LAWSON – Property Spring 2009

ACQUISITION OF PROPERTY

I. WILD ANIMALS

Pierson v. Post

A. What would happen if either Pierson or Post owned the land fox was caught on:
- Owner of land owns everything on that land that does not move or is domesticated
- Owner of land doesn't own wild animals that go onto his land BUT he controls access to the land
    - If someone who does not have any relevant legal claim to land comes and takes wild animal, he is trespassing
- Owner owns the exclusive legal right to try to perform the actions necessary to turn the wild animal into tree or rock while wild animal is on his land
    - Once wild animal leaves owner's land, it becomes another person's legal right to try to "occupy" fox
- Pierson and Post don't own the land here -> where is the landowner?
    - Landowner could be here but he chooses not to be because he doesn't want a dead fox carcass

B. Relativity of Title (**Irving Principle**)
- Idea that in a legal dispute, you don't have to be the true Blackstonian owner, just that you have a higher, better claim to the thing than your opponent
- Exists b/c if legal system required people to show they were the Blackstonian owner, many disputes won't make it to court and people will resort to vigilante justice
- Judges are deciding this case knowing neither Pierson nor Post is the Blackstonian owner

C. Rule of Capture (**hold, kill, mortally wound**)
- If you (1) physically hold item (2) are the first person to kill it or (3) the first person to mortally wound it, you have occupied the wild animal and it is yours
- Post argued he was the first to have the reasonable prospect of holding fox, killing fox, or mortally wounding fox b/c he tired out the fox
- Court rules against Post and adheres to Rule of Capture probably because:
    - Rule of Capture is easier to enforce
    - Reasonable prospect standard would introduce messy evidentiary issues; harder to draw the line of first occupancy
    - Dissent wanted reasonable prospect standard b/c it would lead to more dead foxes

D. Possession of Wild Animals

1. To possess a wild animal w/o killing it or mortally wounding it, you must:
    - Confine it to a space so its motions are under your control; OR
    - Domesticate it and prove animum revertendi, i.e. prove that it will come back to you

2. Reese v. Hughes (**MAJORITY RULE**)
    - Facts: Hughes paid a lot of money for foxes from Canada but one of them escapes from confinement, gets shot and killed by trapper (Reese) and now they're fighting over pelt
    - Contention: Reese says Hughes must prove the fox was tamed to rebut presumption against animum revertendi for wild animals
    - Hughes won in lower court b/c he said everyone knows foxes come back and that he had a neighbor whose fox came back

- Loses on appeal b/c Hughes can't prove that fox was tamed by showing animum revertendi
- Bottom Line: presumption against animum revertendi remains absent evidence of otherwise

3. Stephens v. Albers (**OUTLIER**)
   - Facts: Fox farmer tried to keep foxes confined but pedigree fox escapes to another piece of land and trapper shoots it dead. Dispute arises b/w farmer and trapper (landowner absent)
   - Court acknowledges legal precedent of show (1) confinement or (2) prove animum revertendi BUT also recognizes that fox farming is a big business in Colorado
   - Decision advances new theory based on economic policy
   - New Rule: if it's evident that this is not a native fox, i.e. it was brought into state for commercial purposes, then ownership is vested in farmer who brought it and not in captor or killer of fox
     - Seems to focus on what a trapper would know, but it doesn't talk about what happens if you have a stupid trapper

II. AD COELUM/AD INFEROS

A. Landowner's rights to land and things on it
   - Normal presumption: land includes things that are part of the land (owning physical space and things that are part of that physical space)
   - BUT REMEMBER: property as a bundle of sticks theory says owner can make deal to sell land but retain rights to things on the land or in it

1. Jacque v. Steenberg
   - Steenberg dragged mobile home across Jacques' land even though Jacques said no
   - No one doubts Steenberg is liable to Jacque for trespass
   - Problem: there were no damages to be paid here
   - Case is on appeal b/c Steenberg thinks $100,000 punitive damages (w/ $1 nominal) is unnecessary
   - Case affirmed even though under state law you're not supposed to get punitive damages if you only get nominal damages

2. Fisher v. Steward
   - Facts: Plaintiffs found swarm of bees in a tree on D's land, marked the tree, and told D about it so D cut down the tree
   - Issue: Who owns the honey?
   - Result: defendant owns the honey
   - Rationale:
     - P did not occupy honey by seeing bees or hearing them; marking the tree was trespass so that can't count for valid occupancy for purposes of possession
     - Can't trespass onto land to take honey from a hive you find even if owner (by virtue of owning land) doesn't own the honey either
     - Consequence of owning land is having the right to keep other people off; to allow P to acquire possession through trespass interferes with D's vested property rights

B. Ad Coelum (**NOT GOOD LAW**)
   - Old idea: when you own land, you own everything above the surface up to the heavens
   - Current idea: by virtue of owning the surface, you have certain rights to what is above the surface but it doesn't reach all the way to the heavens -> rights extend to areas close enough to surface that when someone intrudes on it, it interferes with your land ownership abilities
     - There's no numerical measure of extent of rights

Hinman v. Pacific Air Transport

- Facts: D's airplanes flew above P's house at low altitude, P sued for trespass
- Result: limited ad coelum rule
  - Court concluded that consequences of ad coelum were not fully contemplated until air travel
  - Essence and origin of legal right of property is dominion over it; must be capable of exclusive possession -> w/o possession, you don't have a right to the thing
  - Air by its nature is incapable of private ownership insofar as one may actually use it
  - Man owning up to heavens should actually mean no one can acquire right to space above his land that will limit him in whatever use he can make of it
  - Landowner owns as much of the space above him as he uses but only so long as he uses it
  - Court wanted evidence of actual and substantial damage in order for P to recover for trespass

C. Ad Inferos (**STILL GOOD LAW**)

- Idea that land ownership extends all the way down to the center of the earth

Edwards v. Sims

- Facts: Neighbor thinks his neighbor's underground cave business crosses onto his land; judge ordered survey to check but cave "owner" neighbor didn't want people on his land
- Ruling: We can see no difference in principle b/w invasion of a mine on adjoining property to ascertain whether or not minerals are being extracted from under property vs. inspection of respondent's property to ascertain whether he's trespassing.
  - No man can bring up darkness from the depths and make it serve his purpose
  - Cave should belong absolutely to him who owns its entrance and he should own all that he connected to the entrance (basically you can only own what you subject dominion over)
  - Person applying for inspection of cave must show a bona fide claim and allege facts showing necessity for inspection
- Dissent: rule should be that he who owns the surface is the owner of everything that may be taken from the earth and used for his profit or happiness
  - Owner has no right to cave b/c he has nothing of value in there

III. WILD MINERALS

- Common law developed ownership theories similar to wild animals for gas and oil b/c they move around underground
- If you want to own oil or gas, you must capture it, i.e. confine its natural liberty
- Big problem: what happens if it escapes?

TRADITIONAL RULE: Hammonds v. Central KY Natural Gas

- Facts: KY was using natural storage containment underground for gas under Hammonds' land but didn't have use rights for storage; Hammonds sues for trespass
- Result: If the gas is captured but then put into underground reservoirs, you let gas loose like a wild animal, i.e. it's wild again and you relinquish ownership (follows *Reese*)
  - KY argued it was wild so that H couldn't prove they trespassed

TX RULE: Lone Star Gas Co. v. Murchison

- Facts: Lone Star owns right to use underground natural reservoirs to store gas; Murchison breaches containment barrier (not trespass b/c adjacent to reservoir) and gets Lone Star's gas
- Contention: Murchison uses Hammonds' traditional rule to argue gas escaped, is wild again so they weren't stealing

- Result: TX has interest in protecting oil and gas companies so court says pumping gas into storage reservoir is same as confining wild animal to cage or leash

MODERN RULE: TX American Energy Corp. v .Citizens Bank
- Facts: declaratory judgment as to whether gas stored in underground reservoir is a "good" under UCC or an interest in real estate
- Result: Gas in underground storage reservoir remains in possession
- Distinction from Hammond: In Hammonds, there was a leak in the reservoir and so gas was wild, like a wild animal in a broken cage BUT HERE reservoir didn't have a leak so it kept gas in possession
- When previously extracted oil or gas is stored in underground reservoirs capable of being maintained, title is not lost

IV. TRANSFERRING PROPERTY INTERESTS

Nemo Dat – no one can give that which he does not have
- Baseline principle for transfers of property
- Related to principle of "first in time, first in right"
- Classic problem: A transfers interests to B but then later A transfers interests to C
- Answer: Nemo dat says B owns property b/c A had rights to transfer when A transferred to B; A didn't have any rights left to transfer to C so C gets nothing

Exceptions to nemo dat: good faith purchaser & adverse possession

A. Good faith purchaser
Example: A sells to B but transaction is flawed b/c of fraud or bounced check, etc. B then sells to C. As long as C purchased items in good faith (i.e. without knowledge of flawed transaction) AND as long as C gives value (i.e. not a gift) then law will generally give C title to goods

- UCC recognizes nemo dat and good faith purchaser exception BUT limits good faith purchaser to situations where transferor has <u>voidable title</u> (i.e. bounced check, fraud, etc.) but not <u>valid title</u> (i.e. theft)
    i. Voidable title: have power to transfer to good faith purchaser for value
    ii. Void title: gives no power to create rights in another

- 3 kinds of notice relevant to good faith purchaser:
    1. <u>actual notice</u> – knows of relevant fact at time of purchase (i.e. fraud, theft, etc.)
    2. <u>inquiry notice</u> – a reasonable person knowing what one does know would have engaged in further inquiry that would have led to knowledge of relevant fact
    3. <u>record notice</u> – relevant w/ land transfers

    *constructive notice – inquiry and record notice

- Main problem with good faith purchaser exception: 3 parties are usually involved but bad actor is usually gone so have to decide liability between 2 innocent parties (original owner vs. innocent purchaser) -> WHO IS IN A BETTER POSITION TO AVOID THE LOSS?

1. Kunstammlungen Zu Weimar v. Elicofon
- Facts: 2 paintings stolen from P's museum and P's suing to get them back
- Bottom Line: Generally in USA, a thief or someone who gets property after a theft cannot transfer good title even to a good faith purchaser for value b/c only the true owner's conduct or the law can divest true owner of title in his property EVEN IF property is acquired in good faith

2. Kotis v. Nowlin
- Facts: Sitton buys watch from Nowlin w/forged check then sells watch to Kotis
- Problem: Don't know if Kotis is good faith purchaser
- Result: B/c no one can get into Kotis's head, court asks what kind of notice he had about the flaw in Sitton's title
  i. Test for good faith is party's actual belief NOT the reasonableness of that belief
  ii. Sitton had title to watch b/c he got it through a voluntary transaction -> voidable title

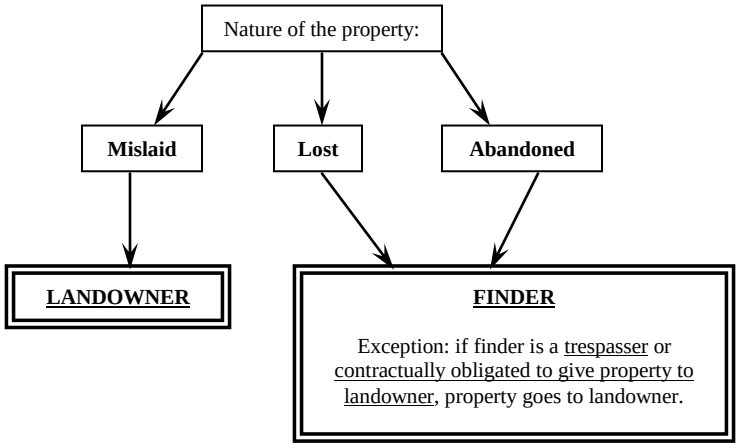
3. Hauck v. Crawford
- Facts: Crawford fraudulently induces Hauck to sign deed for what Hauck thought was a lease for oil and gas but was actually a deed for conveying half the minerals in Hauck's land to Crawford; Crawford then sells mineral rights to White and Duncan
- Result: B/c of fraudulent inducement, contract b/w Hauck and Crawford was void title; i.e. deed conveyed nothing to Crawford so Crawford had nothing to convey to the other two people
  i. Perpetrator of fraud can't avoid his acts or give validity to deed by showing that person who he fooled was negligent
  ii. Court employed equitable estoppel to avoid nemo dat
- BUT: becomes question of fact whether Hauck was negligent in signing the deed; if he was negligent, court will not let him assert rights under nemo dat and get mineral rights back

B. FINDERS/KEEPERS LAW

Lost personal property creates 3 parties:
1. prior possessor (previous owner who lost it)
2. current possessor (finder)
3. landowner (owns land/locus that property was found on)

In the absence of a statute that says who wins the property, common law classifies property as:
1. Lost
   - Prior Possessor's State of Mind in Moment: unaware they lost possession
   - Who wins property?: finder UNLESS
     - Prior possessor comes to reclaim it
     - Finder was trespasser
     - Finder had contract with locus owner to hand over any found items
2. Mislaid
   - Prior Possessor's State of Mind in Moment: intended to part with item and was aware of the parting, but didn't mean for parting to be permanent
   - Who wins property?: locus owner UNLESS
     - Prior possessor comes to reclaim it
     - Idea is that it's easier for prior possessor to retrace steps back to find item
3. Abandoned
   - Prior Possessor's State of Mind in Moment: intended to part with item and never reclaim it
   - Who wins property?: finder UNLESS
     - Finder was trespasser
     - Finder had contract with locus owner to hand over any found items

*which category an item is in is inferable from the circumstances
*prior possessor must bring claims within statute of limitations AND can't reclaim property as a result of a valid transaction according to UCC



Why have these categories -> b/c law knows that in all cases except for abandoned stuff, there's someone out there who has a better claim than the finder or locus owner

1. Allred v. Biegel -> canoe embedded in ground
   - Rule: landlowners normally own things that's in their ground, which can include manmade things
   - Exception in some states: if thing in property is really old money, then that's a treasure trove and locus owner won't necessarily get it vs. a finder who was on land w/o trespassing

2. Benjamin v. Linder -> money in airplane wing
   - Facts: Bank takes possession of plane and brings people in to repair it; someone opens wing compartment and finds $18,000
   - Analysis:
     1. Is there a statute that tells us who wins? Yes, but for argument's sake we'll say common law applies
     2. Is property lost, abandoned, or mislaid?
        i. Would/can someone ever lose something in a plane wing? Probably not lost
        ii. Probably mislaid b/c no one would conceivably abandon $18,000
     3. What is the locus, the plane or the hangar?
        i. Plane because money was found on the specific plane; could have picked any hangar to repair plane in and still would have found money
     4. WINNER: bank
   - Dissent says money could have been abandoned in drug deal gone wrong

3. Anderson v. Gouldberg
   - Facts: P claims he cut logs and brought them to a mill from which D took them
   - Result: One who takes possession of another can only rebut possession presumption by showing superior title in himself or connecting himself to person who has superior title

