimension:
      a. Forever (important) FS
      b. Someone's life (important) LE
      c. Everything else LLT

3. History:
   i. William the Conqueror was doling out the land to get people to fight in his army
      a. Ownership originated from service, not possession, and can be traced back to a sov grant
   ii. We adopted two things:
      a. Life of grantee as a measure for the interest
      b. Need for personal relationship - **incidents**
   iii. Feudal development = desire to keep land for their families…interest in property beyond the present
      a. Began allowing passage to HEIRS
         1. Note: heirs don't exist until the person is died; while he's still alive, it's "**beneficiaries**"
   iv. **Necessary Language =** "to ____ and **HEIRS**"
      a. "Me" = words of purchase
      b. "My heirs" = words of limitation

   v. **Modern law errs in favor of the grantor:**
      a. The "magic words" aren't absolutely necessary to effect a certain type of grant
      b. But a good drafter still uses them!

vi. **FEE TAIL:** Giving the property to the grantor for his life and, when he dies, the next generation will take it for their lives, etc…so, a given generation can only sell of the interest *for their lifetime.*
   a. In effect, creating a series of life estates, which ends when the bloodline dies ("dies w/o issue")
   b. **No longer exists in America**...if you create it, the law will transform it into something else.
   c. A fee tail, however, could've been created *before the statutes prohibiting them*…it'd be enforced.

4. Effect of Wills on Passage of Land:
   i. If you leave a valid will, it will determine the user of the property after your death
   ii. If you die without a will, then the next user will be determined by your state's **Statute of Intestacy**
      a. Intestacy: specifies who the takers will be (usually spouse, kids, siblings, etc.)
   iii. **Escheat:** The state's obtaining the property if you did without a will and there are no people on the list from the statute of intestacy

5. Transferability = VALUE VALUE VALUE
   i. The world wants property to be transferable, since that will increase the value
   ii. *To make land more transferrable, the law can:*
      a. Abolish transfer tax
      b. Create legally cognizable rights in future interests (to me and my heirs)
      c. Abolish service/incident connection to grantor
      d. Create lifetime measurements in the timeline
      e. All for the division and sale of land in parcels
      f. Prohibit transfers with requirements, such as legal acts

6. Three Types of Temporal Duration (PRESENT INTEREST)
   i. **Fee Simple:** potentially infinite interest
   ii. **Life Estate:** ownership measured by someone's life
   iii. **Tenancy**: under LLT law

2. Fee Simple (FS)

1. **Generally**
   a. **Fee Simple**: An interest that's **potentially infinite** (fee) and **freely transferable** (simple)
   b. **Restatement of Property, 14:** An estate in fee simple is one which:
      i. Has a duration of three kinds:
         1. Potentially infinite
            a. Meaning: there is one timeline where the line of succession from present-interest holder (PIH) traces its way through infinity
         2. Terminable upon an event, which is certain to occur, but not within a fixed or computable period of time or within a duration of specific lives
         3. Something else
      ii. Is not a fee-tail
      iii. Essential element not in Restatement***: Free transferability***

2. **Different Kinds of FS**
   a. **Fee Simple Absolute***:* Actually infinite/absolute ownership
      i. No future interests – no one else has an actual or potential claim on the timeline
      ii. FSA Acquisition
         1. Have it transferred from someone who has a FSA
         2. Combine FI and hold them in one place
         3. Adverse possession

iii. Giving a FSA
    1. Traditionally, must state "to _____ and his heirs"
        a. Since abolished, though SC still requires magic words
    2. Anything that expresses intention of grantor
    3. If grantor remains silent, the assumption is that he's giving everything he's got

iv. **White v Brown, TN:** *"My home to live in and not to be sold"…*formality of "and my heirs" no longer exists. Presumption is that if there's no restriction, you've given up everything (FSA)

b. *Broad category of defeasible fee simples:* Potentially infinite/possession is contingent on the world
    i. The grantor includes a condition which, if executed, returns the land to the grantor (reverter) or someone else (remainder/executory interest).

    ii. Limitations on defeasibility conditions
        1. Cannot make the FS defeasible upon transfer
        2. Conditions involving criminal/wrongful activity won't be enforced
        3. In some places, it can't be defeasible on frivolous conditions
        4. Conditions cannot be imposed that are against public policy

    iii. Three Kinds of FSD
        1. Fee Simple Determinable
        2. Fee Simple Subject to Condition Subsequent
        3. Fee Simple Subject to Executory Interest

Remember: These Three are TYPES of FSDefeasible

c. **FS Determinable (FSD):** if condition breached, FSD ends automatically; returned to grantor
    i. "To A and his heirs so long as no booze is sold on the land."
    ii. Corresponds to a **possibility of reverter** (POR) – the instant the condition is breached, the POR becomes a PI automatically
    iii. Grammatically: the condition flows from the grant and is part of it
    iv. Buzz words: until, unless, so long, while

d. **FS Subject to Condition Subsequent (FSSCS):** if condition breached, grantor has the option to end or continue the FS
    i. "To A and his hers[,] but if booze is sold on the land, then you're out."
    ii. Corresponds to a **right of entry/power of termination** (ROE/POT): when condition is violated, the FIH can, if they so choose, end the PI.
    iii. **Many jurisdictions have a strong presumption toward this – less drastic**
    iv. Grammatically: There's a pause, condition is a second thought
    v. Buzz words: but, provided that, on condition that

e. **FS Subject to Executory Interest (FSSEI):** grantor creates FI in a third-party (see below)
    i. The interest is automatically cut short by the following EI upon the happening of the named event, regardless of whether the durational or conditional language is used
    ii. Buzz words: as long as, but if (interchangeably)

3. **Instances where there's a difference between FSD and FSSCS**
    a. *Transferability of interests:*
        i. FI are generally transferable
        ii. Reversions are transferable by will, intestacy or sale

iii. POR can be sold, transferred by will/intestacy in all states except Illinois
iv. ROE cannot be sold in a lot of jurisdictions, but can pass by will/intestacy
v. In Illinois, by statute, there are only 2 ways to pass POR or ROE – dying or sold/given to PIH

b. *SOL*
   i. FSD: SOL for adverse possession runs the moment the condition is breached
   ii. FSSCS: SOL on adverse possession starts to run after the grantor exercises his ROE

c. *Power of eminent domain*
   i. Questions can arise over who's entitled to compensation award
      1. In FSD, if defeasibility event occurs and then, 2 months later, the government condemns the land, the person who held the PI is out of luck and the FIH wins
      2. FSSCS – it doesn't seem to matter

4. **Dealing with the problem of determining which kind of FS:**
   a. Abolish the distinction, usually FSD is abolished so they're all FSSCS
   b. Create a presumption to fill gaps in grantor's grant (FSSCS is more flexible, presume that)
   c. Close reading of the original grant (see above)

   d. **Mahrenholz I and II, IL 1981 (Supplement)**: *Hutton starts with an FSA and wants to give the land to school "for school purposes only." FSD or FSSCS? What are school purposes? School lost grant?*
      i. FSD "This land to be used for school purposes only, otherwise to revert to the grantor's herein."
      ii. School purposes: Construction of intent/factual findings (purposes = anything school related)

3. Life Estates

1. **Life Estate**: PI granted to someone for the duration of a life
   a. *Issues:* From an economic standpoint, it messes up transferability; usually provoked by family issues
   b. **Remember, LE can be subject to the same endings as FS (determinable, SCS, EI)**

2. **Construction**: "To ____ for _____'s life"
   a. Presumption that the measure is the grantee's life; however, it can be built around *someone else's* life
      i. "To A for life" will be interpreted as for A's life…Lawson considers the first drafting malpractice
   b. If measured by the beneficiary's life, when he dies, so does the LE
   c. The beneficiary must be a human being (if you create it in a cat, it's a FS)
   d. Person doesn't have to know that his life is the measure
      i. O grants land to A for life; A grants to B for B's life. If A dies before B, B's interest is terminated; if B dies before A, then A has a quasi-reversion (for the remainder of his life, it then returns to O)
      ii. **Life estate per autre vie:** Life estate for another's life (To B for L's life); measuring life gets nada
   e. Can be timed according to multiple lives (To B and L for their lives....To B and L , until __ dies, for life")
      i. Whose death controls is up to the grantor; if it's not dictated in the grant, it must be constructed
      ii. Law: If the grant says **and** it usually means the grant is for the longer of the two lives; if it says **or**, it usually ends with the first person to die.

3. **Defeasability Doctrine**: Still applies…so you can have a LED or a LESCS
   a. "To A for A's life so long as no booze is sold." LED
      i. Grantor keeps a reversion in FSA in granting the LE
      ii. But the condition also lets the grantor keep a POR in FSA

4. **Future Interest:** When a grantor carves a LE out of his own LE, he keeps a **reversion**

a. This is counter-intuitive, since reversions are usually meant for instances in which you carve a *lesser* interest out of the totality of your interest. Eh, go with it.
b. **Restriction:** If you hold a LE, you can't convey to someone else a LE for your life

4. CL Doctrine of Waste

1. **Doctrine of Waste:** Assumption that grantor (in keeping or creating a FI) intended that people would behave *reasonably* while holding PI (so it's okay for the PI to reduce FI value a bit)
    a. Grantor can contract around this doctrine
    b. If no FI, then the only restraint on the PI is general tort law
2. Any use of the present will likely reduce the future value – the extent depends on the nature of the property
    a. Look to the fact and circumstances of each case to determine reasonableness

3. Categories of Waste

a. *Affirmative Waste* (misfeasance): PI take some affirmative action on the property that is unreasonable and causes "excess" damage to the FI
b. *Permissive Waste* (nonfeasance): PI fails to take some action with regard to the property and the failure to act is unreasonable and causes excess damage to the FI
    i. Rough conceptions of normal behavior dictates the baseline
c. *Ameliorative Waste* (more controversial): Affirmative act by PI that significantly changes the property, but results in an increase in value.
    i. In England, the law of waste was strict – tenants couldn't switch from graving cattle to growing crops even if it increased value of the land
    ii. In US, states have allowed reasonable changes in use and condition.