4. Clark v. Maloney
   - Facts: P found white pine logs in bay so he tied them at the mouth of river to take later; D came along, found the logs and took them
   - Result: Logs were P's property b/c possession is prima facie evidence of title AND D didn't divest P of possession b/c P never abandoned the logs

i. Only the original owner of the logs can win against P

5. What does it require to be a valid finder?
   a. "RULE OF CAPTURE" - Eads v. Brazelton
      - Facts: Brazelton found sunken ship and placed a landmark so he could extract it later; Brazelton came back and found Eads already extracted lead from ship
      - Result: Eads is finder b/c he was first to physically "hold" boat
      - Court rejected reasonable prospect standard like in *Pierson*
      - There was no doubt the lead had been abandoned by owner
      - Brazelton's intent to possess was useless w/o detention of property -> should've put boat over wreck w/ means to raise the lead
      - Occupation or possession of lost, abandoned, or mislaid property depends on actual taking if property and intent to reduce it to possession
   b. RELATIVITY OF TITLE – Armory v. Delamirie
      - Facts. Chimney sweep found jewel and took it to goldsmith for appraisal; D offered boy money instead of returning jewel but when boy refused, D still took the jewels
      - Bottom Line: even though boy is not Blackstonian owner, he has enough rights to the jewel to keep it from everyone else except true owner

*Finders may have statutory duty to report item, including reasonable effort to locate prior possessor; failure to try to locate may be larceny

Actions prior possessor can have against finder:
- Replevin -> usual remedy for claims by prior possessor; results in giving property back
- Conversion (SL tort) -> remedy when item is unavailable or destroyed; must repay value of item

WHAT HAPPENS WHEN PROPERTY CHANGES VALUE

V. BAILMENTS -> voluntary entrusting of property to another's possession but retaining ownership
- Only applies to personal property NOT LAND
- Many bailments are contracts but there are noncontractual bailments
- Assumes that bailee agreed to entrustment or knew that he was being entrusted with something temporarily and must take care of the thing
- Bailor -> gives property to someone temporarily
- Bailee -> entrusted w/property by bailor

Bailee's rights and obligations
- In the absence of a contract or statute, bailee must (in a jurisdiction that still adheres to these):
  1. give item back to bailor when he's supposed to or upon the request of bailor
  2. may be liable for any damage to property during time period; liability depends on:
     a. If bailor benefiting more, bailee will be liable for <u>gross negligence</u>
        - If bailor paid bailee, then bailor is benefiting (payment may be consideration)
     b. When bailee is getting most of the benefit, bailee is liable for <u>slight negligence</u> (bailee must use the care he would have w/his own property + little extra)
     c. When mutual benefit, bailee will be liable for <u>ordinary negligence</u>; should use ordinary care and will be judged on what normal person in control of their own property would have done
  3. Every bailment, even a gratuitous bailment that is not a contract, has some understanding between the parties about the permissible use rights by the bailee, and the specific uses permitted in each case depend upon that understanding. It would not

a breach of contract for the bailee to use the property in an unauthorized way (because by hypothesis there is no contract) but it would be the tort of conversion.

4. Degree of precaution to care for item also depends on what bailee voluntarily assumes as a foreseeable loss
    - ORDINARY EXPECTATION OF A REASONABLE BAILEE: If you hand someone a coat for coat check, that person probably wouldn't expect the coat to have a huge wad of cash in it UNLESS bailor says there is cash in this coat that you're taking for me and bailee still voluntarily takes the coat
5. Use rights vs. bailment
    - There's a difference between giving people the use right to use your parking lot to park their cars (b/c they've basically just bought the ability not to be a trespasser on your property) and running a car garage where you give out tickets, it's got security, and people leave their keys with you
    - Gray area is when total control over the item is not with the bailee but is split between bailor and bailee (i.e. car garage but you keep the keys when you leave)

6. Peet v. Roth Hotel
    a. Facts: P left ring at hotel front desk in an envelope for Hotz (frequent guest) to pick up b/c she wanted it fixed
    b. Contention: No bailment where the presence or identity of article is concealed from bailee and he hasn't assented to assume obligation
    c. Result: there was bailment; liable for negligence
    d. Rationale
        - Mutual assent for contract can be expressed through conduct and/or words
        - Ring's identity was plain to defendant except for its value
7. Allen v. Hyatt Regency Hotel
    a. Facts: P left car and keys with D in indoor, multistory garage; car was stolen
    b. Issue: whether there was a bailment
    c. Result: Yes, there was bailment b/c D assumed custody and control of vehicles and there was implied promise of security from circumstances

VI. ACCESSIONS – adding value to item

- Becomes an issue when someone who has another's property makes it better/adds value and prior possessor comes to claim it
    - Does current possessor have to give the whole item to prior possessor?
    - Does current possessor who improved item get anything for value added?

Basic Principles of Accession (in absence of contract or statute, on assumption that improver is innocent)

- If you improve item and someone with a superior claim asks for it back, presumably the superior claim gets property back UNLESS improvement transformed the item into something else, new
- If improvement can be separated from original item without damaging item, then improver gets the improved parts back -> this is a jury question
- As a matter of property law, improvers improve at their own risk
- To gain possession through accession, improver must act in good faith that they have claim
- Under law of restitution, innocent improvers might get a windfall if it looks unfair for innocent improver to get nothing
- There are innocent improver statutes

Problematic when law has to decide if the original item and improvements are separable or not:

1. Bank of America case
    - Bank has claim to car improved by garage

- Bank doesn't want garage to take engine out b/c it's worth more than the car w/o engine
- Accession stems from equitable notion that an owner shouldn't get his chattel in a condition of less value or usefulness than before it was changed by 3rd party
- Lawson note: Even though engine can be separated from car without damaging car, court still says once engine is installed, it becomes the car -> metaphysical question

Also problematic when have improvement that transforms item into something else entirely:
- Does it "destroy" original item or just add value?
- If destroyed, prior possessor can sue for conversion
- If only value added and item still exists, prior possessor can sue for replevin
- Must determine the principal item -> look at the value of each item

2. MODERN APPROACH: tends to focus on value vs. combination of increase in value and physical transformation

3. Wetherbee v. Green (MINORITY RULE)
   - Facts: Wetherbee goes on Green's land thinking he had permission to do so and got some wood and made it into barrel hoops that were 27x more valuable than the wood itself
   - Contention: Green wants his wood back (replevin) but Wetherbee says wood doesn't exist anymore and is willing to pay damages for conversion
   - Result: Since Wetherbee acted in good faith and added substantial value to make wood a new item and improvement was inseparable from original item, he just had to pay damages for conversion and unintentional trespass
     - Court mentions that a wood beam in a house is no longer owner's b/c beam is insignificant in value compared to a completed house

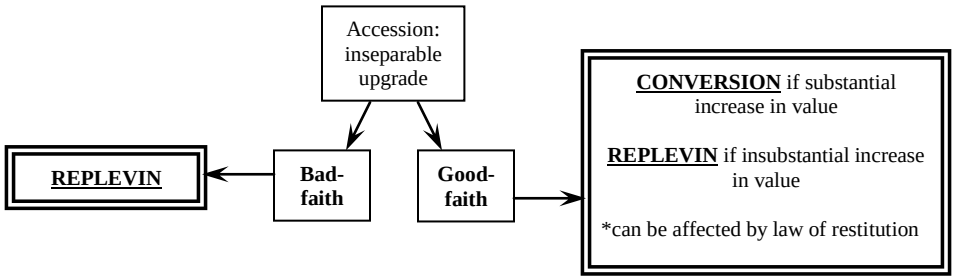
IMPROVING LAND

4. Pile v. Pedrick
   - Facts: surveyor's dimensions of land to Pedrick are off by 1 ½ inch onto Pile's land; Pile wants the building off his land
   - Two possible solutions
     1. Pedrick could buy 1 ½ inches of land from Pile
     2. Pedrick can chop off part of building that's on Pile's land BUT he has to go onto Pile's land to do that and if he doesn't have permission to go on land, it's trespass
   - Result: Court says Pedrick trespassed on Pile's property so Pile gets an injunction
   - Upshot of injunction: Pedrick has to get building off Pile's land, i.e. tear it down
     - If injunction is the threat, then the baseline price for Pedrick to potentially buy Pile's 1 ½ inches of land is the price of an injunction (how much Pile would be willing to get to not care about trespass)
   - This wasn't a case where encroachment added value to land

5. Golden Press v. Rylands
   - Facts: Building encroached on D's land
   - Result: injunction reversed
   - Rationale:
     i. Looked at whether P noticed & complained of encroachment before building was done
     ii. Also looked at whether encroach was intentional or had notice that he was encroaching before he finished the building
     iii. Burden is on P to plead D acted in bad faith
     iv. Where encroachment was in good faith, court should first weigh circumstances to prevent oppression on an innocent actor

v. Looked at possible interference with P's use right by encroaching onto that piece of land
vi. Where D's encroachment is unintentional & slight, P's use not affected, damage is small while cost of removal is big, a mandatory injunction may be denied and P given damages

6. What about situation where A builds whole building on B's land by accident and without permission?
   - Analysis:
     1. Can the improvement be taken out of the original item without damaging the original item?
        a. Depends on house's foundations and type of land
     2. If not, what is the principal object?
        a. In this case, land is probably principal object (for historical reasons) and house has become part of the land -> so can sue for replevin (give me back my land which now includes the house on it)
     3. Usually law won't tell someone to tear down the whole building for encroaching just 2 inches or something if they acted in good faith or if there's innocent improver statute
     4. Should law of restitution give innocent improver something like unjust enrichment OR allow him to buy the land at a price set by court even though the principal item is the land? (look at statutes for what to do)



VII. LAND TITLE

A. Discovery of Land

1. *Johnson v. M'Intosh* (Discovery of Land)
   a) Facts: The Illinois tribe sold land to plaintiff's father. Later the tribe struck a treatise with the federal government, and transferred the land to it. The government sold that same land to defendant. Plaintiff brought an action of ejectment.
   b) Court concluded that upon discovery of the continent, European countries had ownership of all the land – including land that has not yet been visited. Accordingly, the Indian Tribe only had a right of occupancy.
   c) The Tribe could trade their right of occupancy, but the owner (one of the European governments) could take the land back without compensation at any time.

B. Proving Title

1. Terms:
   a) Quiet title: such an action calls for the court to declare who has "Blackstonian" ownership – a better title than anyone else in the world.
   b) Warranty deed: a promise that the seller would bear the consequences if he is discovered not to be the actual Blackstonian owner of the property.
   c) Quitclaim deed: sale of the seller's rights to the property, whatever those rights may be.
   d) Ejectment: action to get someone off your land; must show you're higher in chain of relativity of title
   e) Color of title: document that someone thinks is legitimate title and makes actions based on that belief, but really the title is flawed b/c of something in its history
2. Nemo Dat: "no one can give that which he does not have"

a) Full Blackstonian ownership is not required. Buying property means receiving the seller's rights to it, whatever those rights may be.
   i) *Kunstsammlungen Zu Weimar v. Elicofon* (Buying From a Thief)
      - Facts: a painting was stolen from plaintiff museum by a U.S. soldier during WWII, then sold to defendant in Brooklyn.
      - According to NY law, a thief has no rights to the property.
      - Thus, despite purchasing the painting, defendant never acquires title.

b) Exception to the nemo dat rule: the good faith purchaser doctrine
   i) UCC §2-403 dictates that if A sells something to B without properly transferring title, and B then sells it C, the good faith purchaser (C) would keep the property. A, the prior possessor, could only sue B for damages.
   ii) *Kotis v. Nowlin Jewelry, Inc.* (Purchase with Forged Check)
      - Facts: Sitton purchased a watch from defendant, using a forged check. Sitton thereafter sold it to plaintiff, who did not know the watch was stolen.
      - Since "purchase" is defined as a "voluntary transaction" under the UCC, court concluded that using a forged check is considered purchase.
        * Thus, plaintiff satisfies the "purchase" requirement of UCC §2-403
      - But, since plaintiff learned that the watch was stolen before actually buying, his actions were not in good faith. Thus, he was not a good-faith purchaser.

3. **Recording Statutes**
   a) Aside from very few jurisdictions, no law requires the recording of land transactions. Instead, government encourages the recording of deeds through recording statutes, which provide an advantages in case of a subsequent claim.
      i) Hypo: A sells land to B. Then, A sells that same land to C.
      ii) Solutions under the common-law, race type recoding statutes, notice type recording statutes, and race / notice type recording statutes:

	Common-Law (nemo dat)	**Race** type recoding statutes	**Notice** type recording statutes	**Race / Notice** type recording statutes
Explanation:	According to nemo dat, A relinquished his rights to the land upon sale to B. When A sold the land to C, he was selling that which he no longer owns.	Only question is who recorded first. 1st party to record wins even if he has actual notice of prior conveyance	Only question is whether the last purchaser was a good faith purchaser.	Recording first AND good-faith are both requirements.
B recorded first:	B wins	B wins	B wins, since B's recording means that C must have had notice of B's purchase	B wins, since C failed to record first
C recorded first:	B wins	C wins	If C good-faith purchaser, C wins; If C bad-faith purchaser, B wins.	If C good-faith purchaser, C wins; If C bad-faith purchaser, B wins.
Neither recorded:	B wins	B wins, since he will presumably	If C good-faith purchaser, C wins;	B wins, since he will presumably

		record after A sells to C	If C bad-faith purchaser, B wins.	record upon sale to C

*As a matter of common law, usually good faith can't turn nothing into something for good faith purchaser who bought something from A who actually transferred it to B first

VIII. ADVERSE POSSESSION

- Arises out of a statute of limitations on ejectment notice; landowner must file ejectment action against adverse possessor before statute of limitations runs out
  - Some jurisdictions require payment of property taxes during occupation to maintain AP claim
- For an adverse possessor to win claim to the land he is using for the estate that he is using, the statute of limitations on ejectment must run out AND he must E.N.C.R.O.A.C.H. (exclusive, claim of right, open & notorious, actual, continuous, hostile)
- Adverse possessor, even wrongful, can have a better claim to land under Irving Principle than subsequent possessors
- Can never adversely possess away future interest b/c future interest can't sue for trespass/ejectment

1. **Exclusive** – doesn't mean it has to be one person, just not using it @ same time as owner
2. Notorious (see Open)
3. **Claim of**
4. **Right**
   - Deals with wrongful occupant's mental state at the time of their occupancy (regardless of whether innocent)
   - Three avenues law can take on claim of right:
     1. Theoretical approach: Make adverse possession laws work in favor of people who know they're not on their own land; rewarding bad faith possessors by requiring notice of AP would prompt landowners to assert possession
     2. Majority approach: only allow property to transfer to good faith possessors
     3. Modern approach: don't ask people's thoughts at all
   - Sometimes court will look at whether possessor has color of title (i.e. adverse possessor believes he has title); if adverse possessor wins, he may get the whole piece of land instead of just the small portion he was possessing (b/c color of title may be evidence of good faith)
   - Case Study – Carpenter v. Ruperto
     - Facts: P knew her lot didn't include a cornfield but she started using it as an extension of her lot -> cornfield was part of D's land used to store junk & debris
     - Question: can you get land through adverse possession w/o claim of right?
     - Result: NO, P failed to prove that she occupied the cornfield in good faith under any claim of right -> to let her win would be to condone squatter's rights
5. **Open (& Notorious)**
   a) Goes to physical possession of land NOT knowledge of legality
   b) Is it still open and notorious if owner doesn't notice it at all (with the naked eye)?
   c) This condition is problematic in two possible situations:
      i) Occupation of underground surface (rarely happens)
      ii) Occupation unnoticed by the title-owner (always happens)
      - If encroachment is large, courts say that owner should have noticed it.
      - If encroachment is not very large, jurisdictions split:
        * Some courts call it open and notorious by virtue of encroachment.

        - Other courts only call it open and notorious if owner had a reason to notice the encroachment.