4. Considerations for character/circumstances

a. Look for unreasonable, permanent damage to the FIH
b. Wood: Cutting timber to maintain the realty is okay; cutting timber to sell it when timber cultivation is not the sole reasonable use of the property is waste.
c. Earth and minerals: Life tenant may not remove minerals unless:
    i. The property was used for mining prior to the commencement of the LE (**open mines doctrine**)
    ii. Mining is the only way of accomplishing the purpose of the lease
d. **Brokaw v Fairchild, NY 1929 (p. 596)**: *B wants to tear down a house and put up condos; No right*
    i. Though it would increase value, condos would drastically change the property into something fundamentally different
    ii. **Law concerned with maintaining character of what the FI will get (at least for land), not just $$**
e. **Melby v Pabst Brewing Company** *One house in the middle of an industrial district; only reasonable thing to do is let the PI tear it down, turn it into industrial use and make $$. No waste.*

5. Bringing an action in waste

a. CL: only those holding indefensibly vested remainders or reversion had standing to bring action
b. Standing rules later relaxed: holders on contingent remainders, defensible reversions or executory interests were allowed to sue (provided they sue on behalf of all nonpossessory interests)
    i. So long as its possible that something *could* become a PI, the holder could bring suit
    ii. If something could NEVER become a PI, then it's holder cannot bring an action
        1. "To L and her heirs" – a FS, no reversion kept.
    iii. Some FI will ALWAYS become PI
        1. LE: grantor keeps reversion; realized when life dies

6. **Co-Tenants and Waste:** No waste unless you're literally creating a wasteland

7. **Remedies**
    a. *Damages:* If O creates a LE in A and keeps a reverter, the court can use actuarial tables and determine the difference between the reversion had A acted reasonably and the actual reversion with destruction
        i. To sue for damages, the FIH must have a reversion, because the law wants to know for certain that the FI will mature into a PPI
        ii. Some jurisdictions still grant **treble damages** for wanton, flagrant misuse
    b. *Conversion:* FI gets $$ for the good/property that's been harmed…FI can sue for loss
    c. *Injunction:* Chance of getting an injunction are proportional to the likelihood of FI actualizing into PI
        i. when FIH doesn't want $$ but rather the property
        ii. only possibility when its ameliorative waste (otherwise enrichment)
    d. *Forfeiture:* Early English CL; Awarding the reversion to the grantor and ending the PI
        i. not followed in American law
        ii. not unheard of in contract law

5. Future Interests

1. **All FI have two names:**
    a. First name: FI Label (1 or 5); and
    b. Last name: PI Label (the type of PI it will become…FS, LE and T

2. There are **five kinds** of FI:
    a. *Grantor Can Keep:* Reversion (R), Possibility of Reverter (POR), Right of Entry (ROE)
    b. *Grantor Can Created in 3rd Party:* Remainder (RM); Executory Interest (EI)

FI Kept by Grantor

1. **REVERSION**: A FI left in the grantor after the grantor conveys a vested interest of a lesser quantum than he has
    a. *Remember Nemo Dat:* you cannot give what you do not have; whatever interest you keep is parasitic to the interest you create (so you couldn't give a tenancy of 999 years out a LE)
        i. A divides his FS and conveys a LE to B; A has a reversion, when B dies, A's interest becomes a FS
        ii. A has a LE from a grantor, A leases to B for five years: "Lease to B; reversion to A in LE." If A dies, B's lease ends since A's interest (LE) ends
    b. You have a FS, you give a LE/T, you keep a reversion.
    c. You have a LE, you give a T, you keep a reversion.
    d. Transferring same estate
        i. A FS carved out of a FI is NOT a reversion…it's not a lesser interest.
        ii. A LE carved out of a LE IS a reversion (who knows?)

2. **POSSIBLITY OF REVERTER & RIGHT OF ENTRY/POWER of TERMINATION**
    a. If you start with a FS *of any kind* and carve out a FS *of any kind*, you keep either POR or ROE
    b. Difference between POR/ROE
        i. **POR**: Connected to a *fee simple determinable*: The instant the condition is violated, the grantee's PPI vanishes and the FI matures to a PPI *automatically*
        ii. **ROE/**POT: Connected to a *fee simple subject to condition subsequent (FSSCS)*: When the condition is violated, the grantor can, if he so chooses, end the PI; otherwise the grantee's interest continues uninterrupted

Future Interests Created in Third Parties

1. If a grantor carves a lesser interest from a FSA, he still holds the FI; he can create/transfer it a 3rd party
    a. Remember: FI take their names the moment they are created; it doesn't change with transfer.
        i. So, if a grantor keeps a reversion for himself, then transfer it to a 3P, it's still a reversion
2. **REMAINDERS and EXECUTORY INTERESTS**: An EI is a FI created in a 3rd party that is NOT a RM
    a. RM: FI that remains after interests and estates prior to it terminate or fail
    b. EI: FI in a third party that divests or cuts short a prior estate

3. **REMAINDER Requirements** (if it doesn't meet ALL of these requirements it is a EI)
    a. Created in grantee
    b. Capable of taking possession as a PPI the moment the prior interest expires
        i. "To L for her life, then to B for her heirs" = OK
        ii. "To L for her life, then one day later, to B and his heirs" = NOT OKAY
        iii. "To A for A's life, then if B ever gets married, to B and her heirs" = OK; the "possibility" of immediate possession satisfies this criteria
    c. Must wait patiently for the PPI to expire; can't divest any PI (other than that retained by grantor)
        i. Grammatical distinction: whether RM can swoop into PI or must wait for its expiration
        ii. "To A for A's life, but when B gets married, then to B and her heirs" = NOT OKAY (snatches; comma connects the condition to B's interest)
        iii. "To A for A's life so long as B does not get married, otherwise to B/heirs" = OK (flows)
        iv. "To A for A's life, *then* if B ever gets married, to B and heirs" = OK (flows from A's grant)
    d. Cannot follow a FS (meaning take possession after a FS); RM only follow LE and T
        i. "To A and his heirs so long as no booze is sold, then to B and heirs" = EI
        ii. Can follow the grantor's FS
    e. **IF IT DOES NOT SATISFY ALL OF THESE REQUIREMENTS, it is an Executory Interest**

4. **Two Kinds of Remainders**: After determining that you have a RM, go through this analysis:
    a. **Vested**: from E&E: one that is owned by an ascertained person and not subject to a condition precedent
        i. Beneficiary must be an ascertainable
            1. Usually, you name the person
            2. You can sometimes vest it in an description:
                a. The description can only apply to one person or individually identifiable persons, it is ascertained. ("To Jenn's first daughter" is okay since Ally is born)
                b. If further developments in the world are needed before a specific individual can be pinpointed, the recipient is unascertainable. (unborn persons)
        ii. Not subject to a condition precedent (only thing that has to happen is expiration of PI)
            1. A condition precedent is an event that must occur *before* an interest becomes vested/possessory
                a. "To L for her life, then to B" = VESTED RM
                b. "To L for her life, then to B if B has more kid" = NOT VESTED RM
            2. Grantee's FI must only have to "wait out the clock" to mature into a PPI

        iii. **Two type of Vested Remainders**
            1. Remainder subject to divestment (subject to a condition subsequent)
            2. Remainder subject to open (partial divestment):

    b. **Contingent**: Residual category; one that is not vested
        i. From E&E: one where either the owner is unascertained or possession of the property is subject to a condition precedent (a contingency)

1. "To A for A's life, then to B and his heirs if B has passed the bar." – B's interest *depends on* something else in the world happening"

ii. Problems: Of valuation (can't ascertain the beneficiary or the condition)

iii. **What if condition doesn't happen in time?**

1. At CL, CRM ends if condition is not met in time
    a. For example – "To A for life, then to B and his heirs if B attains the age of 30" would disappear if A died when B was 25"
2. **Modern trend:** If the condition doesn't happen in time, the grantor's reversion will take effect; and then when the condition occurs, the interest will transfer.
    a. So, in the previous example, the grantor will keep the property until B turns 30
    b. *It's still called a CRM, even though it would seem to be an EI*

iv. Definitively failing to vest: **Fizzling out** – certain events can make it impossible for a FI into PI

1. "To L for life, and if B survives L then to B and her heirs"
2. If B dies before L, her interest disappears and the GRANTOR's reversion becomes a PPI

v. **Different from an EI because it still lets the PI die naturally, rather than divesting it**

6. Rule Against Perpetuities (RAP)…

1. A tool through which the law continues to encourage the marketability of land
    a. The law is trying to prevent the "dead hand" of the grantor from controlling the interest into the future
    b. From E&E: It permits a person to control ownership of property for one generation beyond those persons alive and known to the grantor
2. Note: The **modern trend** is away from RAP - build into every FI a requirement that the FI cease being a drag on the marketability after a specified period of time (30, 50, 90 years, etc.); if it continues being a drag, the law will make the interest disappear.

3. **Classic 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.**
    a. **Paraphrase**: For any future interest to be valid, it must absolutely be guaranteed to vest or definitively fail to vest within 21 years after the death of some life in being at the creation of the interest.
        i. If a clause violates RAP, *only* that clause is invalidated; another interest in the grant may remai**n**
        ii. Limits creation of FI; grantor authority based on the *time the interest takes effect*
        iii. **If there is any DOUBT about what will happen w/i life + 21 years, it is void.**
    b. **Break it down:** For any (1) future interest to be (2) valid, it must (3) absolutely be guaranteed to (4) best or definitively fail to vest (5) within 21 years after the death of some life in being…

4. **Five Components of RAP** (from Lawson):
    a. For any future interest…
        i. RAP only worries about *certain FI created in third parties* (PPI and FI in the grantor are OK)
        ii. Contingent remainders; executory interests; vested remainder subject to open

    b. …valid…
        i. The legal effect of a purported interest failing RAP is that the purported interest is void
        ii. RAP invalidate the offending interest, not the grant as a whole
        iii. The normal practice is to read the grant as though the void interest was never there

    c. …Vesting…
        i. FI can do four things:
            1. Become PPI

2. Disappear from the time line because the conditions for their becoming PPI are impossible to satisfy (this is 'definitively failing to vest' or 'fizzling out'**)**
3. Change into another kind of FI (contingent remainder becoming a VRM)
4. Hang around as exactly the same kind of FI as they were when the grant took effect
    a. This is the kind that really pisses off RAP

d. …absolutely guaranteed…
    i. The law wants it to be absolutely, 100% sure that FI will vest within a certain period of time; hence, for any of the FI on RAP's hit list to be a valid FI, the grantor must be able to guarantee that *no matter what happens in the universe*, the FI will best within RAP's time period.
    ii. The grantor must be able to make that guarantee across all possible time lines while indulging the most ludicrous assumptions
        1. The only assumptions you're allowed to make are that dead people remain dead and can't have kids
        2. <u>The fertile octogenarian</u>: there is a conclusive presumption that any person, regardless of age or physical condition, is capable of having children; this will sometimes make a reasonable grant invalid.
            a. T conveys "to A for life, then to A's surviving children for life, then to the surviving children of B"
                i. When T dies, B has three children, and B herself is 80 years old.
                ii. Possibility that B could still have a child after T's death – that child + 21 years…can't guarantee the interest will vest or fail to vest that far into the future.
                iii. "B's surviving" children clause is invalid
        3. <u>Unborn widow</u>: If an interest is created which will flow through the "widow" of X (by naming and relying on her in determining when the interest will vest), the CL view is that the interest MUST FAIL.
            a. Because the grantee's first wife might die, and he may re-marry a new widow who wasn't alive at the time the interest was created.
            b. This is assuming the word "widow" was in the text of the grant (not specifying an actual wife)

e. Within 21 years of a validating life…
    i. CL RAP makes the call on the validity of these grants at the instant the grant would come into effect if valid; hence, it looks as *possibilities* (not *actualities*)
    ii. For a FI on RAP's hit list to be valid when created, the grantor must be able to guarantee, across all possible time lines, that no matter what happens in the universe, that interest will either become possessory, fizzle out, or change into a non-threatening FI within 21 years after the death of someone alive when the grant takes effect
        1. On the flipside, if you can find even one living person at the time the grant takes effect for whom you can say, absolutely, that you will definitively know the fate of the relevant interest within 21 years of his life, then you have a valid FI.
    iii. **If a condition is not tied to anyone's life span and is not limited to 21 years by the terms of the grant, there is a very good chance that it's invalid**
        1. "To A and her heirs, but if liquor is ever sold, then to B and his heirs." – Not okay.
    iv. **Measuring Life:** Anyone whose life span is worth thinking about to determine the validity
        1. Beneficiaries of the grant
        2. People who can directly and uniquely affect the identity of the beneficiaries

3. People who can directly and uniquely affect the happening (or non-happening) of conditions that affect the ability of the FI to become a PI
4. **Remember intestacy: you don't put heirs into the room and kill them; if the grant is to A and his heirs, A will always have heirs through legislation**

v. **Validating Life:** The specific measuring life that works to validate the interest (you know that within 21 years of his death that the FI will become possessory, fizzle out, or transform)

vi. **Method: Collect 'em, count 'em, kill 'em:**
1. Gather up all the measuring lives (three categories)
2. Put them in an imaginary room
3. Kill them
4. Fast-forward 21 years – can you guarantee that the vesting or failing of the relevant interest? If not, it is invalid.

5. **Ways to get around RAP**
   a. **Wait and see statutes**: Many states reject the CL principle and adopt 'wait and see statutes,' by which if the interest actually vests within lives in being + 21 years, the interest is valid, even if the possibility that things could've turned out differently exists.
      i. This virtually knocks out the fertile octogenarian and unborn widow rules
   b. **Savings Clauses:** Clause written into the grant that says "if any part of this grant is held to violate the RAP then [parties specify the consequences]"

6. **Rules of Thumb**
   a. Grantor can always keep a FI interest to themselves; not subject to RAP
   b. RAP forbids the creation of an EI following a defeasible FS when the defeasibility condition isn't linked to a time-span of 21 years (Can create an ROE in yourself and transfer it to another, if allowed)
   c. If the interest is tied to a lifetime of a beneficiary, then you know it's a valid FI because you get the time of the life, with 21 years to spare
      i. If not tied to a lifespan, it's suspicious (though not necessarily invalid)
   d. Suspicious cases:
      i. If not tied to a lifespan
      ii. Where the condition is not dependent on the action/inaction of a specific person
      iii. Anytime you see children or grandchildren

Co-Tenancies

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1. Introduction

1. Interests can be divided across time (present and future); they can also be shared among owners
2. Partnership/family law/condos must be entered into voluntarily
3. Five Types of Co-Ownership
   i. Partnerships: entities own it together
   ii. Family law: marriage
   iii. Condominiums: certain areas association owns together
   iv. Joint Tenancy:
   v. Tenancy in common

← Don't worry about these three, just know that they exist

← These are the only two we studied!

2. Joint Tenancies & Tenancies in Common

1. Both are forms of co-ownership; however, a different appears when someone **dies**
2. These are often *thrust* upon people (gifts, wills, trusts); you still have to accept, but it's difficult to refuse
3. TIC is the default category; though JT may be easier (if you want your interests to go to your JTenants it will happen automatically, thus saving you the administrative costs of going through the legal bit of taking it from heirs)

4. **Similarities**
   - i. Both parties have **a 100% right to possession and use** (regardless of % of financial stake)
     - a. These can be contracted around

5. **Differences**
   - i. **You cannot attempt to give away your JT in your will; if it's a true JT, the grant in the will will vanish with the co-tenants death and everything will continue as usual**.
   - ii. Upon death of one co-owner
     - a. TIC: the financial and use stakes pass to the dead person's successor upon death (servitudes too)
     - b. JT: the financial and use stakes VANISH with death (does not pass to heirs or other owners); to fill in the gap (so that 100% of the property is owned), the other parties absorb the financial value (servitudes vanish too)
   - iii. Financial and use stakes
     - a. TIC: Can have unequal financial stakes, with equal division of use rights
     - b. JT: require equal financial stakes (regardless of division of use rights)
   - iv. If land is sold
     - a. TIC: shares of profit are apportioned according to financial stakes
     - b. JT: people get equal shares of profit

6. **Six Things Required for a JT**
   - i. Live in a state that recognizes them
   - ii. Manifest intent to create JT
     - a. "It is the intention of the grantor to create a JT with right of survivorship and not a TIC"
     - b. Remember: The presumption toward TIC is so strong that courts can be nas-ty about this req
       1. **Hoover v Smith**: "It is hereby the mutually understood and agreed that the grantors are to have and hold said land in joint tenancy and not as tenants in common" = insufficient; left out the words "an right of survivorship"!

   The Four Unities:
   - iii. Unity of Time: All co-owners must acquire property at the same instance in time
   - iv. Unity of Title: All tenants must be on the same piece of paper
   - v. Unity of Interests:
     - a. Financial Stake: all tenants must have the same financial stake
     - b. Equal durational shares: all tenancies must occur over the same span of time (same FS/LE, etc)
   - vi. Unity of possession: all tenants have the same right of possession

7. **Maintenance of Joint Tenancy** (muy difficulto)
   - i. **The legal word for turning a JT into a TIC is *severance***…this can happen in a number of ways:
     - a. Sale, gift, etc…anything that upsets the unities (usually of time and title)
   - ii. Sale/Gift of land to another person: Since the purchaser cannot have unity of time or title, she cannot be consider a joint tenancy. All of the other owners have joint tenancy, but her's is a TIC.
     - a. "A & B are JT in a plot of land; A sells to D…B and D are not TIC.

b. "A, B and C are JT in a plot of land; A sells to D…B and C remain JT, but have TIC with D
c. ALSO – if D dies in either of these situations, the TIC rules apply – meaning the other tenants cannot absorb her financial stake
d. **Hoover v Smith, Va 1994 (Supplement)** *Parents of heirs held property at JT; when one parent died, the other purported to convey a part of the property to one child, who then sold it to property owners. After the other parent died, the heirs filed suit against the property owners on the grounds that the parents held the property w/o rights of survivorship. VA Law: rights of survivorship understood in grant language*

iii. Sale of land to self: You still break the JT because you'll have a new title/time; break unities

iv. Uniform Simultaneous Death Act: The legislature usually dictates what happens when the only two remaining JTs dies at the same time

v. Mortgages: Two theories for the situation in which A & B start with JT; B pledges property as security (she didn't technically sell the property)
   a. **Lean/claim theory**: B maintains ownership of the title/property; no change in JT status.
      1. States that view it this way won't want to lend to co-tenants (when B dies as a JT, the mortgage vanishes with the death); to avoid this you may:
         i. Require all JTs to sign onto lease
         ii. Seek a law that overrules the CL, forcing mortgages to carry over with JT
      2. **Harms v Sprague, Il 1984 (p. 650)** *Two brothers hold a farm as JT; one moves out and lends $$ to a friend by taking out a mortgage on his share of the farm. When he dies, the Ct finds that the mortgage was worthless, so the whole farm returns to the other brother.*
         i. Mortgage treated as an interest in property, rather than a sale, so the 4 unities remain intact, as does the JT. As such, the other brother absorbs the financial stake of the dead brother's JT, but the mortgage disappears.
   b. **Title theory**: B actually sold the property to the bank and is buying it back over time; when that happens, the unities are broken (since time and title aren't the same)

vi. Leasing/Renting Property: Strictly speaking, such an arrangement should change JT to TIC (since B would keep a reversion after renting property, so the unities would be broken)
   a. No hard case law on this; some general thoughts:
      1. Lessee would have the same rights as the co-tenants from whom she is leasing
      2. The leasing party may collect rent from the third-party leasee; but you cannot collect from co-tenants and must share any profits with them.
   b. **CA**: leasing does NOT result in a severance - **Tenhet v Boswell, Cal 1976 (p. 656)**
   c. **MO:** lease does severe the JT, making it a TIC - **Alexander v Boyar, MD 1969 (p. 656)**

3. The Rights of Co-Tenants

1. Regardless of financial stake, all JT/TIC have 100% rights to use /possession…what happens when they conflict?
2. **Swartzbaugh v Sampson, 1936 (Supplement)**: *A married couple opt for a JT with right of survivorship over 60 acres of land in Orange County, on which sits a walnut grove. Mrs. S is disabled and enjoyed looking out over the fields; Mr. S is a douchebag and allows his friend Sampson to plow the field and put up a boxing pavilion.*
   i. **Mrs LOSES**: whether you're a JT or TIC, all co-owners have 100% right to use/possess, and can transfer that right to 3P. So, one 1 TIC leases to a 3P, the other can't cancel the lease/take exclusive possession

3. When parties are faced with **irreconcilable differences**, property law fails them. Outside options:
    i. Contribution: A co-tenant may request that the Ct force his co-tenant to pay for their pro rata share of expenses; the co-tenant must first request the contribution and the other one refuse
        a. Taxes, interests, insurance; Mortgage principal
        b. Repairs and maintenance; Improvements

    ii. Partition: property equivalent of divorce: parties literally carve up the property and create sol, individual ownerships of parcels of land
        a. Works for both JT and TIC; Parties seeking this usually have a subjective interest in the land
        b. Difficult to apply; property may be hard to separate out
        c. **Delfino v Vealencis, CT 1980 (p. 637)** *D and V were tenants in common; V occupied a dwelling and operated a business. Lower ct ordered a partition by sale and V objected.* Partition in kind.
            1. Ct determined that a partition in sale should only be ordered where physical attributes of the land render partition in kind impracticable, and the owners' interest would be better promoted by a partition by sale. The shape and location made partition in kind workable.
        d. Owerlty: Payment to correct imbalances in a partition in kind (if one side gets more $$ property)

    iii. An accounting: It's easier to convert property into money to share than to divide it up physically; an accounting means that you settle the relative equities in the land (figure out who owes whom what for improvements made over the course of the co-ownership)
        a. Explains the weird split in **Delfino**
        b. Things to consider:
            1. **Carrying charges** (basic necessities for maintenance of rights, mortgage payments, etc)
                i. This is under action for contribution too
            2. **Maintaining value of property**: Not necessary to maintenance of title, but needed for maintaining the value of the property (get credit for actual expenditures in the accounting)
            3. **Increasing value of property**: Not necessary for maintenance of title or value, but rather increasing the value (get resulting increase in value but not actual expenditures)

    iv. Ouster: In regard to **Swartzbaugh**: Mrs is effectively ousted from the premises (unable to enjoy her 100% right to use/possession); therefore, the co-tenant doing the ousting is liable for the reasonable value of those rights to other co-tenant
        a. Must involve an affirmative assertion of rights by oustee/an affirmative denial of rights by ouster
            1. Usually results in partition; however, the ousted tenant can request rent from the ouster

    v. Wait for death: Depending on state, since they are JT, any extraneous obligations one party occurs (say, renting it out for a boxing pavilion), dies with the co-owner (remember, CA)
        a. Most states, however, would say that Mr's lease severed the JT; so the lease would continue after his death (all obligations pass to his survivors)…since it's severed, it becomes a TIC.