6. **Actual**
    a) Person has to be on the land physically, not dreaming about being on the land
    b) Actuality requirement necessitates some economic development of land.
    c) Upshot of actual use requirement: adverse possessor who uses land to walk through and admire the wilderness will lose his case
    d) *Jarvis v. Gillespie* (**Relativity of Actuality Requirement**)
        i) Facts: plaintiff, adverse possessor who brought an action for quiet title, occasionally grazed animals and planted trees on the disputed land.
        ii) Court concluded that actuality requires use of the land "as an average owner". (Reasonable use of a kind that a true owner would do on the land)
        iii) Such use depends on the land's character (NYC vs. SD, 1700s vs. 1990s, etc.)
7. **Continuous**
    a) Adverse possessor must be a wrongful occupant, not a mere trespasser.
    b) Issues arise with seasonal land; must look into character of land
    c) *Jarvis v. Gillespie* (**Relativity of Continuity Requirement**)
        i) Facts: plaintiff, adverse possessor who brought an action for quite title, was away from the property for over a month on many occasions, but never for over a year.
        ii) Court concluded that continuity requirement depends on how often an average user would use this type of land.
            - Due to the land's nature, court said that absence for up to a year is acceptable.
            - However, not all courts will accept this view.
    d) *Howard v. Kunto* (**Seasonal Land**; **Change in Wrongful Occupants**)
        i) Facts: McCall, believing to have title over a vacation home (seasonal land), transferred it to Kunto by way of quitclaim deed. Howard had survey done and discovered he actually held title to Moyers' land and Moyers had title to Kunto's land. Howard conveyed his deed to Moyer and Moyer conveyed his deed to Kunto land to Howard
        ii) Is occupation of seasonal land "continuous"?
            - Though defendant only used the land seasonally, court concluded that other owners would also use such land seasonally. Thus, adverse possession granted
            - Other jurisdictions disallow adverse possession of seasonal land altogether due to lack of continuity.
        iii) Must the continuity of occupation be accomplished by a single individual?
            - Court concluded that as long as a prior wrongful occupant and a subsequent wrongful occupant were in privity (quitclaim deed suffices), the prior occupant's (McCall) possession can be added to the subsequent occupant's (defendant) possession.
                - Several successive purchasers received record title under mistaken belief and both plots were transferred and occupied in a continuous manner
            - Privity: exists if occupants are successive and prior occupant sold his interest in property (under relativity of title) to current occupant or gifted it through intestacy or will
            - W/o privity, occupation clock for statute of limitations on ejectment restarts
            - Think about privity in terms of possible mistakes of title or occupation; remember that a new title starts with a successful adverse possession or quiet title action
8. **Hostile**
    a) Non-permissive: no adverse possession if owner grants permission to occupant

B. Notes on adverse possession

1. Burden of proof for ENCROACH is on the party claiming the benefit of adverse possession and they must produce clear and convincing evidence (except for Louisiana)
2. One cannot adversely possess land owned by the federal government.
    a) Adverse possession of land owned by state or local governments depends on local laws.
3. The legislature can postpone commencement of the statute of limitations clock until the landowner is able to contest adverse possession.
    a) E.g. statute of limitations clock may start when a minor landowner reaches adulthood.
4. Once a wrongful occupant completes adverse possession, he is deemed to have possessed the land for the entire period of his "wrongful" occupation.
    a) Thus, adverse possessor is not liable for trespass while wrongfully occupying the land.
5. Some jurisdictions require payment of property taxes during wrongful occupation
    a) Because it gives clear notice to owners, these states shortened the statutes of limitations
    b) This is more prominent in western states, because noticing adverse possession in a less-densely populated area is more difficult.
    c) If someone else is paying property taxes on your land, that might be notice to owner that someone is wrongfully occupying your land (b/c usually county will send back check)

ESTATES

<table>
<tr><th colspan="4">Present Interest</th><th>Future interests in grantors</th><th>Future interests in grantees</th></tr>
<tr><td rowspan="3">Fee simple →</td><td colspan="3">1. Fee simple absolute</td><td rowspan="3">Reversion</td><td rowspan="3">Remainder
1. vested remainder
a. in defeasible
b. subject to divestment
c. subject to open (RAP)

2. contingent remainder (RAP)</td></tr>
<tr><td colspan="3">2. Fee simple defeasible</td></tr>
<tr><td>2a) Determinable</td><td>2b) Subject to condition subsequent*</td><td>2c) Subject to executory interest</td></tr>
<tr><td colspan="4">Life Estate

(can also be defeasible)</td><td>Possibility of reverter (FSDeter.; condition is part of same thought, of interest's natural life span)</td><td>Executory interest (FSSEI) (RAP)</td></tr>
<tr><td colspan="4">Tenancy
1. term of years
2. periodic
3. at will
(can also be defeasible)</td><td>Right of entry/power of termination (FSSCS; condition is set off grammatically, as if afterthought)</td><td></td></tr>
</table>

* presumption towards interpreting grants FSSCS except when specified otherwise by statute; can also be overcome by close analysis of text to see if grantor intended a FSDeter
* law presumes "then" means upon expiration of prior interest (this has to be overcome by grantor)
*people can be co-tenants in a fee simple, life estate, or tenancy
*tenancy = temporal interest tenant = party to lease transaction

Definition of terms:
FEE SIMPLE: present interest in land that can potentially exist forever

1. fee simple absolute: potentially infinite interest w/ no potential future interests that can end it

2. fee simple defeasible: estate that has duration terminable on an event that is certain to occur but is not certain to occur within a computable duration of time
   *each condition can create future interest in addition to reversion grantor retains

   a. fee simple determinable (FSDeter) – grantor keeps future interest (POR) after defeasibility condition is violated; condition is written so it's part of the same thought, fluid, primary

   b. fee simple subject to condition subsequent (FSSCS) – grantor keeps future interest (ROE) after defeasibility condition is violated, but present interest does not become present automatically; condition is separated grammatically as if an afterthought

   c. fee simple subject to executory interest (FSSEI) – grantor gives future interest to someone else and does not keep future interest for himself

FUTURE INTERESTS GRANTORS KEEP
**transferability depends on jurisdiction*

1. reversion: carve lower interest out of a higher one; usually get this in nondefeasible interests

2. possibility of reverter: future interest when present interest granted is a fee simple determinable (FSDeter); future interest becomes present interest automatically after condition satisfied
    - adverse possession clock starts ticking immediately when condition satisfied

3. right of entry/power of termination: future interest when present interest granted is a fee simple subject to condition subsequent (FSSCS); grantor must do something to end the present interest
    - Adverse possession clock doesn't start ticking until grantor exercise right of entry
    - Not transferable in all jurisdictions

OTHER KINDS OF POSSESSORY INTERESTS

1. life estates
    1. **Limiting Life**
        a. There is a rebuttable presumption that the limiting life is beneficiary's life.
        b. If multiple beneficiaries (e.g. "to X and Y for their lives"), grantor's intentions as to who's life limits the LE are to be reconstructed. AND usually means for the longest of the lives, while OR usually means for the shortest.
            i. If number of beneficiaries is in single digits (less than 10), courts are likely to allow a LE contingent upon the lives of all beneficiaries; if number is in double digits, courts are unlikely to allow it.
        c. But, better to be specific (e.g. "to X for *his* life" & "to X and Y *until X's death*").
    2. If X conveys his life estate to Y, Y's ownership becomes contingent on X's life.
        a. Reason: one can only convey what he has (nemo dat doctrine).
2. tenancies

FUTURE INTERESTS GRANTEES KEEP

- always become possessory instantaneously
- grantor may keep a RoE by conveying a fee simple subject to condition subsequent and then convey his RoE to another party later on BUT only half of the states permit this (like in Mahrenholz how this was only possible through will or intestacy but not by grant)

1. remainder – to be a remainder, 4 things must be true:
    a. interest has to be created in someone other than the grantor at the time of the grant
    b. interest is capable of becoming possessory as soon as the prior interest in the grant expires
        i. there has to be at least one timeline where this is true (necessary condition)
    c. can't divest any prior interest in the grant
        i. must wait patiently for prior interests to run their natural course
    d. can't come after a possessory fee simple

*NOTE: if first present interest has a defeasibility condition, see if it's worded as part of the grant (no grammatical break) or set off separately -> if part of grant, it's part of "natural life span" of interest and so the future interest in a grantee is a remainder b/c waiting patiently for first interest to end includes the defeasibility condition

Two kinds of remainders:

1. vested remainder

a. there must be an ascertainable beneficiary at the time interest becomes present possessory interest (at least one person must fit the description)

b. there must be no condition precedent other than expiration of prior interests

Three kinds of vested remainders:

a. in defeasible – NO executory interest that can divest it
b. subject to divestment – THERE IS an executory interest that can divest it
c. subject to open/subject to partial divestment (RAP) – grantors take account of possible additional beneficiaries; more people can be beneficiaries
    i. E.g. if grant is to B's kids then B has another kid later, original kids' financial stake is divested a little to make room for newest kid

2. contingent remainder – any remainder that's not vested (RAP)

2. executory interest (RAP):
    i. Definition: a future interest in someone other than the grantor that fails on any of the three conditions necessary to be a remainder.
        1. Failure on 1st condition (ability to take possession upon expiration of prior interest):
            a. "To X for life, then a week later to Y and his heirs"
                i. Due to the weeklong gap, grantee Y is unable to take possession immediately upon expiration of prior interest (when X dies).
        2. Failure on 2nd condition (inability to divest a prior interest):
            a. "To X for life, but if X ever drives a car, then to Y and his heir"
        3. Failure on 3rd condition (cannot follow a fee simple):
            a. "To X and his heirs, unless he drives a car, then to Y and his heirs"
            b. "To X and his heirs one day from now"
                i. Grantor's one-day interest is a fee simple.

Case Study - *Mahrenholz v. County Board of School Trustees of Lawrence County* (**Difference Between Fee Simple Determinable and Fee Simple Subject to Condition Subsequent**)

1. Facts:
    a) Grantor gave the property to school board in fee simple: "this land to be used for school purpose only; otherwise to revert to grantors herein."
        i) Since the grant was a fee simple defeasible, the grantor gave the property either in fee simple determinable (keeping a possibility of reverter) or a fee simple subject to condition subsequent (keeping a right of entry).
    b) Upon grantor's death, his spouse received his future interest. Upon spouse's death, the son received the future interest (either RoE or PoR).
        i) Under IL law (and about half the states), transfer of RoE is not permitted, except by intestacy. Thus, one cannot transfer a right of entry via will, deed or contract.
            - Rationale: common-law opposed the transfer of legal rights of action.
            - But, transfer or RoE to the holder of a present interest is always allowed.
    c) In 1973, the school board stopped holding classes and began using the land for storage, thus violating the grant's terms.
    d) In 1977 the son gave plaintiff a quit claim deed to the land. Four months later the son gave the same quit claim deed to the school board..
2. Bottom Line: Grant was a fee simple determinable b/c it's a grant that contains the limitation within the granting clause
    a) Difference between FSD and FSSCS is judicial interpretation of the words of the grant
    b) Blackstone said FSD is where the grant is limited by the words of its creation whereas in a FSSCS the limitation is appended to the granting words
    c) To figure out what school purpose meant, looked at precedent, how was used in statutes

Notes on estates:

- Limitations on fee simple defeasible conditions:
    1. can't restrain alienation -> can't have condition be that the land can never be transferred

2. no conditions against public policy
3. some states have statutes that say no frivolous conditions

- NO FEE TAILS ALLOWED IN AMERICA – fee tail is succession of life estates
- Look to see if there's a statute that says grantor cannot convey future interests in certain ways
- Presumption is that life estate is measured by the grantee's life
- Presumption that you convey all interests you have (must be explicit if otherwise)
- Words of purchase: describes who gets property
- Words of limitation: describes how long the interest will be

Law of Waste

a. Governs conflicts between future interest-holder and present interest-holder in the absence of stipulations in original deed/grant or side agreements
    1. Present interest holder cannot act as though he were sole owner of fee simple UNLESS grant says so or he has permission of all future interest holders to do so
b. Purpose is to limit activities of present interest holders
c. It is a requirement that grantee act reasonably, which is defined in terms of waste.
    - A grant that specifies the rights of present interest holders and future interest holders circumvents the law of waste. The law of waste is not invoked if the grant explicitly resolves the conflict.
    - Grantor can always specify limits of reasonable use and depart from the default
    - Reasonable -> mushy term, just leave the future interest holder something
    - Types of waste:
        1. Unreasonable commission (e.g. present interest holder extracting all the oil).
        2. Unreasonable omission (e.g. present interest holder failing to pay property taxes).
            a. Milder omissions, such as failures to repair, make for difficult judgments of reasonableness.
        3. Amelioration (increasing property's value).
            a. Amelioration is deemed unreasonable if it changes the character of the land.
            b. Present interest holder, in LE, cannot sell the property in FS and give proceeds to the future interest holders. Reasons: nemo dat and grantor's intention to give the present interest holder land, not money.
d. Remedy:
    - Typical remedy is damages. If you're entitled to damages, courts must award them BUT in order to be entitled, you must be able to prove them with reasonable certainty b/c of the law of remedies. In highly contingent future interests where the likelihood of future interests becoming possessory is very hard to determine, there may be no way to calculate damages with enough certainty to satisfy law so then remedy is injunction BUT the low likelihood of future interest becoming possessory also lessens chance of injunction
        1. Therefore, contingent future interests almost never get damagesa
    - If damages are inappropriate, as in the case of ameliorations, a future interest holder may bring an action for injunction.
    - Theoretical remedy (almost never used) is triple damages for egregious waste.
    - In common law, the remedy for waste was forfeiture of the estate. Most states no longer use this forfeiture, while a few retain it as a theoretical remedy that is never used.

- If you're present interest holder, no matter how egregiously you create waste, it will not terminate present interest unless instrument creating your interest says so explicitly

e. Standing (which future interests may bring an action for waste):
   - Individuals who are certain to possess a future interest may always bring an action for waste.
   - Individuals who may, under some circumstances, possess a future interest:
     1. Ability to bring an action for waste depends on likelihood of ever possessing the land b/c damages should be calculated with some certainty

d. Case Study – Brokaw v. Fairchild
   - Facts: P has life estate to NYC property that has mansion on it; he wants to turn it into apt. buildings b/c land around it has become apartments and it would be more profitable but D want injunction b/c they claim waste
   - Result: Waste happened here
     1. General rule is that life tenant may do whatever is required for general use and enjoyment of his estate as he received it
     2. This isn't a case where the neighborhood's character changed drastically and the property value of the thing plummeted -> still residential neighborhood here
     3. Tearing down mansion for apt. building, even though it will increase value, changes the inheritance or thing so that it cannot be delivered to future interest holders as promised
     4. Court doesn't inquire into defendants' motives for keeping mansion

Rule Against Perpetuities (RAP)

1. Shorthand definition: interest must vest within some life in being plus 21 years
2. A common law rule that limits the kinds of future interests a grantors can create
   a) Rationale: preserving land's marketability, by minimizing uncertainty, while allowing assignment of future interests
3. Most states have statutorily modified the traditional rule, but there is no unitary amendment. About a dozen states maintain the traditional formulation.
4. Future interests affected by RAP:
   a) Executory Interests (EI),
   b) Contingent Remainders (CR), and
   c) Vested Remainder Subject to Open (VRSTO)
5. RAP makes its judgment when the interest takes effect, without waiting to see whether the future interest will actually harm the land's marketability. In other words, RAP applies once there is potential of harming the marketability.
   a) But, many states have statutorily modified RAP to make it wait for future interest's actual impact ("wait and see")

B. RAP protects against future interests that "hang around" after some life in being plus 21 years.
   1. RAP seeks to guarantee that within a certain period (some life in being plus 21 years), the future interest will either
      a) become possessory,
      b) definitively fail to vest,
      c) or transform into a future interest that isn't affected by RAP
   2. But, if the future interest has the potential of hanging around, it violates the RAP.
      a) Modern rules wait to see whether the future interest will hang around.

C. Lives on which the grant may be contingent:

1. Measuring Lives: candidates for validating life
   *baby in womb at time of grant counts as long as he is born
   a) Potential validating lives fall under three categories:
      i) Purported beneficiaries
      ii) People who can directly affect who is a beneficiary of grant
         - If X's children are beneficiaries, X is a measuring life as he may affect the identity of the beneficiaries.
         - But, X's potential spouses cannot be measuring lives, as the list is too large (half the world's population); their affect is said to be indirect.
      iii) People who can directly affect conditions in the grant
2. Validating Life: of the pool of measuring lives, the person whose life actually measured the contingency
3. Shortcut for finding whether the grant violates the RAP:
   a) Are there still uncertainties if all measuring lives immediately die and 21 years pass?
      i) If yes, RAP is violated and the future interest is invalidated.
      ii) If no, RAP is satisfied and the future interest is valid.
         - E.g. "to A and his heirs, but if there is ever a remake of a B's song, then to B and his heirs"
            * Measuring lives: A and B (including anyone who could remake song would make the list too large).
            * Test: if A and B immediately die, and 21 years pass, someone may still make a remake of the song. This is an uncertainty, and thus RAP invalidates the future interest.
         - E.g. "to A 25 years from now"
            * Measuring lives: A
            * Test: if A immediately dies, and 21 years pass, A's future interest would continue to hang around. Thus, this grant violates traditional RAP.
            * But, as a policy matter, this does not present a marketability problem.
         - E.g. *Symphony Space, Inc. v. Pergola Properties, Inc.*
            * Grant in this case: "to corporation A, but if corporation B decides to execute its option, then to corporation B"
            * List of anyone who can exercise the option on behalf of corporation B is too large (potentially anyone in the world). Thus, no measuring lives could be listed, and the time period for the RAP is 21 years.
            * Test: as corporation B could potentially exercise its option in 30 or 50 years (no time limit on option), RAP is violated.
            * Here, grantor retained the option for himself (no marketability problem if grantor has the future interest). But, NY statutorily modified RAP to include future interests in grantor in violation of traditional RAP.
   b) Shortcut has one problem: someone born after creation of the grant cannot be a measuring life, even if he may affect the identity of beneficiaries or grant's conditions.
4. Generally, courts refuse to make assumptions about the world.
   a) E.g. court refused to assume that an 80-year-old woman would not have children.
   b) Only assumption courts are willing to make is (1) that dead means dead AND (2) that dead people cannot have children.
      i) But, with advent of technology, post-death procreation is possible.

IMPORTANT POINT

D. When a future interest is invalidated for violating RAP, any defeasibility conditions attached to the future interest are wiped out as well.
   1. "To A and his heirs, but if there is ever a remake of a B's song, then to B and his heirs"

a) Precisely the uncertainty RAP comes to invalidate - B's future interest is invalidated.
b) Defeasibility condition is attached to B's interest, and is therefore wiped out as well.
c) Result: to A in FSA.

2. "To A and his heirs so long as there is no remake of a B's song, then to B and his heirs"
   a) Similarly to above, B's future interest violates the RAP and is thus invalidated.
   b) But, defeasibility condition is attached to A, not to B, and it therefore remains in place.
   c) Result: to A in FSD, PoR in grantor in FSA.
3. "To A and his heirs so long as there is no remake of a B's song while B is alive, then to B and his heirs"
   a) Future interest remains, as it does not violate the RAP.

E. Circumventing the RAP:

1. Upon granting a FS, the grantor may proscribe any condition (even one that violates the RAP) and reserve a PoR to himself. Then, grantor may grant his PoR to a third party.
   a) E.g. "to A and his heirs so long as there is no remake of a B's song, then to B and his heirs" violates RAP.
   b) But, "to A and his heirs so long as there is no remake of a B's song", and giving a quit claim deed to B (thus transferring grantor's PoR), does not violate the RAP.
2. This method only works in jurisdictions that allow transfer of PoR.

COTENANCIES

A. Tenancy in Common vs. Joint Tenancy

	Tenancy in common (TIC)	Joint tenancy (JT)
A's use and possession rights	100% unconditional and absolute use and possession rights	100% unconditional and absolute use and possession rights
A's financial stake	Proportional to what A invested in the purchase price	Equal stake as the rest of the joint tenants
Successor's use and possession rights after A dies	100% use and possession rights pass to successor through will or intestacy	NOTHING; interest in property cannot be passed on through will or intestacy A's interest vanishes
Successor's financial stake after A dies	Same financial stake that A had passes to successor through will or intestacy	NOTHING; successor has no financial stake in property Remaining joint tenants' financial stake expands to fill the void so shares remain equal
What happens to A's financial obligations when A dies?	Financial obligations pass on to successor through will or intestacy	Theoretically, financial obligations vanish along with the interest and financial stake in property BUT some statutes allow financial obligations to pass on to someone for payment
Other differences	Tends to be seen as more flexible b/c A gets to determine what happens to property when A dies Must write a will or look up intestacy statutes to convey away interests/$$ Law presumes people intend to create TICs	Administratively easier to enter into JT

B. **How to create JT:**

1. live in the right state (i.e. state that recognizes JTs)
2. Must manifest intention to genuinely create JT
   a. Must say "To A and B as joint tenants with right of survivorship and not as tenants in common."
   b. Hoover v. Smith (extreme case of intention manifestation)
      i. Grant said: "It's mutually understood and agreed that grantees are to have and hold land as joint tenants and not as tenants in common."
      ii. Court said: this isn't clear b/c it doesn't say anything about right of survivorship so the grant is a tenant in common grant
3. Must satisfy the four unities*:
   i. Unity of time: All of JT interests must be created at the same time
   ii. Unity of title: All of JT interests must be created under the same title (i.e. same document)
   iii. Unity of financial interest: All joint tenants have to hold equal financial stake in property (so even if A puts in 90% of purchase price, the financial stake in the property is still equal among all JTs)
   iv. Unity of durational interest: Everyone must have the same temporal slice

*if one of the 4 unities ceases to be true, then JT becomes TIC (severance)

C. **Co-existence of TICs and JTs**

- If A, B, and C have a joint tenancy, and C sells his interest to D, D cannot be a JT (b/c he failed to satisfy all 4 unities). So, A and B are still joint tenants with each other and D is a tenant in common with A and B.
    - If D dies, his financial stake can pass to his successors through will or intestacy since he is a tenant in common
    - If A dies, his interest in the property goes to the other joint tenant BUT NOT to any tenants in common
    - Because B becomes the only joint tenant, his tenancy becomes a tenancy in common together with D (<u>severance</u>)

D. **Effect of taking a mortgage using a joint tenancy**

1. If jurisdiction seeks mortgage as granting the bank a claim on the property, without actually transferring ownership, the joint tenancy is maintained. (i.e. Harms v. Sprague)
2. If the jurisdiction sees mortgage as transferring ownership to the bank, and original tenant buys back property over time, severance occurs, meaning joint tenancy becomes tenancy in common. The bank becomes tenant in common.
    a. If original joint tenant pays off mortgage, he becomes a tenant in common b/c the unity of time requirement isn't satisfied for joint tenancies.
    b. If tenants want to become joint tenants again, they could transfer all their interests to a lawyer, who will convey it back to them as joint tenants satisfying four unities.
3. Leases are similar in operation to mortgages
    a. Most courts see lease as transfer of ownership for certain period of time that transforms joint tenancy into tenancy in common (b/c not all four unities satisfied)
    b. Outlier -> Tenant v. Bondswell (CA)
        - One of JTs leases his interest in the property to someone but then that JT dies
        - Court says if you adhere strictly to Four Unities, then the lease turns JT into TIC
        - BUT if you're talking about a short-term lease, the parties probably didn't think that it intended directly or indirectly for lease to create a change in ownership structure
        - Court says A didn't really understand that he was potentially turning JT into TIC so we're going to let JT survive

E. **Rights of Co-Tenants**

1. Each co-tenant has an absolute unconditional right to use and possess the property, irrespective of their financial stake in the property
2. A tenant may not prevent a cotenant from diminishing property's value (outside of the remedies listed above), because each cotenant has an absolute right to use the property
3. Problem: what happens when tenants want to use the property at the same time for conflicting/different purposes?
    - E.g. *Swartzbaugh v. Sampson*
        1. Facts: Mr. and Mrs. Swartzbaugh owned, as joints tenants, a walnut grove in Orange County. Mr. Swartzbaugh leased his interest to defendant, who wanted to make the property into a boxing pavilion (lessee has the same rights to the property as the lessor). Both Mrs. Swartzbaugh (wants walnut grove) and defendant (wants boxing pavilion) have an absolute unconditional right to use and possess the property.

Possible remedies for such situations:

a. <u>Partition</u>: division of co-ownership into individual ownerships; no-fault process
- <u>Physical partition/partition in kind</u>: when property is split between the owners
    - Can be problematic if tenants can't argue on which land each person will have; hiring experts to examine land's value is costly

- Owelty: side payment made in a partition action to compensate for the fact that parties are not getting equal value in the physical partition
  - This can be a problem b/c parties have to agree on the $ amount

- Partition by sale: when tenants sell property and divide profits
  - Also costly and needs accounting services

b. Ouster: extreme remedy granted if one co-tenant affirmatively prevents another co-tenant from absolutely using the property as he wishes
   - Legal consequence #1: kicked-out tenants get to collect reasonable rent from tenant who ousted them from property
   - Legal consequence #2: starts adverse possession clock on ouster (i.e. wrongful occupant)
   - Law sees ouster as a very rare event
- What constitutes an ouster?
  1. Metaphysically, anytime someone uses property in such a way that he forecloses other uses of the same property
  2. Co-tenant literally bars other co-tenants access to property

c. Wait for other joint tenant to die
   - This will only allow a singly joint ownership "share" to fold into an individual ownership if the state does not turn a joint tenancy into tenancy in common b/c of a lease

d. Case Study – Delfino v. Vealencis (**Physical partition vs. partition in kind**)
   - Facts: Members of a tenants in common had agreed to a partition but plaintiff wants physical partition (partition by sale) while defendant wants partition in kind
   - Result: Court grants partition in kind
   - Rationale:
     1. Burden is on party requesting partition by sale to show it would better promote all of their interests
     2. Court must consider the interest of all TICs, not just the economic gain of one tenant or group of tenants
        - Interests judged by how partition would affect possessory rights of parties
     3. Court favors partition in kind; partition by sale should only be ordered when:
        - Physical attributes of land are such that partition in kind is impracticable or inequitable
        - Interests of owners would be better promoted by partition by sale

e. Case Study – Gillmor v. Gillmor (**example of ouster**)
   - Facts: P claims D ousted her from her land b/c his grazing prevented any other use; in this jurisdiction, cotenant may sue for his share of rents and profits from common property if he has been ousted from possession of common property
   - Result: There's been ouster here
   - Rationale:
     1. Exclusive use for ouster means an act of exclusion or use of such a nature that it necessarily prevents another cotenant from exercising his rights in the property
     2. When cotenant out of possession makes a clear, unequivocal demand to use land that is in exclusive possession of another cotenant and that cotenant refuses to accommodate that right to use, there is claim for relief

F. Expenditures made in co-tenancies
    1. If payments are to maintain title (e.g. property taxes, bank payment), the tenant can demand contribution from other cotenants in a suit
    2. If payments to maintain property's value (e.g. fixing the roof) the tenant cannot demand contribution from other cotenants in a suit. Must get compensation for share he paid towards maintaining value through an accounting.
    3. If payments to make improvements (e.g. upgrading a house), the tenant cannot demand contribution from other cotenants in a suit. Must get compensation (what tenant paid and the full value he created through that improvement) through an accounting.

G. Other Notes
    1. Any co-tenant owns their property for some temporal duration (fee simple, life estate, tenancy)
    2. Can also be a tenant to a lease w/ more than one co-owner of that lease interest and therefore be a TIC or JT as a tenant

H. **LANDLORD-TENANT LAW**

I. Introduction

A. Basic difficulty of landlord-tenant law:

1. Execution of every lease means two things: conveyance of a present possessory interest (privity of estate), and an execution of a contract (privity of contract).
2. Every lease also has defeasibility conditions
3. Death is not a defeasibility condition unless lease or statute stipulates it as such
4. Difficulty is with reconciling differences between property law and contract law.

B. Types of tenancies (distinguishable by how they end):

**look at rules of jurisdiction for when lease has to be in writing to satisfy statute of frauds*

1. Tenancy for a term of years
   - Transfer of a present possessory interest for a fixed period of time
   - Parties agree on a time period and an end date/time
   - Tenancy terminates when end date arrives without notification from either party OR if defeasibility condition is satisfied
2. Periodic tenancy
   - Automatically renewed every period of time (e.g. every month, every year)
   - Ends upon notice by either party
     - How to give notice?:
       - Lease (1^{st}) or statute (2^{nd}) can stipulate form of notice
     - When to give notice?:
       - Common-law default rule: at least one lease period in advance (e.g. lease renewed every month requires one month's notice)
       - Common law default rule: notice is given upon receipt
3. Tenancy at will
   - Terminates when one of the parties wants to end lease
   - At common law, intent was sufficient to terminate lease
   - Termination transfers land to future interest. Under statute of frauds (contract law), transfer of land must be in writing
   - Some jurisdictions enact statutes that require some measure of notice to the other party

II. Transferring Tenancy Interests

1. Common law permits a tenant to transfer his present possessory interest during the lease; also allows landlord to transfer his future interest during the lease to a "new landlord".
   i. But, a lease may designate a transfer without landlord's consent as a defeasibility condition terminating the lease.
   ii. Generally, landlords and tenants may restrict transferability.
   iii. REMEMBER: since tenancies are usually conveyed by contract, both contract law and property law may be grounds for liability
      i) Privity of contract – relationship creating legally enforceable rights & obligations under contract law; read contracts in light of jurisdiction's laws
      ii) Privity of estate – rights & oblig. in property law (rent, waste, quiet enjoyment)
2. Types of transfers:
   i. **Assignment**
      i) Traditionally occurs when tenant transfers all of his property interests in lease to assignee and does not keep a future interest
         1. Can be problematic when tenant gives assignee a defeasible interest (because then original tenant technically keeps future interest)
         2. Courts are divided on whether above situation is assignment or sublease

3. Intentions of parties are irrelevant when construing assignment vs. sublease
    * Can't transfer all your interests to someone else and call it a sublease
    * Can't create an assignment but put liabilities of a sublease into it

ii) Privity of estate:
1. Landlord and assignee are bound to each other under obligations of property law, i.e. obligations of original lease that <u>run with the land</u>
2. No more privity of estate b/w landlord and tenant

iii) Privity of contract:
1. New contract created b/w tenant and assignee
2. Maintains contract b/w landlord and tenant
    * Tenant must purchase a release of liability from landlord to get out of it
3. Presumptively no contract b/w original landlord and assignee, but they can always agree to enter into one or have assignee be 3rd party beneficiary of original contract b/w landlord and tenant

iv) Legal consequences:
1. Assignee is liable to landlord for all property law obligations that run with the land
2. Tenant and landlord are liable to each other for breaches in contract
3. Tenant and assignee are liable to each other for breaches of their contract

ii. **<u>Sublease</u>**

i) Tenant transfers portion of his interest to sublessee but keeps a future interest