4. **Waste Issues**: When co-owners hold the present interest together, the law of waste doesn't apply
    i. So, if one party diminishes the value of the land, the other cannot bring an action in waste

5. **Statute of Anne**: Early English common law that requires co-tenants to share profits (but not losses); this applies even if the other co-tenant(s) are not living on the land!
    i. However, the co-tenant who secured the profit (found the tenant, etc.) may insist on an **accounting**, and will have a legitimate argument that the profits are directly from his own actions
    ii. However, if one co-tenant is living on the property, he needn't pay rent to another co-tenant (there are a few jurisdictions, OH/NC, that require co-tenants who are exclusively occupying the premises to pay)

V. Landlord Tenant Law

Introduction

1. Nature of Leasehold Estates
    1. LL-T relationship is one of **Present and Future Interests**: tenancy is a type of PI you convey away
        i. Everything we've learned thus far applies to them – law of waste, RAP, etc.
        ii. Consequence: Tenancies are usually defeasible upon the non-payment of rent; LL can keep FIs

    2. Two Things happen:
        i. Convey a PI, keep or convey a corresponding FI
        ii. Execute a contract
            a. The lease then may come under the domain of both contract and property law; to resolve disputes:
                1. Read the lease – it may provide resolution, though the transaction costs may be high
                2. CL approach: reacts to certain situations in certain ways (K or prop may control)
                3. Statutes
    3. **Three Kinds of Tenancies**
        i. Names: Term of years ; periodic; tenancy at will (at one time: tenancy of sufferance, not really a T)
            a. To know what you have, look to the CL rules, the lease itself and the statutes

        ii. **Term of Years:**
            a. Any property interest with a fixed date and time
            b. The lease will say "This lease ends on _____" (otherwise, not a term of years tenancy)
            c. When you create a T for a term of years, you keep a reversion (or give a vested remainder)
            d. Tenancies may be limited by **defeasibility conditions**
            e. **Ends:** On date specified

        iii. **Periodic tenancy**:
            a. At the end of a given term, the lease will automatically renew itself
            b. The term isn't considered one that ends the lease, but one that starts it again
            c. Single instrument avoiding unnecessary transaction costs
            d. **Ends**: with a defeasibility condition; or with **notice**
                1. Law has rules about how to give this
                    i. **Form**: specified in lease or legislature
                    ii. **Timing**: specified in lease or legislature or CL default (whatever the period of the lease is, notice must be given at least one period in advance; though no matter the term, six months is always considered sufficient)
                    iii. **Receipt:** Mailbox rule does not apply; property law wins this battle and the timing starts upon receipt of notice, not mailing
        iv. **Tenancy at will:**
            a. Tenancy exists until one party decides they don't want to participate anymore
            b. No notice required to end the lease at CL; states sometimes require it; parties may require communication of will
            c. Generally not transferrable
            d. Can be subject to defeasibility clauses
            e. **Ends:** When one party says it does

4. **Additional Considerations**
    i. Statute of frauds applies – must be in writing
    ii. Must have notice to terminate a lease – leaving the premises/death are insufficient
    iii. Mailbox rule doesn't apply generally – notice entails receipt and delivery.
    iv. Late notice applies for the subsequent period
    v. Unless specified in the lease, the ending point is usually **midnight** on the day

2. Transfer of Leases

1. **General "rules":**
    i. Tenancy at will usually not transferrable
    ii. CL default: tenant can transfer, subject to conditions of PPI
    iii. LL can write into the lease that tenant cannot transfer (or he has power of approval)
    iv. Two bodies of establish liability among parties:
        a. Privity of Estate (POE): liable as a consequence of property law
        b. Privity of Contract (POC): liable under contractual obligations
    v. **Most of the time, the parties will use words to designate a transfer an assignment or sublease; the CL still looks to the effect, not the language** (if the NT's interest is touching the FI, it's an assignment; otherwise, it's a sublease)

2. **Sublease**:
    i. Transfer to sub-leasee (S) for LESS THAN the time remaining on the lease – T gets it back
        a. It's a sub-lease if T retains a reversion
    ii. Creates a new line of POE and POC between OT and NT (nothing between LL and NT)
    iii. Property adds new layer of liability between original tenant and new tenant; but original LL is left out of it
    iv. Original LL and New T:
        a. No Property obligation; possible contractual obligation
    v. <u>Ways to get new tenant liable to LL</u>
        a. Third-party beneficiary: two parties can make a K with each and make, as a term, the conferring of benefits to a non-party and give that party the right to enforce the K term
        b. In new lease, new T may assume liability to LL

3. **Assignment:**
    i. OT transfer the entire unexpired term of his lease
    ii. Creates new line of POE between LL and NT; creates POC between OT and NT
    iii. Eliminates the original property liability between LL and OT and moves it down the chain – property liability now exists between LL and NT; K remains though, so OT still liable to LL under contract
        a. POE (privity) between OT and LL gone; now exists between NT and LL
            1. OT loses rights and duties to L
        b. POC (privity) between OT and LL remains
            1. L can still sue OT, even though OT no longer on the property
            2. Only way OT can get out of it is if LL gives OT a **release**
        c. Assignment is still a K between OT and NT = they can sue each other (through POE and POC)
    iv. When you transfer POE, you don't transfer every single bit of the lease – only some subset of the promises carry through (see running covenants, etc.)

4. **<u>Three things can create POC between LL and NT</u>**
    i. Write a new K: get all the parties together and execute a new deal
    ii. Assumption: as part of the OT/NT deal, NT explicitly adopts obligations to LL

5. **First American National Bank v. Chicken Systems, TN 1970s (Supplement)** *FANB owns property, leases it to a tenant (CS) who operates a fried chicken place (15 years, $1050/month – T cannot transfer without LL approval). CS finds new tenant after first year, Performance Systems Inc (PSI) and transfer interest, etc. without getting FANB permission. FANB still takes their money, doesn't fight this breach of K. 2 ½ years into this, PSI fails and stops paying rent. To mitigate damages, FANB rents to Sir Pizza for $600 month (term of 11 years).*
   i. CS is the OT; *assigns* to PSI (NT), who fails to pay;
      a. Under assignment, PSI assumes responsibilities of the lease and obligations to LL
   ii. LL then assigns to SIR (NT2)
      a. This is a new K entirely; POC remains between LL and CS (though POE dissolves), but dissolves everything between LL and PSI (the Ct treats it as though PSI itself assigned the lease to CS, which eliminates the relationship between the two (since there was never POC).
      b. LL tries to get $$ from CS, since it's the only one with money, but the Ct doesn't allow it.

6. **Distinguishing between Assignment and Sublease**
   i. CL Approach
      a. Assignment transfers *everything* up to the time the PI meet's the LL's reversion
         1. Would require language: "assign for the remainder of the term"
      b. Sublease transfers something *less* (so that the NT doesn't touch the LL's interest)
         1. This approach is easy, but may stifle the intent of the parties
   ii. $$:
      a. Under an assignment, monies going from NT to OT are *installments* toward an amount of money being paid for the value of the property
      b. Under a sub-lease, monies are *rent* (it could also be installments, but not usually)
         1. LL cannot sue and collect rent from T1 and T2 during the same time period
      c. **For both:** unless written into the assignment, NT must pay OT, who then pays LL

   iii. **Jaber v Miller, Ark 1951 (p. 750)** *5-year lease with a defeasibility condition of "the lease provided that the lease would terminate if the premises were destroyed by fire." Jaber operates a rug shop; transfers the lease to Nober (paper says "transfer and assigns for the remainder of the term"); Nober then transfer to Miller (who has trouble paying, Jaber works with him). The place burns.*
      1. Jaber = LL; Nobert = OT; Miller = NT; Jaber claims it's an assignment and that Miller owes J the remaining $$; Miller claims it's a sublease, so that the burning of the building releases him from liability to J.
      2. The Ct follows the CL approach, but considers the parties' intentions: when the lease term ends, the LL and Miller are next to each other on the timeline, so it's an assignment. They also acknowledge the parties' intent, which was for an assignment (Jaber wouldn't have sold business otherwise)

   iv. **Helmholtz Effect**: Cts purport to use the CL test and refuse to look at intention; in practice, however, they follow Jaber and twist things to carry out the intention of the parties.

7. **Restrictions on Transferability**
   i. *Reasons LL may do this:*
      a. LL rented to *this* individual, may not want another persons
      b. Tenants may transfer for all reasons, including to make money in favorable market conditions; LL want a stake in the profit.
   ii. CL does NOT like restrictions on transferability and requires people follow exact rules of construction

iii. **Commercial Lease Approval**

a. **Kendall v Ernest Peston** *LL reserves the right to refuse transfer; T transfer to make more $$, finds a NT willing to pay the market value. LL agrees to consent only if he can share the profits*.

1. **Held:** The Ct allows transfer restrictions, so long as they are **commercially reasonable** (so this particular refusal is invalid…which puzzles Lawson)

b. General rule: Transfer restrictions for leases are acceptable

1. LL and NT can have contractual relations through statute or equitable servitudes.

3. Implicit Obligations (CL Reads them into Every K)

1. **Sources of LLT Obligations**
   i. Read the lease
   ii. Statute in your jurisdiction
   iii. Common law decisions, which will impose default rules and implicit responsibilities
      a. **Paradine v Jane, Eng 1647 (p. 691)** *Agricultural lease; paying rent with yearly feasts. An alien prince invades the land, so that T can no longer farm and raise the feasts for the LL.*
         1. This is a contract issue representing frustration of purpose, though book presents it as an independent/dependent covenant principle
         2. Ct unwilling to extend an implicit provision of the T's ability to grow the feasts

2. **No requirement of quality/purpose** (statutory response = Implied Warranty of Habitability, see below)

3. **Law of Waste**
   i. Read into *every* lease
   ii. Property law reads a basic assumption that the T is liable to LL for waste, though parties can contract around it; silence does NOT override the law of waste

4. **Independent Covenant Rule**
   i. Each parties obligations are *independent* of the other's performance
   ii. Breach by one party does not excuse the other party's performance
      a. If the LL kicks the T off the property, the T must still pay rent (unless there's a written clause)
      b. T can't withhold rent because LL failed to make promises repairs

5. **Covenant of Quiet Enjoyment**
   i. If all lease covenants were actually independent, a LL who doesn't actually own the property could still collect rent from a T who gets kicked out by the actual owner.
   ii. *In response, the CL reads into all lease the implicit promise that the LL has superior title to the property he is conveying the tenant*
   iii. **Three things the CQE protects against**
      a. No one will boot you for no reason
      b. LL will not directly interfere with possessory right
      c. LL will not engage in activities amounting to constructive eviction

   iv. **Constructive Eviction**:
      a. Ct will often find that a serious interference with enjoyment/use qualifies as constructive eviction, which breaches the CQE
      b. Principles of Constructive Eviction
         1. LL must fail to perform or breach an express/implied obligation
            i. **Paradine** isn't an example of constructive conviction because the **LL** didn't do anything (he didn't permit the Prince to take over half the land)

2. The breach must render the property uninhabitable, presenting a substantial interference with T's use and enjoyment of the land so that it's objectively unreasonable to expect T to remain on the land.
    i. T really should leave the property to prove this point
3. T must give the LL notice and a reasonable chance to address the problem
4. If you do all of these things and the LL doesn't fix it, T must leave the property to prove that it is actually uninhabitable.
5. **Result**: T no longer has to pay rent and may sue the LL

c. Examples: If the LL is meant to maintain the roof/plumbing, the T is still bound to the lease if he breaches. What if T is running a printing business and a neglected plumbing problem ruins his business?
    1. Under independent covenants model, he must still pay.
    2. The Ct may find that LL breaches the CQE since the property can no longer be occupies because of LL's fault!
d. **Blackett v Olanoff, Mass 1977 (p. 703)** *P LL sued D tenants to collect pass-due rent; tenants raised successful defense of constructive eviction: late evening noise from a nearby lounge leased by P LL to others violated the CQE (P had it within their control to change the circumstances of tenants)*

6. **Flaws of Old Law**
    i. CL provided little rules other than the law of waste/CQE
        a. If T showed up for the first day of occupancy and someone else was on the land, ½ the jurisdictions held the LL responsible, the other ½ required the T to take action himself.
    ii. Leaves leases themselves as the source of rights/obligations
        a. **Smith v McEnamy, Mass 1897 (p. 694)** *T rented a lot from LL, part of which was covered by a shed that was used by T to store wagons; LL's husband built a brick wall on adjoining land, that encroached of T's land. Ct found that by the terms of the lease, T made it an absolute condition that he should have the whole of the demise premises, at least against willful interferences by LL. Such an eviction didn't necessarily end the lease or other obligations under it.*
            1. General rule: Other covenants would fall as well; maybe if breach wasn't bad enough to impinge on those other covenants, the T may be liable for them..but probably not.
    iii. Didn't have any warranty of habitability or fitness for a particular use
        a. **Sutton v Temple, Eng 1843 (p. 696)** *Lease for grazing cattle, who die from lead paint in the grass.*
            1. The CL does nothing for the T; if he wanted it for cattle, it should've been written in
            2. At CL, there is no warranty for a particular use!