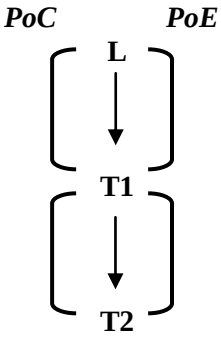
ii) Privity of estate
1. Maintains property law relationship b/w landlord and tenant
2. Creates new property law relationship b/w tenant and sublessee
3. NO PROPERTY LAW RELATIONSHIP b/w landlord and T2

iii) Privity of contract
1. Maintains contract b/w landlord and tenant
2. Creates new contract b/w tenant and sublessee
3. NO CONTRACT b/w landlord and sublessee

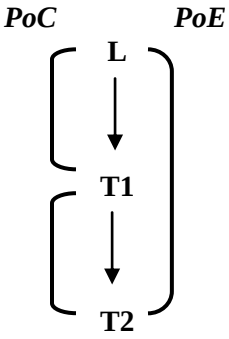
iv) Legal consequences:
1. Sublessee cannot directly enforce any obligations that run with the land in original lease or any obligations in contract between landlord and tenant
2. Landlord and tenant remain liable to each other for property obligations that run with the land and any obligations in contract
3. Sublessee and tenant can enforce the terms of their contract with each other

	Privity of estate	*Privity of contract*	*Liability*
ASSIGNMENT	1. Assignee and landlord are in privity of estate 2. Landlord and tenant privity of estate dissolved	1. Tenant and landlord are in privity of contract 2. Tenant and assignee are in privity of contract 3. Assignee and landlord are not	1. Tenant is liable to landlord for contractual obligations in lease 2. Tenant and assignee liable to each other for their contract 3. Assignee liable to landlord for all obligations that run with the land
SUBLEASE	1. Landlord and tenant are in privity of estate 2. Tenant and sublessee are in privity of estate 3. Landlord and sublessee are not	1. Landlord and tenant are in privity of contract 2. Tenant and sublessee in privity of contract 3. Landlord and sublessee are not	1. Tenant is liable for contractual obligations in lease, but sublessee is not 2. Tenant can enforce obligations that run with the land against landlord, but sublessee cannot 3. Sublessee cannot directly enforce property or contract law obligations against landlord

<u>Sublease</u>:



<u>Assignment</u>:



(c) Landlord transferring interest in tenancy

- After lease executed with tenant by contract, landlord keeps a future interest, at least a reversion in the property
- If landlord transfers reversion to someone else, that new landlord acquires future interest in land and the protections of the law of waste when interest becomes possessory
- New landlord also acquires liabilities under privity of estate old landlord had with tenant BUT new landlord hasn't entered a contract with tenant so presumptively he is not liable for things in the contract between the old landlord and tenant
- <u>"Run with the land"</u>: Property law will allow certain provisions in a lease to pass on to successors to the original landlord as part of privity of estate but is limited to those provisions that have some special connection to the property itself
    - Promises that pass on have to both touch and concern the land; metaphorically sink into the property so that anyone who acquires a property interest in that land gets the actual land and the promises embedded in the land

- Usually includes promises about physical characteristics of the land
- Includes paying rent

B. Cases about transferring tenancies

1. Mullendore Theatres v. Growth Realty Investors Co.
   - Facts: Original landlord enters into a commercial lease with tenant and promises to return security deposit if there's no damage to property at the end of the lease. Landlord transfers future interest to new landlord. Tenant wants the security deposit back but new landlord refuses to give it to him
   - Result: New landlord and tenant are not in privity of contract. Old landlord and new landlord are in privity of estate so new landlord assumes liabilities under property law including obligations in lease that "run with the land." Court decides that security deposit does not run with the land because landlord wasn't required to spend it for repairs or maintenance or for anything else related to property. So new landlord does not have to give it back to tenant. However, tenant is not barred from suing old landlord for it since they are still in privity of contract.
   - COURT SAYS: to run with land, it must be so related as to enhance its value and confer a benefit upon it; intent for it to run w/ land is not enough to make it run w/ land

2. First American National Bank v. Chicken Systems, Inc. (**legal consequences of assignment**)
   - Facts: terms of years lease b/w plaintiff landlord and defendant tenant, disallowing defendant to transfer the lease w/o plaintiff's permission. Defendant transferred the lease (reflected in a contract) to defendant PSI as an assignment without plaintiff's consent, but PSI sent rent ($1050/mo) to plaintiff and plaintiff accepted payments. PSI defaulted on rent payments. After a year with no tenant, plaintiff landlord lease property to another tenant, Sir Pizza, for $600/mo (they had privity of estate by virtue of assignment and they voluntarily made a contract with each other).
   - Contention: Plaintiff wants difference in rent b/w Sir Pizza and PSI
     - Rent is an obligation that runs with the land and so is part of privity of estate
     - PSI's argument #1: no assignment was made to PSI b/c plaintiff landlord never consented to the assignment. But, court said a landlord may disregard a condition of consent by accepting rent and PSI can't use the illegality of its own act as a defense to liability (bank can raise it if it wants to)
     - PSI's argument #2: Sir Pizza is the last assignee, and privity of estate with plaintiff landlord transferred from PSI to Sir Pizza upon assignment to Sir Pizza. Court agreed, concluding that transfer to Sir Pizza was an assignment and by virtue of that, PSI was no longer in privity of estate with landlord.
     - Presumptively, assignees do not have privity of contract with landlord. PSI could only have privity of contract with landlord if landlord was named a third-party beneficiary of the original assignment contract from CSI to PSI. But landlord was not made a third-party beneficiary so PSI has no privity of contract with landlord
     - Bottom line: PSI does not have privity of estate or contract with landlord and does not owe damages for the difference b/w PSI's rent and Sir Pizza's rent.
   - Contention: Claim for one year of unpaid rent, before Sir Pizza became tenant
     - During that period PSI had privity of estate with landlord so PSI is liable for that year's rent.
   - Contention: claim against Chicken Systems
     - Landlord pursued suit against CSI because privity of contract remains absent release of liability -> guarantors of CSI (who had said they wouldn't raise

statute of limitations issue but ultimately did) have to pay difference in rents plus interest

3. Jaber v. Miller (**legal consequence of assignment vs. sublease**)
    - Facts: Jaber enters terms for year lease w/landlord that has a provision that lease would terminate if the premises were destroyed by fire. Jaber transferred his lease (which ended in 1951) to Norber "for the remainder of the lease," indicating an assignment. But, Jaber also says possession returns to him if Norber fails to pay rent, thus retaining a future interest. Norber agreed to pay total $4200 with $700 upfront and then pays every few months until paid in full. Jaber still obligated to pay $200/mo to landlord, but he does so landlord is not part of this suit. Norber assigned property to Miller, meaning they have privity of estate (run with the land). Building burns down before Norber completes his payments.
    - Crux of problem: whether Jaber-Norber transfer was assignment or sublease?
    - Analysis:
        - If Jaber-Norber was assignment, then Miller owes the remainder of the rent despite property burning down b/c rent is obligation that runs with the land and so transfers to assignee under privity of estate
        - If Jaber-Norber was sublease, then Miller has no obligation to pay rent after property burned down; only obligation is to pay rent under the sublease because sublessee is not in privity of estate with landlord and so does not have obligations of original lease
    - Court should really look at whether Jaber kept a future interest BUT instead court looks at intention of the parties and ignores common law
    - Court concludes that it's an assignment b/c it sees "assignment" in lease and only a weird little future interest and thinks Jaber and Norber intended to create an assignment
    - Upshot of Jaber:
        - As a technical, formal matter there hasn't been a huge following of this intentions test
        - However, some courts probably look at intentions of the parties to decide but just don't say so explicitly in their opinions
4. Kendall v. Ernest Pestana Inc. (**commercially reasonable reason for rejecting transfer**)
    - Facts: Landlord and tenant have commercial lease for hangar space in which landlord says he has power to approve transfers of lease. Tenant wants to transfer lease and finds a new tenant who is at least as good as the original tenant. Tenant wanted to transfer the interest b/c his rent with landlord went up so he could get the difference and make a profit by transferring the lease rather than using his present interest. Landlord refused to approve transfer b/c he wants the extra profit for himself.
    - Conclusion: Court says that at least in commercial property, we're going to require that every lease contain a provision that says the landlord must be reasonable in approving transfers ("commercially reasonable objection")
    - Commercially reasonable objections can include: financial responsibility of proposed assignee, suitability of use for particular property, legality of proposed use, need for alteration of premises by new assignee, nature of occupancy, etc.
    - Lawson's notes on this case:
        a. Not every court buys this decision
        b. By commercially reasonable, they don't mean how a commercial sensible person would reason because if that was the case then it would be reasonable for landlord to want a cut of profits
        c. CA court does a narrow interpretation -> tenant has appropriate financial capacity so we the court see them as a comparable credit risk

d. General proposition that landlords are free to put in provisions about approving transfers and tenants are free to have a provision about exclusively dealing with that landlord only

III. Dirtbag Landlords

A. **Covenant of Quiet Enjoyment**

1. Definition: promise not to interfere with tenant's possession of land during lease term
    i. "Enjoyment" doesn't mean that landlord is liable any time the tenant is not able to "enjoy" his land as he sees fit; landlords and tenants can contract over the property's suitability for a particular purpose in the lease, but without such provision, courts will not read suitability into the lease
    ii. "Quiet" doesn't necessarily mean the landlord has to be quiet around tenant's property or maintain quiet around tenant's property -> in some cases tenant can bring tort suit against landlord for nuisance but that wouldn't get them out of privity of estate or contract
        i) To get out of privities with landlord, must create circumstances so dramatic that it would be unreasonable for tenant to be required to occupy the land.

2. **Constructive Eviction**
    i. Definition: tenants may exercise it when certain circumstances make use of the property impossible; such situations are conceptually tantamount to eviction b/c no tenant should be reasonably required to continue to occupy the property
        i) The independent covenant rule requires either party to fulfill requirements under privities of estate and contracts w/o regard to whether other covenants have been or can be performed
            1. E.g. even if landlord fails to perform covenant, tenant must still pay rent bu he can sue for breach
        ii) But, covenant of quiet enjoyment applies to constructive evictions. Therefore, upon a showing of constructive eviction, tenant is no longer obligated under lease.
    ii. How to prove constructive eviction:
        i) Landlord must breach an obligation that makes the property uninhabitable
            1. Courts apply rigorous standard of proof; breach must be severe
        ii) Tenant must give landlord notice of the breach and a reasonable chance to fix the breach
        iii) Tenant must actually leave the property to establish cause of action; show that no reasonable tenant would continue to occupy the premises b/c of landlord's breach
            1. This can be very risky b/c if tenant leaves property, litigates, and loses, then tenant is still obligated under original lease and most likely for the new lease for whatever new property tenant moved to during construct eviction
            2. Tenant should probably assess his chances of success at trial before moving out of property

3. Cases about Covenant of Quiet Enjoyment
    i. Paradine v. Jane
        - Facts: Tenant gets interest in property to have a farm but then a civil war erupts and soldiers are all over tenant's land, preventing him from having a farm. Lease here said how much rent was but did not expressly include promise to pay rent
        - Contention: Tenant says covenant of quiet enjoyment violated and so doesn't owe rent to landlord anymore

- Result: Court says landlord didn't guarantee in lease that land would be soldier-free. As long as the landlord wasn't the one who caused the soldiers to be on the land, then covenant hasn't been broken and tenant still owes rent. Promise to pay rent is implied as a matter of law in all leases. Lessee has advantage of causal profits so he must run hazard of causal losses

ii. Smith v. McEnany (**encroachment onto tenant land releases from rent payment**)
- Facts: Landlord's fence encroaches a few feet onto defendant's property so there is a cause of action in tort against landlord.
- Contention: whether by virtue of trespass, tenant is still obligated to landlord under the lease? Does it excuse complete performance or just part performance?
- Result: If landlord trespasses on tenant's land, tenant can be released from obligations under the lease if tenant chooses to do so b/c warranty of title includes noninterference with land
  - Wrongful eviction of tenant by landlord from a part of the premises suspends rent under the lease
  - Rent is on the whole piece of land so if you lose a piece, it breaks lease b/c tenant it a condition that he should have the whole piece of land in lease

iii. Sutton v. Temple (**land quality not a guarantee unless explicit**)
- Facts: Tenant rents land from landlord to use for cattle grazing but the land doesn't end up being so good and cows die
- Contention: Tenant argues grass quality is read into the lease as a guarantee. Landlord says he never promised good land, he just promised land, no interference, and that no third parties would come to kick tenant off land
- Result: Except in very narrow circumstances, common law says that landlord isn't promising as a matter of law that the land is good for anything (if tenant wants to ensure this, he should have it written into the lease)

iv. Hypo on "quiet" in covenant of quiet enjoyment
- Facts: Suppose landlord rents property to tenant and tenant uses it for meditation office. But then, Beavis and Butthead move in next door and plays Metallica really loudly all the time. -> tenant could have tort action against B&B for nuisance
- Facts: Suppose it was landlord blaring the music? It may violate covenant of quiet enjoyment if the landlord does something that so dramatically interferes with the tenants' use of land even if it's not a direct encroachment on the land. If the landlord creates circumstances such that it would be unreasonable to require tenant to continue to occupy the land, tenant can get out of the lease. Tenant must exercise constructive eviction to establish cause of action.

v. Lackett v. Olanoff
- Facts: Landlord leased property to them for use as a bar; music was so loud that it reached tenant's property. Landlord promised to fix it, tried and failed
- Contention: Tenant claimed the landlord should have stopped the third party from playing music so loudly
- Result: Landlord had right to control the noise b/c he knowingly introduced a commercial activity into residential area (both under his control); bar's potential threat to residents was apparent; landlord permitted bar tenants to engage in activity that interfered with other tenants' rights

B. **Implied Warranty of Habitability**

1. Definition: set of legal doctrines (that emerged in 1960s-1970s during a shortage of housing leading to landlord-biased leases in urban areas) deemed by law to be incorporated into every lease and sets a minimum quality standard for a unit that covers both obvious and

latent defects; landlord's failure to satisfy them constitutes a breach of lease and possible damages for tenant -> IWH can be found in statutes or common law

i. Name is misleading because:
   i) Not "the" because there is no single version; every state has a different version
   ii) Not "implied" because sometimes it is express in statutes
   iii) Not a "warranty" which is a contractual term because IWH does not involve things that parties agreed to in the lease
   iv) Doesn't always relate to "habitability" of property
ii. Universal feature of IWH is to make provisions covered by IWH dependent covenants so that tenants always have the option for terminating lease for a violation
iii. Where jurisdictions diverge on IWH
   i) Source: mostly statutory but can be from common law too
   ii) Scope: does IWH apply to:
      1. Large-unit apartments in urban areas?
      2. Apartments in urban areas?
      3. Large-unit apartments?
      4. Urban residential?
      5. Residential?
      6. All?
   iii) Content: can draw it from…
      1. Housing codes
         * Good: already exist so don't have to create a whole new common law or conduct surveys
         * Bad: may be overinclusive and underinclusive
      2. Housing codes dealing with inhabitability
         * Good: gets closer to what most people's intuitions are about what kinds of changes IWH is aimed at
         * Bad: Can create too much litigation to determine whether a violation rises to a level of seriousness to be part of IWH; "habitable" has to mean something other than what it means for constructive eviction
      3. General common law doctrine requiring habitability – fuzzy standard that requires costly litigation to determine so may not be appropriate for slums
      4. Reasonableness standard: requires litigation
      5. Warranty of merchantability: minimum quality premises have to satisfy
   iv) Waivability
      1. Most jurisdictions say IWH is non-waivable -> makes IWH stronger than quiet enjoyment
      2. Perception that tenants and landlords have unequal bargaining power
      3. Have to weigh contractual origins of doctrine against consequences you're likely to achieve
   v) Remedies
      1. Since initiating suits cost money that is unavailable to slum housing tenants (the primary beneficiaries of IWH), many jurisdictions set IWOH as a defense so tenant can pay lower rent and use IWOH as a defense to landlord's action for collection or eviction
      2. Expectation damages: not helpful because it is too low to deter slum housing landlords from violating IWH
      3. Difference b/w value of unit & value of unit in compliance with IWH: can be unhelpful b/c amount is costly to determine or damages come out to $0