4. The Implied Warranty of Habitability (some kind in 46 of 50 jurisdictions)

1. History: Over time, the law began to change to recognize the need for quality/purpose; in the **1960s**, property law underwent the largest-scale transformation of an aspect of American law
    i. Occurred through statutes, regulates, case law and transformation of legal doctrine
    ii. A time of great social upheaval, when courts saw themselves as implementers of societial change
    iii. Attempt at addressing the problem of SLUM HOUSING in the 'hood
2. **Result of change:** LL get socked with a lot more than they did 50 years ago!; T relatively unchanged

3. Four Ways the Label is Misleading
    i. This thing isn't a universal doctrine, but an umbrella term to describe the general set of doctrines that changed LLT law
    ii. It's explicit in the law (though sometimes implied in the lease)
    iii. Warranty is a contractual term that can be disclaimed; these obligations cannot be disclaimed

iv. Obligations are not always tied to the habitability of the property

4. **What is it?** LL can't afford to provide standard housing; tenants can't afford to pay for it; but law tries to encourage standard housing at substandard rates (almost no one has been able to use it!)

5. **Sources of IWH**
   i. Statutes: wave of statutory enactment regulating the LLT relationship
   ii. Common law: Essentially overruling **Sutton**, in which the CL has recognize that when LL's lease certain types of units (especially residences), we'll imply a promise for a certain quality
   iii. **Medico-Dental v Horton, Cal 1942 (p. 712)** *Lessee's lease stated that the lessor was not to lease any other premises to another entity that operated a drug store; they leased to a doctor who promised not to open a drug store, but then did. The lessor was unable to stop the doctor and the lesee vacated before its next rental payment. Found for lessee*

6. **Scope**: The types of leases covered…
   i. Varies from state to state: single unit/multi-unit; residential/urban?
   ii. Lots of change for large-unit apartments in urban areas
   iii. Not much change in commercial leases

7. **Content: What Changed?**
   i. The law now reads into leases a promise that the unit will satisfy a legally mandated standard
   ii. Determining the Standard of Quality: **Different approaches for different juridictions**
      a. **Housing codes**: existing body of law that mandates general health/safety requirements for building construction.
         1. **Javins v 1st National Realty Corps, DC 1970 (p. 719)** *LL attempted to evict tenants of his apartment complex; lower ct allowed evictions, finding proof of housing code violations were inadmissible. High Ct viewed lease as a contract, and that contracts have implied warranties, and say that housing code displaced CL rule.*
            i. CL rule burdening the tenant with a repair was no longer valid where modern urban tenants' interest in property had nothing to do with the land itself, but was an interest in the suitability of living quarters.
         2. Used to only be enforceable against state agencies; now against priv citizens
         3. Read every leas as implicitly guaranteeing to the tenant that the unit will comply with the housing code
         4. Pros: It's easy!
         5. Cons: Provisions are likely to be:
            i. Over-inclusive: covers things that no one other than the housing commissions care about (pipe sizes)
            ii. Under-inclusive: won't cover every aspect that a resident may deem necessary; they don't care if the stove works

      b. **Substantial Violations of the Housing Code/Housing code through lens of habitability**
         1. The virtue of the housing code is that it already exists; it would be difficult to administer if you were to pick and choose what to consider
         2. No Ct has ever found that only one violation would suffice
         3. Makes it more expensive to litigate when you have to argue whether the violation was substantial – and the idea is to help poor people.
         4. The gap between litigation costs and the $$ people have renders the whole scheme useless

c. **Habitability**
    1. Cherokee Problem of enforcement: classic example of a fuzzy, standard-based doctrine that must be resolved through expensive litigation
    2. **Lenley** *High-end vacation home in Hawaii; T will have $$ to sue.*

d. **Reasonable tenant expectations**
    1. All of the problems are case-by-case; decouples the doctrine from a connection to habitability and doesn't solve the under-inclusiveness problem

8. **Remedies!**
    a. Remember **1968** and the purpose for the change: there was an urban housing crisis; only reason people would be in this terrible housing is that they *have nowhere else to go*
        1. Termination of lease wouldn't help; hence damages remedy that makes it costly for LL to retain the unit in substandard condition
    b. Presumptive remedy of expectation: Doesn't work; you'd only get what you'd expect in a slum
    c. Rent Reduction/Abatement: Reinterpreting expectation…reduce rent by the value that is lessened by the substandard conditions
        1. Fair rental value of compliant unit LESS value of unit in present condition = remedy
        2. **Problem**: Must construct the fair rental value, which costs $$$, through experts

    d. Percentage reduction: **The actual model**
        1. Take the particular defects, present them to the trier of fact, and have him figure out the percentage of the overrule value that is lost by those defects
        2. Meant to return the party to the position he would be in it the unit was in compliance
        3. Idea is that a T can come to Ct without expert testimony, and his own % views
        4. **Problem:** Rests on assumptions that aren't true…
            i. That a normal person can turn the defects into percentages
            ii. That the intervention will actually help

    ii. Tort Approach
        a. T can recover for emotional distress, discomfort, punitive damages
        b. This isn't damages, but a whole new cause of action

9. **Economic Effect**
    i. IWH was motivated to fight poverty; however, the effect of having a minimum quality provision is the same effect as rent control – it reduces the supply of housing
    ii. Reporter for Restatement of LLT: this may actually be good and result in government providing adequate housing for low-income persons
    iii. **Real world:** IWH doesn't do that much – in situations that need it, it costs too much to employ, so it doesn't make economic sense.

5. Deadbeat Tenants: Landlord Remedies against Tenants

1. In theory, the lease will require the T to pay and, if he doesn't, he's in breach and the LL can boot him.
2. Two situations can arise: T fails to pay and leaves or T fails to pay and remains.

3. **Abandonment**
    i. Abandonment means that the T has left the premises without a legal right (before the lease is expired) and has expressed his intention to leave permanently (need mental state)

ii. LL has the opportunity to find a new tenant, since vacant property is dangerous and unprofitable. This, however, may be costly.
   a. This represents a **clash between K/property law:**
      1. K law requires a reasonable effort to mitigate damages
      2. Property law does not require mitigation since a lease has been signed
      3. **Summer v Crydell** *Overrules traditional view that property law wins and requires that LL make a reasonable effort to mitigate damages (new tenant).*

iii. Abandonment seen as an OFFER to the LL to terminate the tenancy; LL has three response options:
   a. **Surrender (Accept the offer)**
      1. This action results in the termination of the lease, so that T has no continuing obligation to pay rent, though it does NOT relieve T from prior obligation (back rent)
      2. A proper surrender must comply with STATUTE OF FRAUDS; there's a problem since parties don't usually sign papers (Ct, however, usually accept the reality of LLT relationships and recognize the surrender)
      3. **POE ends; POC technically remains (unless there is a release)**
         i. Property Law: LL's reversion becomes a PPI; privity of estate is ended
         ii. Contract law Issue: To fully extinguish the lease, the parties must also terminate the CONTRACT through a release
            1. **Surrender of release by operation of law**: If the parties don't actually sign a paper, the law will essentially imply a surrender/release over a large range of
      4. Acceptance is determined by the trier of fact, who determines whether the LL has manifested his intent of acceptance

   b. **Mitigate damages through re-renting (but not surrender)**
      1. Abandonment without acceptance of surrender
      2. **Poe continues; POC continues**
         i. LL wants to maintain both property and K liability (POE and POC)
         ii. K: L is acting as an agent for the T, finding a sub-leaser on his behalf
            1. Good for both LL and T
      3. Jury issues arise: did L create a new LL-T relationship or putting someone on the property to prevent vandalism?
      4. In a jurisdiction that requires mitigation, the judgment will always be reduced by the amount recovered through mitigation

   c. **Do nothing**
      1. Under the CL, a LL can let the rent accrue without seeking to mitigate; since it's a transfer of land under property law, there's no duty to mitigate
      2. Many jurisdictions now require mitigation

4. **Holdovers: Tenant remains on the property**
   i. The tenant fails to pay rent, but remains on the property
   ii. IWH Complications: IWH can complicate this matter – it draws a gap between failure to pay rent and breach of the lease
      1. To be in breach, T must fail to pay rent owed to the LL; under the IWH, the rent that is owed MINUS damages of IWH
      2. Jurisdictions allow T to make repairs and deduct the amount from the rent
   iii. **Remember: It's difficult to get a tenant out quickly**

iv. **Assuming LL is in the right, he can:**

a. Self-help Remedies

1. At CL, self-help, so long as it's peaceful, is totally kosher
2. Generally disfavored, though lots of jurisdictions still allow for peaceful self-help remedies
    i. **Berg v Wiley, Minn 1978 (p. 428)** *T operating a restaurant on the premises, encounters a health code problem and must shut down. LL fears a reduction in property value in the future and changes the locks. Ct finds for T*
3. If done improperly, can lead to actions against the LL himself

i.

b. Acceleration Clause: Working the theory of anticipatory breach into the K itself by saying that the LL can sue for the rest of the lease when T fails to pay one month's rent

1. K law, however, hates punitive damages and wants actual damages to be indicative of actual harm; this then becomes a nice tool but doesn't guarantee the LL will get full amount.

c. Housing Courts: Law creates special courts, with faster results, for LLT situations

1. Forcible entry/detainer statutes: designed as an alternative to self-help
2. **Problems remain**:
    i. Even with the special ct, a backlog exists (so that you may be less than a civil docket, but still waiting six months)
    ii. T will be allowed to bring up defenses (IWH), which slows down process
    iii. Still doesn't solve the **enforcement** aspect (Cherokee problem!)

d. In court:

1. Sue for damages: Can only sue one month at a time, for breaches that have occurred
2. Sue for anticipatory breach: Difficult to prove
3. Eviction: LL can file a legal action for ejectment: draft/file the complaint
    i. Once T doesn't pay rent, the property is conveyed back to LL
    ii. **Problem**: This takes MONTHS

6. Housing Discrimination

1. **Common-Law Baseline**
    i. When you own property, one of your rights is the right of disposition
    ii. Presumptively, the right TO transfer would include the right NOT to transfer; however, even CL had a non-discrimination clause for **public entities**
    iii. Overtime, the CL began prohibiting restrictions on transferability, and applied a **reasonableness standard**
        a. Allowing negative promises with respect to transfer so long as they didn't too far
        b. US jurisdiction split: Some said NO restraints on alienation, other adopted the reasonableness stad

2. **US then had the Reconstruction Amendments**

3. **Civil Rights Act of 1866 (42 USC 1982)**
    i. "All citizens of US shall have the same right in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."
    ii. Meant to address **state** statute that restricted sale of land to blacks; no one at the thought that it had anything to do with private acts
        a. **Jones v Alfred Mayer**, 1960s: Applied housing discrimination prohibition to PRIVATE individuals (though it only applied to racial discrimination)

4. **Civil Rights Movement + Implied Warranty of Inhabitability = Fair Housing Act of 1968 (p. 467)**
    i. Following the Civil Rights Title VII model during at time that allowed Congress to use its commerce power to regulate social activities
    ii. **Dilemma:** Do we want a general prohibition on unreasonable decision-making or something focused?
    iii. Though there are supplements, this is THE major statute regulating the housing market….

    iv. **3601:** Declares policy (not in the book)
    v. **3603(b): Exemptions**
        a. No exemption from 3604(c) – can *never* circulate discriminatory advertisement
        b. 3604(a) - Mrs Murphy Clause
            1. 3604(a) doesn't apply to room/units in a dwelling of only 4 residents if the landlord is one of the occupants
        c. 3604(a) doesn't apply to:
            1. Single family houses,
            2. Sold/rented by the owner
            3. Without a broker
            4. Who doesn't own more than 3 houses
            5. And only uses the exemption once every 2 years
    vi. **3607: More exemptions (not applicable to racial discrimination)**
        a. No law can prohibit a religious organization from limiting sales, operations, etc. of a dwelling to persons of the same religion, unless membership of such religion is restricted on account of race, color or national origin.
        b. Exemption for discrimination of "familial status" for housing for older persons

    vii. **3604: Discrimination in the sale or rental of housing and other prohibited practices**
        a. Unlawful to refuse to sell, rent (after the making of a bona fide offer), refuse to negotiate for the sale or rental of, or otherwise make available of deny a dwelling because of race, color, religion, sex, familiar statute or national origin
        b. Can't discriminate in terms of conditions, term, privileges of sale or provisions of services
        c. Can't make, print or publish or cause to be made, printed or published any advertisements that indicate preference based on race, color, religion, sex, **handicap**, familiar status or natl origin
            1. DOJ will not take action where legal preferences are stated in ads (though this quasi-exemption won't stand for race, religion or national origin preferences)
        d. Can't represented to anyone based on race, color, religion, sex, **handicap**, familiar status or natl origin that a dwelling is NOT available
        e. Can't for profit, induce or attempt to induce prospective buyers into (or out of) a neighborhood on basis of current occupants race, color, religion, sex, **handicap**, familiar status or natl origin
        f. Can't discriminate on basis of **handicap** (under a reasonable basis/cost-benefit test)
            1. Handicap not in A/B because F covers it specifically

    viii. **3613: Enforcement/Remedy**
        a. An aggrieved person can get damages, injunction, reasonable attorneys fees and cost
            1. Two methods: private lawsuit or through the Department of Justice

5. **Scope of Fair Housing Act**
    i. Civil Rights Act of 1866 (42 USC 1981/1982): Guarantees same rights regardless of race; later applies to private citizen
        a. Mrs. Murphy/single family sale exemption may be unconstitutional (would have to litigate it)

ii. Limited Exemptions: If you don't fall within those categories, the fair housing act applies.
iii. This serves as a **floor** for the **state/localities**; they are free to adopt their own anti-discrimination ordinances that are appropriately broad or narrow

6. **Mechanics of Litigating a Dispute**
   i. All of the prohibitions (other than 3604(c)) contemplate **intent** (prohibited action is "because of")
      a. Becomes a trial question – the trier of fact must get into the head of the defendant.
   ii. The aggrieved party will send fake applications to the alleged defendant (obviously, before the suit is brought) to test what's happening…applications will be perfect, except for the supposed bias element.
   iii. What if an accepted discriminatory element (wrestling fans) is a proxy for a suspect classification?
      a. Huge issue in employment: 1971, Ct said that there can be circumstances in which the effect, regardless of the intent, will sufficient
      b. Still some uncertainty in housing: most cases involve govt units, little authority for private conduct.

VI. Protecting Ownership

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1. Trespass & Nuisance

1. **Introduction**
   i. The law has remedies to vindicate the LL's interest in the land
      a. Quiet title action (inviting anyone with other claims to challenge you)
      b. Ejectment (you have a better claim and boot someone)
      c. Injunction (to stop actions)
      d. Damages (to pay for them)
   ii. People can also interfere with your possession and use of the property; welcome TORT LAW
      a. Trespass = possession
      b. Nuisance = use

2. **Trespass: The Super Tort**
   i. Trespass is a super tort because it cuts through other rules; doesn't require injury; and automatically triggers an injunction
   ii. **Test: See, Feel, Touch**
   iii. Bringing a suit:
      a. Present possessor can bring suit; needn't have Blackstonian ownership
      b. NOT someone with a future interest

   iv. Alleged Trespasser's Conduct
      a. D doesn't have to know he's going onto your land
      b. Must have intention to do the physical act (not cause harm)
      c. Conduct must be voluntary
      d. D can escape liability if:
         1. Involuntary (pushed over boundary)
         2. Certain privileges apply

   v. **Privileges**: The Law recognizes "privileges" – a range of circumstances that entitle you to go onto someone else's land without permission:
      a. Preventing a crime
      b. Public/private necessity
      c. Public use

vi. Relevant Restatement of Torts Sections

a. **R158**: "One is subject to liability for trespass, irrespective of whether he causes harm, if he intentionally enters the land of another or remains on the land or fails to remove from the land anything which he has a duty to remove, etc..

1. **Intent** = not to cause harm, but to physically do the action
2. Basically crossing a boundary lines or causing a person/thing to do so
3. If you have permission to be on the land, trespass is staying on the land after the permission has been revoked

b. **R159**: A trespass may be committed on, beneath or above the surface of the earth, with an ad cellum exception for aircrafts (so long as they aren't close and cause substantial harm)

c. **R163:** One who intentionally enters the land is subject to liability as a trespasser although he acts under a mistake belief of law or fact (however reasonable)

1. Mistake examples = thinking the land is yours, thinking you have permission, etc.
2. **Wetherbee v Green, Mich 1871 (p. 166)** *Here, though, the mistake worked in his favor because the Ct found he was acting in good faith*

vii. **Affirmative Defenses:**

a. Owner's consent (implied or express)
b. Past consent which is irrevocable
c. Various kinds of public access rights
d. Privileges (of which there are 45)

viii. **Remedies**:

a. Usually, an automatic injunction
b. However, if an injury exists and you get damages, you cannot also get an injunction.
c. **Jacque v Steenberg, Wis 1997 (p. 1)** *A company drags mobile homes across someone's property even after the landlord requested they stop. Judgment of $1 compensatory fees; $100,000 punitive.*

1. Punitive damage award is excessive; however, the Ct notes that an award in excess of nine times compensatory damages may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages

2. Nuisance (the most annoying tort…in the world!)

1. **Every nuisance plaintiff wants to be a trespass plaintiff…laa daa dee, laa daa dum**

2. Two Types

i. Public Nuisance: a regulatory doctrine outside of "nuisance"
ii. Private Nuisance: a tort

3. Differences from trespass

i. Nuisance has a broader class of plaintiffs (not just the PPI)
ii. Nuisance Includes use and enjoyment
iii. Nuisance invasion must be *significant harm*; trespass does not require harm
iv. Traditional nuisance things: sounds, smells, light and water
v. Gross tangible physical particles and **natural gas** are usually trespass; small dust is nuisance
vi. Trespass automatically triggers injunction; nuisance must still prove harm for it
vii. **Note: You can have an incident that gives right to both; however, the specific actions must still differ.**

4. **821D: Definition**
    i. A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land
        a. Making it clear that one action can only be a trespass or a nuisance, NOT both
        b. Invasion = border crossing
        c. Trespass only covers possession, nuisance includes use and enjoyment

5. **821E: Parties who can bring a suit**
    i. Liability only to those who have property rights and privileges in respect to the use/enjoyment
    ii. Possessors of the land
    iii. Owners of the easements and profits, and
    iv. FIH that are detrimentally affected by interferences with its use/enjoyment
    v. *So it's broader than trespass*

6. **821F Standard of Harm**
    i. Liability only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community under normal conditions/use….objective standard.
        a. There are certain annoyances that all members of the community must suffer; for a nuisance, it must be intolerable to the average person of normal sensitivities

7. **822: Standard for liability** (biggest difference with trespass)
    i. One is subject to liability if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment and the invasion is either:
        a. Intentional and unreasonable, or
        b. Unintentional and otherwise actionable under the rules controlling negligent/reckless conduct or for abnormally dangerous conditions/activities
    ii. **825: Intentional:** Intentional if the actor
        a. acts for the purpose of causing it, or
        b. knows that it is resulting or is substantially certain to result from his conduct
    iii. **826 Unreasonable:** Unreasonable if
        a. The gravity of harm outweighs the utility of the actor's conduct,
            1. *Nightmare to litigation; gives CL judges unlimited discretion; leads to dumb outcomes*
            2. **827 Gravity of Harm Factors**
                i. Extent of harm
                ii. Character of harm
                iii. Social value that the law attaches to the type of use/enjoyment invaded
                iv. Burden on the person harmed of avoiding the harm
            3. **828 Utility of Conduct**
                i. Social value that the law attached to the primary purpose of conduct
                ii. Suitability of conduct to the character of the locality
                iii. Impracticability of preventing or avoiding the invasion
        b. 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
            1. *This works only for damages, not injunctions*
            2. **829A Gravity v Utility: Severe Harm**
                i. Unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation

8. **840 Coming to the Nuisance**
    i. Fact that the P has acquired or improved his land *after a nuisance* is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable

9. **826(b) Remedies**: Injunction or damages?
    i. **Injunction**: balances the utilities:
        a. If gravity of harm outweighs the social utility of the nuisance action, P wins
        b. A D is usually only freed of liability if he can prove that the social value outweigh the harm
    ii. **Damages**: if P is only seeking damages, he needs on prove substantial harm (no balancing)
        a. Damage can be granted into addition to equitable relief or in place of it
    iii. **Permanent Damages:** Establish the nuisance and that there's reason to believe that it will continue; bring in experts to determine what the total past and future loss will be in lieu of P bringing the suit.
    iv. **Spur Industries v Del E Webb Development, Ar 1972 (p. 964)** *An old folks home moved in near a cattle feed. Not a nuisance because no one was there to bother, but as people got closer they got more annoyed and a nuisance formed.*
        a. The plaintiff made the action a nuisance by moving closer to it; if the feed-lot
        b. *The Ct forced the P to pay damages:* if the cattle feed has to move, P has to pay for it.
        c. **Note:** Most courts haven't followed *Dell Webb*