4. Percentage reduction: asking for percentage of the unit's overall value lost due to defects
    - Benefit: can be calculated without experts
    - Problem: difficult nor normal person to construct a reliable, non-arbitrary percentage
    - How you do it: identify various defects in unit that fall below minimum standard of quality specified by jurisdiction); calculate how much of the unit's overall value is attributable to those defects; rent you don't have to pay equals the percentage of apartment value lost from defects
5. Remedies in book: specific performance of IWH; recission of lease with no further obligation to pay rent; withholding portion or all of rent until violation corrected; fair market value (assumes there is a fair market value for defective housing)

iv. IWH in practice
   i) If there's a breach of IWH, tenant can terminate the lease
   ii) How to handle a IWH violation if tenant wants to maintain lease:
      1. Landlord must breach some obligation covered by IWH
         - Tenant should look at jurisdiction's statute about IWH
      2. Tenant must give landlord notice of breach and give landlord reasonable chance to fix the breach
      3. If landlord doesn't fix the breach within a reasonable amount of time, then tenant can fix it himself and as long as expense towards repair is reasonable, tenant can ask landlord for compensation (repair and deduct)
      4. If the breach is for something that tenant cannot fix himself b/c it isn't feasible to do so (i.e. fixing central air conditioning unit for large apartment building), tenant can sue for breach of lease and try to get damages
      5. This whole time, the tenant must keep paying rent but the rent may be somewhat less than the stipulated amount in the lease b/c of IWH breach
         - Look to percentage reduction or other ways to figure out rent
   iii) Doesn't get enforced very often b/c often it affects low-end housing and it's too expensive to enforce it
   iv) Most courts have followed *Javins* in making IWH a non-waivable rule of law, mainly because of the perception that landlords and tenants have unequal bargaining power
   v) Tort suits under IWH
      1. Tenant usually assumes tort liability for injuries incurred on property under a lease unless liability is modified by a lease provision
      2. Under IWH, landlord's liability could expand to having a general obligation to maintain the premises in a manner consistent with the housing code and make sure it meets minimal standards of public safety and health
   vi) Issues about adequacy of physical conditions and services under COMMERCIAL leases continue to be address in most jurisdictions under specific lease provisions or under doctrine of constructive eviction
   vii) Constructive eviction may still be used under residential leases, but only to the extent that the jurisdiction relies on its housing code to define IWH's content; so if housing code does not include what is bothering you, you must go to covenant of quiet enjoyment to get remedies

2. Case Study – Javins v. First National Realty Corp. (**reading urban leases like contracts**)

- Facts: Landlord filed suit against tenants who did not pay rent. Tenants said landlord violated housing code which gave them a reason not to pay rent.
- Result: Court rules that implied warranty of habitability is implied by operation of law into leases of urban-dwelling units covered by DC Housing Regulations and that breach of this warranty gives rise to breach of contract. Court says value of lease in apartment dweller's situation is that it gives him a place to live so IWH is fair to read into them, whereas in leases involving farm or commercial land, it's the value of the land
- Court's holding reflects belief that leases of urban dwelling units should be interpreted and construed like a contract

3. Case Study – Pugh v. Holmes (**discussion about appropriate measure of damages**)
    - Facts: Landlord sues for unpaid rent, tenant alleges breach of IWH and wants compensation from landlord for fixing door lock
    - Discussion on damages:
        - Fair market value approach suffers from two drawbacks:
            - Assumes there is a fair market for defective premises
            - Determination would require some type of market survey, statistical evidence or expert testimony about the local rental market -> costly for low incomers
        - Percentage reduction is better because:
            - Rent is abated by a percentage reflecting the diminution the value of the use and enjoyment of leased premises by reason of the existence of defects which give rise to the breach of habilitability
            - Better achieves goal of returning tenant to position he would have been in had performance been rendered as warranted
            - Not as big a need for expert testimony
        - Recovery will not be precluded simply b/c there is some uncertainty as to the amount of damages incurred -> breaching party should not be allowed to shift the loss to the injured party when damages were certainly the responsibility of breaching party

IV. Deadbeat Tenants

A. Generally

- Most commonly litigated breach by tenant is failing to pay rent, which will almost always trigger defeasibility condition in lease (determinable or conditions subsequent)
- Different problems arise depending on whether tenant is still on the property or tenant has left the property or never moved in
- Not paying rent always creates a future contract action against tenant BUT whether it terminates tenant's possession depends on whether rent payment is determinable or condition subsequent
- Both tenants and landlords can always waive a breach

B. If tenant has left the property and didn't pay rent

1. Abandonment of interest in lease, unlike that w/ personal property, does not release tenant from obligations. Tenant is still legally bound to all provisions of lease and therefore still under privity of contract and estate with landlord
    i. Is a meaningless act; can itself be a breach of the lease depending on its provisions
    ii. Doesn't terminate lease BUT UNDER LAW IS AN OFFER TO TERMINATE LEASE
2. Surrender
    i. Bilateral act preformed after tenant offers to terminate lease through abandonment

ii. When parties agree to a surrender, tenant's present possessory interest is transferred from the tenant to the landlord so their privity of estate dissolves BUT NOT contract so tenant would still be liable for past damages, expectation damages (which must be mitigated by landlord under contract law)
iii. Formally required to meet statute of frauds

3. Surrender by operation of law
   i. Something the law will treat as a surrender even if it doesn't satisfy the formal requirements of the statute of frauds
   ii. Must be clear from the intention of the parties that they want to terminate the lease
   iii. Whether there's a surrender tends to turn on facts of case and interpretation of the intentions of the parties with caveat that if landlord puts someone else on the land, it is a surrender (contrary to *McGrath*)
4. Release
   i. Bilateral act performed in conjunction with a surrender
   ii. Terminates privity of contract between landlord and tenant
5. Consequences of landlord's different actions
   i. If landlord accepts abandonment through surrender but doesn't sign release and law doesn't consider release implied in surrender, then privity of contract remains. Landlord has to make a reasonable attempt to mitigate damages under contract law.
   ii. Most jurisdictions require mitigation of damages so doing nothing is not permitted.
   iii. Landlord cannot recover for future nonpayment of rent under surrender & release (b/c contract dissolved through release) but may recover for future non-payment under mitigation of damages (b/c privity of contract still exists)
6. As a practical matter, law presumes a successful surrender as also constituting a release
7. Refusing abandonment and letting damages pile up is not usually an option in residential contexts but may be possible in commercial contexts

8. Case Study – Sommer v. Kridel
   - Facts: Tenant said he couldn't move into property b/c his marriage had been called off. Landlord waited for a year, didn't get a new tenant, and sued tenant for year's rent.
   - Question: Is landlord still obligated to mitigate damages even with no surrender?
   - Analysis:
     - By abandoning, tenant offered to terminate lease BUT there was no reason indicating that landlord agreed to terminate the lease
     - Under contract law, landlord should make a reasonable attempt to mitigate damages by finding a new tenant
     - Under property law, it wouldn't make sense for landlord to find new tenant b/c since there was no surrender, it's still the tenant's possessory interest and the landlord has no right to rent out tenant's possessory interest
   - Result: Court required reasonable effort to mitigate damages by re-letting the property (MODERN VIEW, accepted in 42 states)
   - Rejects view that renting tenant's apartment would result in a lost sale to landlord of another vacant apartment in his building b/c each apartment is unique and there's no guarantee a buyer will like an apartment
   - Landlord has burden to prove he made reasonable efforts to mitigate damages b/c he's in better position to demonstrate it
9. Case Study – McGrath
   - Facts: Landlord takes unit that tenant abandoned and knocks down a wall to combine it with another unit. Landlord rents out joint unit.

- Question: When landlord re-rents abandoned property to someone else, does that constitute surrender or mitigation of damages?
- Result: Court rules that it was mitigation of damages b/c the only way that landlord can do that is by leasing out to a new tenant; doesn't mean landlord accepted surrender
- Dissent: Says landlord's actions (combining abandoned unit with another unit and re-renting it out to a new tenant) show he was not expecting tenant to come back anytime soon -> ceased to deal w/ premises as abandoned subject to lease and thereafter dealt with them in their own right as owners

10. Hypo
    - Facts: Tenant abandons, landlord says value of property increased since time of original lease and so landlord wants to get a surrender so he can re-rent property for higher price. No surrender occurs but in the course of mitigating damages (by re-renting property to a new tenant at the higher rent price) landlord makes a profit.
    - Question: Who gets the profit?
    - Result: It would seem the tenant gets the profit b/c no surrender has occurred and tenant still has present possessory interest

C. **If tenant is still on the property and breaches lease**

1. Two possible remedies (depending on jurisdiction): ejectment & self-help eviction
2. How to handle breaching tenant
    i. Make sure tenant's breach actually terminates tenant's present possessory interest
        i) Important b/c as a landlord you don't have a right to enter tenant's property and so you can't show potential tenants the property
    ii. Then bring action for <u>ejectment</u>
        i) But this was problematic sometimes b/c if there's a large backup on the court docket (like in large urban areas), then landlord can't do anything about tenant or mitigate damages until ejectment action decided
        ii) 20th century – legislatures created special housing courts to handle ejectments of deadbeat tenants BUT THEN those started having a backlog
    iii. If landlord wins ejectment action and tenant still doesn't leave property, then landlord should take the judgment to law enforcement to enforce it which can result in:
        i) Police say yes, show me the tenant so I can kick him out
        ii) Police say yes, but I'll get to it later when I have the chance
    iv. Traditional common law allowed landlord take matters into own hands and eject tenant as long as it didn't disturb the peace (<u>self-help eviction</u>)
    v. Traditional common law allowed landlord to seize tenant's property and sell it at auction to satisfy damages
3. Case Study – Berg v. Wiley (**<u>self-help eviction must be peaceable</u>**)
    - Facts: Tenant got a lease for a family restaurant and starts remodeling kitchen without asking for permission from landlord and kept operating restaurant with alleged health code violations. Wiley had reserved right in lease to retake possession if any provisions were violated. Wiley changed locks while Berg was away.
    - Questions: Did Berg abandon lease before Wiley locked her out? Was Wiley's self-help eviction wrongful as a matter of law?
    - Result: Jury finds as a matter of fact that no abandonment occurred b/c testimony and evidence suggests Berg intended to retain possession and was just closing temporarily to remodel. Minnesota only allows for self-help eviction when landlord is legally entitled to possession and when landlord's means of re-entry are peaceful but there was a record of animosity b/w them & only reason it was peaceful is b/c Berg was absent.

D. **Housing Discrimination**

1. Common Law
   - Owner had absolute right to transfer, or refuse to transfer, property
   - Employer had absolute right to hire anyone and fire anyone; employee had absolute right to leave a job, couldn't be forced to stay there
   - But, common law did prohibit certain types of discrimination in transportation and public accommodations
   - By mid-20th century, there are few if any statutes changing common law baseline with respect to employment or land transactions
     - Most statutes govern nondiscrimination in employment law
2. Development of nondiscrimination statutes
   i. **Civil Rights Act of 1964** – first major statute that makes inroads onto noninterference
      i) Dealt with just employment discrimination, not housing or land transactions
      ii) Fair Housing Act is based on this statute
      iii) Title 7 prohibited discrimination by ERs based on race, religion, color, national origin, or interracial association
      iv) Upshot – if you have a person in a category that the Civil Rights Act and the common law don't prohibit, then you can discriminate against him
   ii. 14th Amendment
      i) Outlawed slavery and stipulated that all people born or naturalized in the USA are citizens of the USA (tried to overrule Dred Scott with citizenship clause)
      ii) Effort to constitutionalize Congress's authority to enact certain statutes, including the Civil Rights Act of 1866
   iii. 15th Amendment
      i) Extended voting rights to African Americans (i.e. to persons regardless of race, color, or previous condition of servitude)
   iv. **Shelley v. Kraemer**
      i) Facts: tenants had a covenant that discriminated on the basis of race; prevented a willing seller from selling a house in neighborhood to willing black buyer
      ii) Result: SCOTUS concluded that if it were to enforce a private restrictive covenant based on race, the covenant would become official state action. Since that state action would be discriminatory, the judicial enforcement of a racially-based restrictive covenant would violate the Equal Protection Clause of the 14th Amendment.
      iii) Bottom line: if you have a restrictive covenant against race you want enforced by the law, you will lose because the State will not enforce it
   v. **42 USC §1982**: Property Rights of Citizens
      i) Prohibits discrimination on the basis of race in the inheritance, purchase, lease, sale, holding, and conveyance of real and personal property
      ii) Notion of race interpreted very broadly by SCOTUS
      iii) Contains no exceptions for small landlords or religious organizations
3. **Fair Housing Act of 1958**
   i. §3604 (Liability)
      (a) It is unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale and rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."
         - Familial status: having children
         - Other discriminations (note: sexual orientation) are not prohibited

(b) It is unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin, or an intention to make any such preference, limitation or discrimination."

(c) It is unlawful to "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of the dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin."

- Anyone who provides the forum for the ad (e.g. Craigslist) is also liable
- Very common instance of housing discrimination: "female roommate wanted"
    - Permitted b/c Department of Justice's policy is that it will not take action against sex-based preferences in shared housing arrangements (though other preferences are still enforced)
    - DOJ's reluctance to enforce does not preclude private actions to enforce

(d) It is unlawful to "represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."

(e) It is unlawful to "induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin."