10. **Cases**
    i. **Adams v Cleveland Cliff Irons, Mich 1999 (p. 938)** *Adams lives next to an iron mine, which generates noise and dust. Jury found it was not a nuisance because it wasn't unreasonable.*
    ii. **Morgan v High Penn Oil, NC 1953 (p. 955/Supplement)** *Oil refinery with a trailer park next to it which operates a restaurant; Ct seems NOT use the gravity of harm test, which demonstrates that application of the straight-forward inquiry would lead to a conclusion of no liability…court still calls it unreasonable E*
    iii. **Crest Chevrolet v Williamson, Wis 1986 (Supplement)** *Glass company next to a car company; glass company sick of the water from the car company, builds property to deflect water back to car company.*
        a. Water is always a nuisance, Glass Co acted unreasonably
        b. Illustrates that if P is only asking for damages, we only need to find significant harm; no balancing
    iv. **Boomer v Atlantic Cement Company, NY 1970 (956):** *Cement co throws dust all over the community, the community members want to bring an action for trespass; ends up nuisance since the dust is so fine.*
        a. This case came about at a time when automatic injunctions were the remedies for both nuisance and tort law; hence, it put pressure on imposing nuisance liability, since the Ct would STOP an activity.
        b. Ct hesitant to weight the interests if it would lead the shutting down this big employer; therefore, the Ct will find that the gravity of the harm < the social utility.
        c. **Problem:** Balancing should take place at REMEDY stage, not liability stage
            1. **This case prompted the addition of 826(b) to make the balancing occur at remedy stage**

11. **Invasion**
    i. To be a private nuisance, it must be a non-trespassory **invasion** of another's interest in the use/enjoyment
    ii. **Hendricks v Stellnicker, WV 1989 (p. 23):** *One neighbor wants to put in a septic system, the other has a well in place; there's a city ordinance that says you can't have one w/i 100 ft of the other/ need permits.*
        a. The Ct asks whether either party is doing anything wrong; Lawson thinks it should be asking whether the existence of the well serves as an invasion?
            1. The well isn't physically invading H's property, rather the invasion comes from the ramifications of the city ordinance

2. **The Restatement requires an 'invasion' because if it didn't, anything that disturbs another would be a nuisance; the law only wants to cover things that in a physical sense seep from one property to another.**

12. **Non-invasion nuisance/effect on Property Values**
    i. Generally, nuisances that only diminish property values are not actionable
        a. **Nicholson v CT Halfway House, CT 1966 (Supplement)** *Residents want to shut down a halfway house for parolees because they fear property values will plummet*
            1. There is no actual invasion (no one broke into your house)
            2. Ct sees that the real objection is potential future crime and finds that depreciation of property value is not an adequate invasion
            3. Tries to rely on **Brainerd v Hartford**, which enjoyed an unreasonable use of property that may be anticipatory (stopping a proposed town dump); and **Jack v Torrent** which held that a neighbor could enjoin the creation of funeral home.
        b. **Arkansas Release Committee v Needler**, *Another residents attempt to stop a halfway house*
            1. Trial Ct found nuisance and Appellate Ct affirmed because of the depreciation of value, fear of future crime, admittance of sex offenders and use of alcohol by one parolee
            2. Differentiates Nicholson because that community had no experience with the halfway house; there was no actual evidence of depreciation (Lawson points out depreciation was a Ct finding)
            3. Bottom Line: Arkansas didn't want criminals in their hood, different than Connecticut
    ii. When it's certain that a nuisance is coming, you can shut it down before it happen (save costs)
        a. **Brainerd v Hartford**, which enjoyed an unreasonable use of property that may be anticipatory (stopping a proposed town dump)
    iii. **Funeral homes** are an exception to this rule; though cemeteries are not.
        a. **Jack v Torrant, CT 1950 (Supplement)** *Granted an injunction of a funeral home w/o proof of damages or invasion*
            1. Foundation: studies show that neighbors and properties suffer adversely…bum out factor
            2. Only exception to the general rule; rather universal in application

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VII. Private Land Use Controls

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1. Introduction to Servitudes

1. **A servitude** is a right to do something to another's property that would otherwise be a tort
    i. It can be an affirmative right to allow use of something
    ii. It can be a negative right to veto someone's use of something
2. Law has divided them into five categories (though we only study three):
    i. **Licenses**
    ii. **Easements**
    iii. Profits
    iv. **Running Covenants**
    v. **Equitable Servitudes**
3. **Remember:** Two kinds of arrangements:
    i. In gross arrangement: Only binding on the PARTIES (to the license)
    ii. Appurtenant: binding to the LAND (related to easements)
4. The Reporter of the Third Restatement of Servitudes has built her career on saying that "the law of servitudes is stupid and needs to be scrapped."

5. **Payment:** You needn't pay for licenses and easements, you must pay for RC and ES (types of contracts)

2. License

1. **License** = form of legal permission without an easement; an interest in land in the possession of another, which entitles the owner of the interest to use the property (ticket to a movie theatre)…**revocable.**
2. **For our purposes, a license is a failed easement**
    i. **Restatement 512:**
        a. Entitles owner of the interest to use the land
        b. Arises from the consent of the one whose interest in the land is affects
        c. Is not incident to an estate in the land
        d. Is not an easement
    ii. **Basically:** If one or more formal requirements of an easement are missing, then it's a license
        a. Hence, it is revocable at any time by the grantor
    iii. **Do not travel with transfer of property**
    iv. **Baseball Co v Bruden, Ma***: Arrangement to place an advertisement on someone's building for $25/year; after a few years the landowner backs down…*
        a. This could be three things: revoking permission for a license; a lease for the side of the building; an easement (use right of building).
        b. Court believed it was a **lease**, because advertiser wouldn't pay $25 year back them for nothing.

3. **Irrevocable Licenses /Easement by estoppel** (not quite an easement; not quite a license)
    i. Some jurisdiction refuse this type of easement/licenses
    ii. Property law will not forbid revoking a license, but will consider **reasonable reliance**
    iii. Other laws WILL forbid revoking a license: law of estoppel may prevent you from exercising this right if you knowingly, willfully induced reliance (hence, the Ct is estopping the licenser from asserting his legal right to revoke a license)
    iv. If you win an easement by estoppel, you only get the right for a reasonable time
    v. **Holbrook v Taylor, KY 1976 (p. 997)** *For a long period of time, neighbors had a great relationship, one allowed the other to use the access road. Then something goes wrong and the owner cuts off the access*.
        a. If it's a genuine license, it's allowed; if neighbor wants access, he must pay for an easement.
        b. Ct did NOT let neighbor pull license

3. Easements

1. **Introduction**
    i. **Easement** = a non-possessory right to use land in the possession of another; entitles owner to a limited use or enjoyment of the land in which the interest exits…so, if you win, you win the easement forever
    ii. **Restatement 450, p. 590:** An easement is an interest in land in possession of another which:
        a. Entitles the owner of such interest to limited use/enjoyment of the land in which the int exists
        b. Entitles him to protection as against third parties from interference of use/enjoyment
        c. Is not subject to the will of the possessor of the land
            1. Once owner gives you an easement, he can't change his mind (though it can blow up through defeasibility conditions)
            2. Hence, it is irrevocable
        d. Capable of creation by conveyance (you can deed and transfer easements)
        e. Is not a normal incident of the possession of an land possessed by the owner of the interest
            1. Acknowledges that people have rights to do and not do thing (by virtue of being a neighbor, but the law of easements go beyond that)

2. **Main Ideas**
   i. An interest in land isn't a possessory interest; it's only a use right
   ii. RAP applies
   iii. A right to do something that would otherwise be a trespass or nuisance; but not possess it
   iv. Holder of an easement has a right to use and enjoy, but not possess
   v. Critical Distinction
      a. All easements are either:
         1. **Appurtenant:** Benefits particular piece of land and transfer with ownership
            i. Land that is benefiting from the easement is the **dominant tenement**
            ii. Land that is subject to the easement is **servient tenement**
         2. **In gross**: Benefits a particular person, not attached to the land

   vi. **CL doesn't allow the creation of negative easements**
      a. **Affirmative:** Right to do something to someone else's land
      b. **Negative:** Right to prevent someone else from doing something with their land that they could otherwise have done (ie right to prevent your neighbor from building a driveway)
         1. Can do them, but only through CONTRACT (don't run with the land)
         2. You can still do things to prevent people from doing anything to your land, it's just not an easement (it's a running covenant or equitable servitude)

   vii. **PRACTICALLY:** First try for a prescriptive easement, then an equitable servitude, then a RC

   viii. **Different kinds of easements (see below);**
      a. Through a grant
      b. Implication
      c. Necessity
      d. Prescription
      e. Easement by estoppel (described above under 'revocable license')

3. **Creation of an Easement**
   i. Because an easement is irrevocable and protected against 3rd parties, it resembles a PPI
   ii. It is **subject to the statute of frauds** and must be in writing
   iii. **Future:**
      a. An appurtenant easement runs with the land through property law (not K law)
      b. An in gross easement only binds the specific parties

   iv. **Creating an easement through transfer:**
      a. You can always keep an easement for yourself when transferring land
      b. But you cannot create an easement in a third party when you transfer (CL)
         1. You can get around this by doing two transactions (if CL still applies in jurisdiction):
            i. Sellers makes an easement with one party, then sells land to another and the easement runs with the land, binding successors
            ii. Grantor can transfer land to a new party on stipulation that the later give an easement to third party
            iii. Transfer land to A , then have them make the sale and keep an easement
      c. **Willard v 1st Church of Christ Scientists, CA 1972 (p. 979)** *An appurtenant easement in a third-party*
         1. Church member has an empty lot across the street from the church, which she lets the church use for parking. She agrees to sell the land so long as it remains a parking lot.

i. Problem with doing all of the transactions at once: CL doesn't allow you to create an easement in a third-party when selling to another.

2. **Creating an appurtenant easement:** The easement must be related to the land, the use right must tie the lands together (not the owners)

v. **<u>Elements of the writing</u>**
   a. Duration (or law will imply that you gave away all that you had)
   b. Defeasability conditions
   c. Scope (nature of the use right)
   d. Location

4. **Transferability of the Easements**
   i. If you want to extend right to future generations, it's property law not contract law
   ii. **Appurtenant easements** are transferrable, they are soaked into the land and benefits the owner or possessor of a particular parcel of land.
      a. Must incorporate: duration, termination (defeasibility), location, scope, subsidiary and transferability
      b. Must find INTENT of parties to make it appurtenant (but where the nature of the arrangement meets the physical requirement of an appurtenance, there's a good chance the Ct will find the easement appurtenant
   iii. **In gross** are generally not transferrable, though there are exceptions; they relate to a person, whether or not the persons owns any specific property (or any property at all).
      a. If the purpose of the easement is **commercial**, it's assumed to be transferable
   iv. **One stock rule:** If you have an easement, and its transferable, you can transfer it, but only to <u>one entity</u>, so that the servient tenement does not qualitatively change
   v. **Ct tends to favor appurtenant because they love transferability!**

<u>Three Types of Easements</u>

1. **Express Easement:** See above.