(f) Sections (a) and (b) apply to discriminations based on handicap, if the buyer or renter, a person intending to reside in the dwelling, or a person associated with the buyer or renter is handicap

ii. §3603(b) & §3607 (<u>Exceptions to Liability</u>)

i) §3603(b)

1. For the sale or renting of a single family house by the owner as long as that private individual owner doesn't own more than 3 single family homes at any 1 time, sections (a), (b), (d), (e), and (f) do not apply.
    - Advertisement of discrimination is still prohibited
    - Exemption only allowed once every 24 months
2. For renting of rooms by an owner that resides in one of the rooms, and when the other rooms are to be occupied by no more than 4 families, sections (a), (b), (d), (e), and (f) do not apply (the "Mrs. Murphy Exception")
    i. Advertisement of discrimination still prohibited

* BUT REMEMBER: 42 U.S.C. §1982 still prohibits all race-based discrimination so for exceptions under Fair Housing Act, §1982 becomes an alternative cause of action.

ii) §3607

1. Religious organizations may limit the sale or rental of dwelling to persons of the same religion AND private clubs (e.g. Yale Club) can limit occupancy or rental of its lodging to its members or give preference to its members
    * Doesn't apply if membership in religion is based on race, color, or national origin
2. Localities may limit the number of occupants, so long as the restrictions are reasonable
    * Discrimination based on familial status permitted

iii) BUT REMEMBER: state and local government housing discrimination statutes may cover what the Fair Housing Act or §1982 does not
1. Example: AG v. Desilets – state provision narrower than federal statute

4. **Litigating a housing discrimination case**
   i. Generally
      i) Difficult to litigate a discrimination case b/c most of the evidence will be inferences of discrimination
   ii. Disparate treatment
      i) Litigation is concerned with defendant's motive (mental state) behind denying plaintiff's application at the time that the defendant denied it; defendant violates law if he rejected plaintiff's application based on one of the categories prohibited in the statute either with or without pretext
      ii) Procedure for litigating a disparate treatment case:
         1. Plaintiff should allege that he has one of the characteristics the antidiscrimination statute is trying to protect, that he applied for X for which the statute protects your right to be treated fairly, and that you were denied X by defendant
         2. Defendant will then say the plaintiff is not guaranteed to get X and the reason why plaintiff didn't get X is not because of (race, gender, etc.) but because of Y (reason not prohibited by statute)
         3. Plaintiff then alleges defendant is using pretext and give evidence of pretext like how defendant had rented to people like plaintiff in the past OR (Lawson says sometimes this works/is admissible) make up a fake person with plaintiff's characteristics and submit it to defendant and see if he rejects
         4. Pretext becomes a question of fact for the jury to decide

   iii. Disparate impact
      i) Litigation occurs when defendant's alleged pretext for denial of plaintiff's application is actually the true reason for the denial but the consequences produced by that pretext are discriminatory on the bases prohibited by statute
         1. Example: No rentals to people over 6 feet inevitable produces more male renters than female renters
      ii) Can use disparate impact analysis in employment discrimination cases
      iii) SCOTUS hasn't said anything conclusively about using disparate impact analysis in housing discrimination cases
      iv) Lower federal courts allow disparate impact analysis in housing cases
      v) Some circuit owners only allow statistic based impact claims when it's for a low income owner but

5. Last notes
   i. Fair Housing Act, Civil Rights Act, and §1982 apply nationally
   ii. Every state is free to adopt its own laws about housing discrimination that can go farther than federal law prohibitions
   iii. Must look at laws of state or locality to determine whether, how, and which discrimination is outlawed
   iv. Depending on the law, person may have direct legal action (i.e. private right of action) or may have to go through a government agency first

V. NUISANCE AND TRESPASS

A. **Trespass**

1. Definition (§158): One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
   i. Enters the land in the possession of the other or causes a thing or third person to do so; or
   ii. Remains on the land; or
   iii. Fails to remove from the land a thing which he is under a duty to remove
2. Explanation
   i. Intent – you intended to take the action that led to the trespass; does not mean you have to show person intended to cross the boundary
      i) Doesn't require a showing of bad intention, just volition
      ii) You can commit trespass when you reasonably believe that you have the right to go onto a piece of land
   ii. Don't have to show harm to the landowner or his land in order to bring a suit for trespass
   iii. Trespass may be committed on, beneath, or above the surface of land
      i) Exception: airplane flights are only considered trespasses if they substantially interfere with the use and enjoyment of the land
   iv. ALL trespasses are intentional
   v. Person can trespass w/his instrumentality even if he does not know his instrumentality has made a boundary crossing into someone else's land
3. Remedies
   i. Injunction – If you've established liability in trespass, an injunction follows automatically because law presumes that since person crossed boundary once, he's like to do it again
   ii. Damages
   iii. Punitive damages

4. Exceptions to Liability - EXAMPLES
   i. Get consent of possessor to go on the land
   ii. Actor may have an interest in the land (e.g. future interest, etc.)
   iii. Entry by landlord
   iv. Entry pursuant to easement or license
   v. Public/private necessity
   vi. Entry to arrest for criminal offense
   vii. Other things stipulated in Restatement of Torts
5. NOTE: trespass is limited to a specific context -> interest of landowner to vindicate their exclusive rights to possession of land
6. NOTE: future interest holder can never bring an action for trespass BUT they can sue for nuisance
   i. THEREFORE, prescriptive easement based on trespass doesn't necessarily keep going after interest holder changes b/c the future interest holder that is now possessory never got to sue for trespass

B. **Nuisance (private)**

1. Definition (§821D): nontrespassory invasion of another's interest in the private use and enjoyment of land
   i. Anticipatory nuisance – permits bringing a nuisance case where a future invasion is certain to occur and is blatantly obvious (like natural/probable consequence)
      i) Example: pig farm inevitably brings pig smells, more sewage, etc.
      ii) If you can prove all the other elements except invasion and the invasion is certain to happen and is obvious, then you may be able to get an injunction
      iii) Location of nuisance matters whether court will see it as a foreseeable nuisance

2. Persons who may recover for nuisance
    i. Only to those who have property rights and privileges in respect to the use and enjoyment of the land affected, including (§821E):
        i) Possessors of the land,
        ii) Owners of easements and profits (use rights) in the land, and
        iii) Owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment
            1. Note: those who have a future interest that is very unlikely to become possessory can still bring a legal suit but they will have a harder time getting an effective remedy
    ii. Liability for nuisance only to those whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose (§821F)
3. Liability
    i. Show evidence of a nontrespassory invasion of another's interest in the private use and enjoyment of land
        i) Tommy test: something is nuisance if you can see it, feel it, touch it with unaided senses (e.g. light, smell, sound); water is also treated as a nuisance BUT natural gas is trespass
    ii. Show evidence of "significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose" (§821F)
    iii. Show evidence that the invasion is either (a) intentional and unreasonable OR (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities (§822)
        i) Intentional (§825)
            1. Person acts for the purpose of causing it (i.e. volitional); OR
            2. Knows that it is resulting or is substantially certain to result from his conduct
        ii) Unreasonable (§826)
            1. §826A Gravity of the harm outweighs the utility of the actor's conduct; OR
                * Factors important (not determinative)to determine gravity of harm:
                    i. Extent of the harm involved;
                    ii. Character of the harm involved;
                    iii. Social value the law attaches to the type of use or enjoyment invaded;
                    iv. The suitability of the particular use or enjoyment invaded to the character of the locality; AND
                    v. The burden on the person harmed of avoiding the harm.
                * Factors important (not determinative) to determine utility of conduct:
                    i. Social value that the law attaches to the primary purpose of the conduct
                    ii. Suitability of the conduct to the character of the locality; AND
                    iii. Impracticability of preventing or avoiding the invasion
            2. §826B The harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.
                * This means that awarding damages wouldn't be equivalent to putting the person/place out of business and the harm is serious
                * If awarding damages = shutting them down, YOU MUST BALANCE

iii) **Bottom Line** (§829A): It's unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without just compensation

4. Challenges of nuisance:
   i. Factors given to determine gravity of harm and utility of conduct don't provide much guidance to judge who has to balance the equities
   ii. Sometimes the utility of the conduct involves an entire neighborhood's jobs and welfare
   iii. Even if you collapsed the boundary between trespass (not having to show any harm) and nuisance (having to show significant harm), judge would ultimately still have to go through the balancing test for an injunction (trespass remedy) which is essentially the same as gravity of the harm vs. utility of the conduct (nuisance)
   iv. Essentially plaintiff can either bring a nuisance action under §826A (balancing gravity vs. utility) or §826B (serious harm, damages won't shut them down). §826B seems easier b/c plaintiff has less to prove and already had to pass threshold question of whether there was significant harm (§821F) anyway
      i) BUT: what is the difference between serious and significant harm?

5. Case Study – Adams v. Cleveland-Cliffs Iron Company (**Trespass vs. Nuisance**)
   i. Facts: Plaintiffs allege that dust and noise from defendant iron mine caused them to suffer shock and nervousness and that their property values went down. They brought trespass and nuisance claims against the defendant iron mine.
   ii. Issue on appeal: propriety of trial court's jury instruction in trespass claim
   iii. Result: Reversed judgment and held no trespass had occurred b/c noise, vibrations, and dust are intangible things and they didn't directly invade
   iv. Rationale
      i) Court refused to adopt modern view of trespass (i.e. eliminating requirement that there has to be a direct physical entry on land)
      ii) Upheld traditional view that requires proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which plaintiff has right of exclusive possession
      iii) Recovery in trespass is appropriate for any appreciable intrusion onto land
      iv) Said to prevail in nuisance, must prove significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of the property
      v) Recovery in nuisance is appropriate for substantial and unreasonable interference w/ plaintiff's use and enjoyment of land

6. Case Study – Nicholson v. Connecticut Half-Way House (**Invasion vs. noninvasion**)
      i) Facts: Defendant opened a halfway house for parolees in plaintiff's residential neighborhood. Plaintiffs' property values went down. Plaintiffs try to get injunction to stop halfway house from operating
      ii) Result: halfway house stays because its mere existence is not an invasion
      iii) Rationale:
         1. The action of putting the halfway house there is intentional and a significant harm to the plaintiffs who are using their land normally b/c it lowers their property value
         2. Court never says "invasion" explicitly but it's clear the court does not think a nontrespassory invasion occurred here because there hasn't been a boundary crossing of any kind
         3. Depreciating property value is not enough to sustain an injunction
         4. Fear of future potential acts is not grounds for a nuisance action

iv) NOTE: Plaintiffs couldn't prove anticipatory nuisance b/c they couldn't prove the halfway house would inevitably lead to the things they feared would happen
v) NOTE #2: Only state to allow nuisance claim in a halfway house (e.g. Arkansas Release Guidance Foundation v .R.J. Needler)
    1. Court said there's nuisance where operation of halfway house resulted in property value depreciation and nearby residents had real and reasonable fear and apprehension for their safety AND one of the halfway house residents was convicted of carnal abuse and another of alcohol activities
    2. Distinguished itself from Nicholson by saying Nicholson was tried before halfway house even operated whereas here it had been operating for several months after the action was filed
    3. There was substantial evidence of property value depreciation and fear for residents' safety to uphold nuisance injunction

7. Case Study – Jack v. Torrant (**Invasion vs. noninvasion**)
    i) Facts: Defendant undertaker buys a piece of land in the middle of a residential neighborhood and opens a funeral home. Plaintiffs argue that their property values are dropping as a result and that they're bummed out all the time
    ii) Result: injunction granted against funeral home
    iii) Rationale:
        1. Undertaking establishment is not a nuisance per se
        2. This funeral home was being run properly so the decisive issue was its location in a residential neighborhood
        3. Court said the greater weight of recent authority shows that the establishment and operation of a funeral home in a purely residential area where property value goes down and it causes residents to be depressed all the time constitutes a nuisance
            * Precedents say things like inherent nature of a funeral home is such that if located in a residential district, it will inevitably create an atmosphere detrimental to the use and enjoyment of resident property
    iv) **Funeral home exception:** all but 5 states allow nuisance action for funeral homes in residential areas upon a showing of nothing more than depression an depreciation in property value
    v) BUT: plaintiffs alleging a cemetery in residential area constitutes nuisance b/c of depression and low property value ALWAYS LOSE

8. Morgan v. High Penn Oil Co. (**Creation of §826(b)**)
    i. Facts: Morgans were operating a restaurant and alleged that defendant oil refinery nearby interfered with their use and enjoyment b/c of smells and noise
    ii. Proof of liability: Plaintiffs succeeded in establishing that defendant committed a nontrespassory invasion(§821D), that was intentional (§825) and caused significant harm (§821F) BUT court has to determine whether defendant's invasion is unreasonable (§826(a) gravity vs. utility)
        i) Have to balance harm to restaurant vs. oil and people refinery employs
    iii. Result: Court refused to do §826(a) balancing test and instead just says as long as you pass the threshold of a significant harm and that it was a nontrespassory, intentional invasion, you get damages for nuisance
        i) Court didn't even mention need to do balancing to determine unreasonableness
    iv. Consequence of decision: Restatement of Torts added §826B which is serious harm + damages wouldn't shut them down alternative to balancing in §826A

9. Case Study – Hendricks v. Stalnaker (**Example of balancing, sort of**)
    i. Facts: Defendant appeals from a decision declaring a well drilled on his property to be a nuisance to plaintiffs who owned property adjacent to defendant's and were denied septic tank permit b/c defendant's well came within 100 feet of proposed septic tank location. It would have violated the health code. Plaintiffs claim well is a nuisance.
    ii. Result: defendant's well wins; no nuisance
    iii. Court's rationale:
        i) Defined private nuisance as a substantial and unreasonable interference with the private use and enjoyment of another's land
        ii) Said interference is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm BUT additional things to consider are malicious or indecent conduct of actor
        iii) Court rules that septic system, with its potential for drainage, places more invasive burden on adjacent property. Septic system also raises nuisance questions.
    iv. CRUX OF DECISION: Regardless of which was installed, both would have burdened adjacent property BUT water well needs noninterference within 100 ft of its location while septic system needs 100 ft safety zone from edge of absorption field (bigger)
    v. NOTE: Hendricks analysis doesn't say anything about whether an invasion actually occurred and if so, what the invasion was

10. Case Study – Estancias Dallas Corp. v. Schultz (**Balancing Test for Nuisance Injunction**)
    i. Facts: Defendant's air conditioning system that he installed for an apartment complex next to plaintiff's property was very loud and bothered plaintiffs to the point that they could not converse inside, sleep, or entertain visitors in their backyard. Plaintiffs' property value also went down as a result.
    ii. Result: Court affirmed lower court's injunction preventing defendant from operating his air conditioning system
    iii. Analysis:
        i) Court balances harm to defendant and public in injunction granted vs. harm to plaintiff and public if no injunction
        ii) Court says it will only deny injunction if injured party can seek relief in the form of damages
        iii) Even though monetary loss for plaintiffs is significantly less than that for defendant, Court upholds injunction b/c there is no public interest in allowing the defendant to continue operating the air conditioning unit (i.e. no damage to apartment complex if it doesn't have an air conditioning)
    iv. NOTE: this is standard balancing for injunctions, not for §826A gravity vs. utility

11. Case Study – Boomer v. Atlantic Cement (**Alternative remedy for nuisance**)
    i. Facts: Defendant operates large cement plant and plaintiffs bring action for injunction and damages for dirt, smoke, vibrations emanating from the plant. Trial court found for plaintiffs on nuisance claim and temporary damages
    ii. Issue: Whether to grant equitable relief or to allow private litigation to continue
    iii. Result: Court issues injunction that will be vacated after defendant pays permanent damages to plaintiffs for present and future harm
    iv. Rationale
        i) NY law presumed injunction if nuisance was demonstrated
        ii) If court denied injunction, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred (leads to high litigation costs)

iii) Court refuses to follow application of nuisance literally (i.e. "where a nuisance has been found and where there has been any substantial damage shown by the party complaining, an injunction will be granted")
iv) Court decides to grant injunction that would be lifted after defendant paid permanent damages to plaintiffs that would compensate them for the total economic loss to their property present and future
v) Decides this is far because it avoids litigation and gives defendant incentive to minimize nuisance since it might have to pay permanent damages to other people

v. Dissent: Majority's decision allows defendant to continue to pollute the air and worries about the dangers of overruling NY's long-established rule granting an injunction where a nuisance results in substantial continuing damage

12. Case Study – Crest Chevrolet, Inc. v. Willemsen (**Application of §826B**)
    i. Facts: In order for defendant glass company to put their building on the land, they had to get rid of the puddles on it. By the time defendant gets rid of the puddles, their land is higher than plaintiff car dealer's land which now gets the runoff/puddles when it rains. Plaintiff sues glass company for nuisance because its land is flooded. Cost to repave plaintiff's property is $20,000
        *NOTE: water is usually trespass but diversion of naturally produced water has been treated as a nuisance for historical reasons
    ii. Plaintiff's contention: Does not argue that the gravity of the harm caused by defendant outweighs the utility of its conduct. Does argue under §826B that the harm caused by defendant is serious and that the financial burden to defendant for compensating for the harm would not have stopped its business
    iii. Defendant's contention: Does not argue anything under §826A, but does argue that a correct application of §826B must include an analysis of the social utility of its conduct
    iv. Result: Invasion of surface water into plaintiff's land was unreasonable; award damages
    v. Analysis:
        i) §826B makes no express reference to social utility analysis
        ii) Nothing inherent in the §826B test dictates that the fact finder must undertake a social utility analysis of an actor's conduct to determine its reasonableness
        iii) To conclude that an actor's conduct is socially useful does not help a fact finder conclusively determine, in an action for damages, whether conduct is unreasonable
            1. Even if social utility of conduct was determined, court would still need to inquire into whether there was serious harm and whether awarding damages would render defendant's conduct infeasible (social utility not dispositive)
        iv) Uses the factors used to determine gravity of the harm in §826A and applies them to §826B to determine whether harm is serious and concludes that:
            1. Extent of harm is serious -> $20,000 to repave
            2. Character of harm is serious -> harm was physical invasion that prevented the affected portions to be impossible to use during heavy rains or melting
            3. Crest property is a lawful commercial venture
        v) Court determines financial burden to defendant of compensating plaintiff would not have rendered continuation of their business infeasible using monetary evidence of cost to avoid harm, how much they had already spent on project, etc.