2. **Easement by prescription** (like adverse possession)
   i. **Prescriptive easement** acquiring the use right by doing the wrong long enough without getting sued
   ii. Related to adverse possession:
      a. Law of prescriptive easements <u>follows the SOL for adverse possession</u>
      b. Similar <u>encroach</u> elements
         1. The wrong must be legally actionable
         2. Continuity requirement (so that the law is confident you'll commit the tort in the future)
            i. Must be continuous in the intermittent character appropriate to the use right
         3. Must be actual and hostile (whether the use was permitted or not)
            i. Competing theories:
               1. If you're using AP, then of course the use has to be hostile
               2. **Lost Grant Theory**: permission by the person who's land it is is *evidence* of the lost grant of an easement (back in the day when there was only one copy and it could've been destroyed)
            ii. Jurisdictions split on need for hostility element
         4. Don't have to pay upon acquiring the easement
   iii. Can still consider appurtenant or in gross, depending on what/who is benefiting

iv. **Warsaw v Chicago Metallic Ceilings, Cal 1984 (p. 986)** *people driving a truck over someone else's driveway; remember that Western states adopted a shorter SOL and required payment of taxes; there's no property tax on use right.*

3. **Easement by Implication**
   i. The law recognizes easements that are implied by prior use; wants to suggest that parties would have intended for the easement to continue after sale
      a. Document construction: implying a term that the parties didn't state expressly
      b. **Schward v Timmons, Wis 1999 (p. 979)**
   ii. People actually argue for an easement by implication because it was accidently left out…or they are now trying to steal an easement (hence the apparent use requirement).

   iii. Elements of an easement by implication
      a. **Common ownership** (unity of title): at one point, all relevant parcels were owned by one person
      b. **Quasi-ownership rule/continuous use:** Circumstances that are subject to an easement had to be in place at the time the unitary ownership was dissolved
      c. **Apparent Use:** The use must be established at the time of sale, obvious to the reasonable person
         1. Access road = clear; sewage pipes?
      d. **Necessary:** Ct will not imply an easement unless the usage is necessary for the beneficial enjoyment of the property
         1. Necessary as in helpful/convenient
         2. Standard of necessity is higher for the original grantor than to later purchasers

4. **Easement by Necessity**
   i. An offshoot of easement by impl, for instances when the use right is necessary to enjoyment of property
   ii. Necessity has to prove other elements of implication, but with a strong notion of necessity
   iii. **Do not need to prove pre-existing use or that its apparent**
   iv. Usually reserved for **land-locked** situations
   v. Some legislature will intervene for easements by necessity, having statutes that force landowners to sell you the easement; they do not do this for easements by implication.

Way to Create Negative Covenants

1. **Negative Easements:**
   i. CL originally adopted a hard rule that forbid negative easements
   ii. **Exceptions** recognized the need of an **agrarian society**
      a. Could prevent neighbors from blocking your sunlight, water, air or removing lateral support
      b. Refused to add any more exceptions over time

   iii. Contract Law: you can contract for affirmative and negative uses
      a. They may not travel to the new owner, since original K law didn't recognize third party beneficiaries
      b. To get full effect of negative use restrictions, you want them to survive transfers
      c. Law of tenancies: The effect of **assignment** is to bind the assignee to the LL by important terms
2. Both **real covenants** and **equitable servitudes** are ways to create negative easements that bind successors
   i. You can make affirmative rights with these things as well, but that's easier to do under easements

3. **RC & EQ share two requirements:**
   i. **Enforceable contract**: A written document that will satisfy the statute of frauds

   ii. **Intent**: The original parties must have the intention to bind the successors

a. Can be determined from the language of the grant (shall always/never), but there's still trouble
    1. **Spencer's Case** *Minority view*
    2. If the agreement concerns things that don't exist, you must use the magic words
        i. "Successors are to be bound"
        ii. "There are the assigns of the promisor"
    3. Not strictly necessary for things that are already in existence
b. **Mosley v Bishop** *Majority view*
    1. Infer intent from the instruments as a whole when the covenant is a promise to do or not do something on a particular piece of land the promise clearly improves the value of the land

iii. **Covenants must touch and concern the land:** To limit the class of promises that run with the land
a. Doesn't mean anything that benefit the land (too broad)
b. Doesn't mean 'things that physically affect the land' – physical things can touch and concern the land, but they don't all have to be physical
c. Certain personal promises to pay money don't touch/concern the land (though fees to homeowners' association *do* count)
d. **E&E Examples:**
    1. Non-competition business restraints (subject to public policy concerns)
    2. Requiring a management company does NOT
    3. Providing the seller will build something does NOT
    4. K that the seller will bring water is NOT
    5. Promising to support a rezoning application does NOT
e. Restatement proposes to ditch this requirement all together

iv. **Then things get different**

Running covenants require PRIVITY

1. **Horizontal Privity**: *relation between original parties to the agreement*
    a. **Brits** required simultaneous, overlapping *temporal* interests in the same property (P/F interests)
    b. **Americans** requires that original K parties have a relationship to bind successors (buyer/seller or neighbors)
        i. US accepts phony transactions (A sells to B; B sells back with RC)
            a. *Minority*: So long as parties have any interest in each other's land, and the other elements are fulfilled, we're good.

2. **Vertical Privity**: *relationship between original parties and successors*
    i. At CL, successor had to succeed the same estate of the original promise
    ii. Modern Ct have changed it to something closer to tacking/adverse possession definition of privity
    iii. **States vary too widely to get into this**

Equitable servitudes require NOTICE

1. Notice: Actual, constructive (gathered from the deed records) or inquiry (gathered from viewing the premises and surrounding premises)
    a. May require **recording** for notice
2. States abolishing the horizontal privity requirement rely on the recording acts to give notice to subsequent possessors or to protect subsequent purchasers from covenants in deeds not properly record

They also have different REMEDIES

1. The presumptive remedy for an RC is damages ($$), though they can get injunctive relief too.

2. The presumptive ready for an ES is an injunction (remember – law of equity)

2. **Equitable Servitudes Examples**
    1. **Equitable servitude** a non-possessory interest in land that functions like a running covenant but isn't (meaning it can also have negative covenants)

    2. **Tulk v Moxhay, Eng 1848 (p. 1014)** *In 1808 the owner of several plots in Leicester Sq sold a plot to another party, making a covenant to keep the Garden Sq uncovered with buildings. Over the following years the plots were sold a number of times, with the covenant continuing. One purchaser tried to ditch the covenants, claiming that he wasn't in privity to the original parties. Ct said covenant remained.*
        i. P has a K to use the land as a park; original agreement wasn't an easement because it was a negative right; not a RC because it's between the neighbors and the parties didn't have simultaneous interests
        ii. It is an **equitable servitude**
    3. **Neponset Home Owners Assn v Emigrant Industrial Savings Bank, NY 1938 (p. 1019):** *Buyer will pay a fee to the homeowner's association; new buyer doesn't want to pay; assn wants to foreclose.*
        i. Extending law: Ct ignores the fact that the association has no standing against the buyer
        ii. An exception to the general rule that payment of $ does not touch and concern the land is a contractual requirement to pay money to a homeowners association

    4. **Residential Subdivisions**
        i. Fact Pattern: A developer may want to create a residential neighborhood
            a. RC allow for negative restrictions on land to ensure uniformity/residential

        ii. Procedures
            a. Developer K with each buyer a covenant with several restrictions, including a clause that requires all buyers in the development to agree to the same terms.
            b. **Developer and neighbors can now enforce that covenant against the first buyer, and any subsequent purchasers**
            c. Developer ensures that all parcels are recorded so that there is **notice** to future owners

        iii. Enforcement
            a. Necessary to have enforcement mechanism beyond the knowledge that everyone "signed on" – inevitable that someone will act against the covenants and decrease the value of the land
            b. What if there are differences among the covenants?
                1. Ct try to enforce promises homeowners never made – invested a new kind of servitude: **implied reciprocal servitudes**
                    i. Ct implies that everyone who bought a parcel knew that they were getting into a residential community with restrictions; otherwise they would not have bought there
                    ii. Lawson suggest that judges LIVE in subdivisions, so are willing to imply restrictions
            c. Ct asks evidentiary questions – where do you find out what is implied?
                1. Filing that the developer made with regulatory bodies
                2. Promotional brochures
                3. Oral representation
            d. **Rule:** When a kind of development suggests it will be residential, this is enough to bind all owners, and means no commercial buyers…**this only works in residential areas**

        iv. **Sanborn v McLean, MI 1925 (p. 1034)** *Residential subdivision for houses, only certain parcels had the residential restrictions; by the end of the 1920s, they were all houses. McLean buys a lot without restrictions and puts up a gas station; other owner's revolt.*

a. Ct finds something like constructive notice; that since only houses existed in the neighborhood, it was the developer's intent that no gas stations appear (regardless of different covenant)
b. **Note: Similar to Neponsent**; Neponset does to corporations what Sanborn does to servitudes…**both result in upholding the running quality of restrictions in residential subdivisions**

3. **Other Easement Issues**
   1. **Ending Servitudes:**
      i. Pay off the person
      ii. Get out of it without paying (usually unsuccessful)
   2. **Non-use**:
      i. Formally, just because you haven't used your easements doesn't mean it's extinguished
      ii. BUT if you make a claim that you have an easement (ie defense to trespass) non-use will be strong evidence that you have ABANDONED your easement
   3. **Changed conditions**
      i. If the assumptions on which the easement is based change, you can re-bargain

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VII. Zoning

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1. Introduction

1. **Zoning** is the modern statutory solution to all of these problems (closely related to servitudes); so that a govt entity creates an ordinance imposing negative restrictions upon all land owners in the area
2. Law recognizes that servitudes can be **valuable**
   i. They can increase the value of the land
   ii. Inhibit competition
   iii. **Problem:** Once you recover damages, you can't sue for nuisance…ZONING BOARD

2. Zoning Board

1. Use of the local zoning board may be less expensive than litigation for the same effect of servitude
2. **Two Sides of the Zoning Board**
   i. **Cheap:** Some circumstances where, if you know there are relatively uniform servitudes that most people want, it may be easier/cheaper to go through the zoning board
   ii. **Broad:** People may be bound to servitudes without their choice
      a. Normally, you get $$ for negotiating a servitude; but not with the zoning board

3. **If you want to change the law**, then:
   i. Find out what institute enacted the ordinance (pay them off)
   ii. Amend it – only smaller/local bodies are going to listen…if local body says no, little chance it'll happen
      a. **Rule or Adjudication?** Operates between legislation and adjudiciation
   iii. Other methods:
      a. Get a referendum pass at a town meeting in order to effect zoning change
      b. Bring them to Ct (a check on the processes just like everything else)
         1. **Problem** – what do Cts look for when considering the work product of local bodies?
         2. Judicial deference upon review lies in between legislative and judicial as well
   iv. **Law likes to maintain a certain level of generality in zoning process with some specifics**

4. **South Burlington NAACP v Mount Laurel, NJ 1975 (p.)** *Controversial judicial interpretation of the NJ State Constitution; the doctrine requires that municipalities use their zoning powers in an affirmative manner to provide a realistic opportunity for the production of housing affordable to law/moderate incoming households.*