13. Coming to a Nuisance (§840)
    i. Definition: The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable

VI. SERVITUDES

A. General definition – nonpossessory use rights that can do 2 things:
   1. can give other people the right to do things to landowner's land that would ordinarily be a tort if it was done without his permission; OR
   2. can prevent the doing of things that would otherwise be lawful for a landowner to do

B. Types of servitudes:
   1. licenses
   2. easements
   3. covenants
   4. equitable servitudes

C. Servitudes can differ in:
   1. Duration
   2. Defeasibility
   3. Scope
   4. Location
   5. Positive vs. Negative
      i. Positive – right to do something to or in a piece of property that would not normally exist
      ii. Negative – right to forbid something from being done to or in a piece of property that would normally exist
      iii. NOTE: When the right can be characterized as either positive or negative, the use right's primary object will define the positive vs. negative question

D. **License**
   1. Definition: use right arising from possessor's consent that is revocable, may be made orally, and does not run with the land
      i. Generally not transferable -> it goes to the person to whom its been granted
      ii. Under traditional common law, there is no such thing as a negative license
      iii. A failed easement becomes a license
      iv. Remedy for revoked license: may constitute breach of contract -> damages
   2. Irrevocable license – turns license into easement when it doesn't meet formalities of an easement
      i. Reasonable reliance induced by conduct of another is minimum requirement
      ii. Can't be revoked unless court sets out terms for revocation in opinion
   3. Case Study – Holbrook v. Taylor (**Irrevocable License**)
      i. Facts: Appellants purchased property and gave permission for a haul road to be cut for the purpose of moving coal from a newly opened mine. Appellants were paid for the use until the mine closed. Appellant also used the road b/c they built a house on their land. Appellees then bought the land next to appellants' land and built house on it. Trial court evidence shows appellants had given appellees permission to use and repair the road during appellee's construction of their house.
      ii. Conflict: Appellants say using the haul road has always been subject to their permission and so want to negotiate a price for the easement but appellee says it had been used by them and others without their permission and without interference by appellants
      iii. Result: License is not an irrevocable license
      iv. Rationale:
         i) Use of roadway by appellees to get to their house from the public highway, to take in heavy equipment and material and supplies, maintenance of roadway, improvement of premises, and construction of resident all with actual consent of

appellants or at least with their tacit approval clearly demonstrates that the license to use the roadway may not be revoked

E. **<u>Easement</u>**

1. Definition: use right that must be in writing to conform to the statute of frauds where an owner agrees to abide to waive his right to exclude certain kinds of intrusions by another
    i. Cannot be revoked at grantor's will BUT they last as long as the estate period that parties agree to (i.e. fee simple, life estate, tenancy)
    ii. Can have defeasibility conditions attached
    iii. Always run with the land -> transferable
    iv. Are property rights but not possessory rights to the land
    v. Remedies: specific performance
2. Types of easements
    i. Easement in gross vs. appurtenant easements
    ii. Affirmative easements vs. negative easements
    iii. Easement by Prescription (judicially created, not by grant)
    iv. Easement by Implication (judicially created, not by grant)
        i) Easement by Necessity (judicially created, not by grant)
3. Easements must be affirmative
    i. <u>Reason</u>: in the past, easements weren't made in writing and so proving negative use rights created an evidentiary problem (harder to prove that you're not doing something)
    ii. There were exceptions to this b/c of nature of agrarian British society (e.g. blocking sunlight from falling on windows of dominant property)
4. Transferability of easements
    i. Traditional common law rule: property seller cannot keep an easement in someone other than themselves
5. How to create an easement:
    i. Check jurisdiction's conveying rules to determine the form of the easement
    ii. Conform to statute of frauds by putting agreement in writing
    iii. Define the geographical scope of the land at issue
    iv. Define for how long the use right will be valid (law presumes you give everything away if you don't specify it)
    v. Determine scope of use right
        i) If using land for cattle grazing: which cows, how many, where can they be, etc.
    vi. Determine whether you want money for it -> parties can agree to an easement for free

6. Baseball Publishing Co. v. Bruton (**<u>License vs .Easement</u>**)
    i. Facts: Plaintiff buys exclusive right and privilege from defendant for $25 so he can put a billboard on the side of a building for one year and maintain ownership of billboard. Defendant kept returning checks but plaintiff put the sign up anyway. Defendant removed the sign and brought suit for specific performance.
    ii. Plaintiff: agreement was a lease
    iii. Defendant: agreement was a license
    iv. Result: The agreement was an easement, not a license or a lease
    v. Rationale
        i) Court defines lease to convey an interest in land that needs to be in writing that complies with statute of frauds
        ii) Court defines license to just excuse acts done by one on land in possession of another that without the license would be trespass, conveys no interest in land, and may be made orally

iii) Court says what the parties had was not a lease b/c it left the wall in the defendant's possession with the right to use it for all purposes not forbidden by the contract and maintains responsibilities to wall as an owner
iv) Writing in this agreement seems to go beyond being a license into being an easement b/c it was in writing, parties seemed to have intended the use right to be irrevocable (i.e. $25 in 1938 is too much to pay for a license)

7. Willard v. First Church of Christ Scientist (**Transferring Easements**)
   i. Facts: McGuigan, member of the church, owned two lots across the street from the church. One of the lots had a parking lot on it that she allowed churchgoers to use for free during church services. Willard approached McGuigan with offer to purchase parking lot because he bought her other lot as well. McGuigan said she would sell him the lot as long as he allowed churchgoers to continue using it for parking. She had church's attorney draw up the contract/deed with an easement clause, sold lot to Peterson who recorded the deed and gave it to Willard. The deed Peterson recorded did not mention the easement. Willard didn't know about the easement clause in McGuigan's deed. When he found out, he brought suit for quiet title.
   ii. Procedural History: lower court refused to honor easement clause b/c it was conveyed in a deed and historically common law didn't like that
   iii. Result: upheld easement even though it was a clause in a deed
   iv. Rationale:
      i) Primary objective in construing a conveyance is to look at grantor's intent
      ii) Grants are to be interpreted like contracts
      iii) Parties to the deed intended to convey the easement to the church
      iv) Willard couldn't say he didn't know about easement b/c the land was being used by the church for parking as he was negotiating the sale
   v. NOTE: Willard is not the general rule among most jurisdictions

F. **In Gross Easements vs. Appurtenant Easements**
1. Easement in Gross: use right that binds the individual and gives individual benefits
   i. Do not travel with the land, unless the easement is commercial
   ii. E.g. A right to walk across B's land to catch the bus
2. Appurtenant Easements: use right that binds the land, not the person using it
   i. Use right travels with the ownership of the property ("runs with the land")
   ii. Dominant appurtenant – piece of property, the ownership of which gets to do something to another person's property (i.e. where the use right is sunk into land)
   iii. Servient appurtenant – land that gets burdened with use right
   iv. Presumption: parties want to create an appurtenant easement over in gross
      i) General rule: easement will never be presumed to be in gross when it can be fairly construed as an appurtenant easement
      ii) Must be explicit in agreement if you want it to be an in gross
      iii) Look for evidence that parties did not want an appurtenant easement
   v. Things to consider when making appurtenant easement:
      i) Scope of use right – Who, what, where, when, which; which land
   vi. Commercial easements tend to be more like appurtenant easements b/c utility companies are unlikely to re-negotiate easement terms every time someone sells a house or building

3. Case Study – Martin v. Music (**Appurtenant vs. In Gross**)
   i. Facts: Parties agreed that Music would give Martin the right to construct and maintain a sewer line under and through his property as long as Martin agreed to lay the sewer line

at sufficient depth so as not to interfere with Music's use and enjoyment of property and to put an intake connection wherever Music wanted for Music to use. At the time of agreement, Music owned 8 lots that were all unoccupied but afterwards, 6 were sold off and three of the new residents sought to connect to Martin's sewer line. THEREFORE, one easement to build sewer line in property and another easement to use sewer line.

ii. Martin's contention: right to connect with sewer was personal to Music alone b/c at the time of agreement, Martin says Music had talked about how he intended to build a home on his lots and that's why he wanted the intake connection privilege
iii. Lower court: Music and 2 new residents each had right to connect to sewer using the one intake connection given to Music by Martin
iv. Result: agreement was an appurtenant easement
v. Rationale
    i) Court looks at negotiations Martin and Music did and what they believed they were agreeing to and under what circumstances they believed to be agreeing under
    ii) Looks at whether Martin's sewer line would be able to handle so much sewage
    iii) Says it's clear that the right to connect to Martin's sewer line was to be exercised only in connection with the occupancy of the land through which it ran, i.e. Music couldn't use the sewer line for a piece of land that the line didn't go through
        1. THEREFORE, appurtenant easement
    iv) Also looks at whether the use of the Sewer by Music +2 others will unduly burden Martin -> determines this by looking at agreement to see what burden the two parties had agreed to or thought about that might be imposed on the sewer line
        1. Agreement does not limit the kind of use Music could make of sewer
            * E.g. Music could have built an apartment building, pig farm, etc.; he wasn't limited by agreement to only using intake connection for a house
        2. Because on the face of agreement, it does not prohibit greater uses of sewer than that of two or three dwellings, Court thinks that it's ok to let Music and two residents use sewer line

4. **<u>Easement by Implication</u>** (judge made easement; can be in gross or appurtenant)
    i. Occurs when there is no prior agreement courts can look at to determine whether parties intended to create an easement -> it's implied from the state of affairs when land split
    ii. <u>Requirements</u>:
        i) Single ownership of the land
        ii) Owner splits that ownership – single owner has to divide property into more than one unit and transfer one or more of those units
        iii) Must be some use one piece of land was making of another at the time of the split
            1. E.g. piece of land that had house on It was using land that had road on it
            2. Quasi-easement: use on a piece of land that if you imagine that land divided among several owners would be the kind of use plausible for an easement
        iv) Use has to be apparent -> someone looking at the land would notice it
        v) Use must be necessary -> no alternative except extremely burdensome ones

    iii. **<u>NOTE</u>**: Should look in original negotiations of parties first to see if they had considered the idea of an easement at all while they were transacting to determine if they had intended to create one but never did or just rejected it outright

5. **<u>Easement by necessity</u>** (judge made easement; can be in gross or appurtenant)
    i. Type of easement by implication reserved for land-locked situations where:
        i) an owner cannot get out of his property without going onto someone else's property (e.g. access to roads)

ii) an owner cannot use his property without using things that are owned by other property owner or go through that other's land (e.g. plumbing)

ii. Requirements:
   i) Same as easement by implication but don't need quasi-easement
   ii) Just need single ownership of land (at some point); owner has split the ownership and transferred interest of some; use has to be apparent and necessary at the time of the split

iii. Some states have adopted statutes that give people with landlocked property and no easements over others' property the power of eminent domain so they can force a sale of an easement against someone else's land -> pay fair market value for easement

iv. Case Study – Schwab v. Timmons (**Necessity vs. Implication**)
   i) Facts: Schwabs own a piece of property that was previously owned by the US and then split into different pieces and transferred away. Property is bordered on the west by bluffs and on the east by water. Schwabs had conveyed away property to the north that had access to the public road. They tried to get road extended but that failed. Schwabs bring action seeking easement by implication or necessity
   ii) Result: Court refuses to grant easement to Schwabs
   iii) Rationale:
      1. Schwabs fail to establish easement by implication b/c
         * the road the Schwabs want to extend does not and never extended to their property (no quasi-easement)
         * no showing that any use by US (previous single owner) was so obvious, manifest, or continuous that it was meant to be permanent
      2. Defines easement of necessity: where an owner sells a landlocked portion of his property to another, the law will give grantee (owner of landlocked piece) easement over grantor's land
      3. Schwabs fail to establish easement by necessity b/c:
         * At time US conveyed land, Schwabs' land was not landlocked
         * Rejects geographical barriers as reason to grant easement by necessity
         * Schwabs' ownership of landlocked property resulted not from a grant of property to them but by their own acts in conveying away their road access -> refuses to change law for silly actions Schwabs took knowingly
         * Rejects argument that there is no rational basis for landlocked property b/c it would ignore precedent and public policy

6. **Easement by Prescription** (judge made easement; can be in gross or appurtenant)
   i. Definition: use right acquired on an estate using E.N.C.R.O.A.C.H. to some extent after statute of limitations for ejectment has run out
   ii. Requirements:
      i) NOT Exclusive: nature of use rights allow X to use Y's property at the same time Y is possessing that property
      ii) Open & Notorious: probably required so owner knows to file ejectment action
      iii) Actual: person has to be actually using another's land
      iv) Continuous: use must occur with a certain degree of continuity (i.e. time, place, what/purpose) BUT continuity will define the scope of prescriptive easement
         1. E.g. if what you do everyday is to trespass over X's land at the southeast corner at 8:30am to catch the bus, if you get a prescriptive easement for that, it will be just for that, not for if the bus changes schedule or pickup location
      v) Hostile: property owner must not have given you permission; otherwise, it would be a valid use right and not a tort

1. Whether use was permissive (i.e. not hostile) will depend on what law requires (e.g. evidence, actual written permission, showing it was permissible, etc.)

iii. General rule: don't have to pay for easement by prescription (except if set by statute)
iv. ALSO: Getting an easement by prescription is like getting Blackstonian right to use
v. How to avoid prescriptive easement: sue for trespass (depending) or give a license, BOTH BEFORE STATUTE OF LIMITATIONS HAS RUN OUT

vi. Case Study – Warsaw v. Chicago Metallic Ceilings
   i) Facts: Two parcels of land were acquired from a common owner. Defendant had northern parcel and plaintiff had southern parcel. Plaintiffs had agreed with original seller that plaintiffs would buy a large commercial building (warehouse) built by seller with a driveway to provide trucks with access to loading docks. Defendant built a smaller building on his land. From the beginning, it was apparent that plaintiff's driveway was inadequate b/c the large trucks could not turn and position themselves at docks without traveling onto defendant's property. Plaintiffs trespassed for 5 years until defendant raised the part of land plaintiffs were trespassing on to construct a warehouse.
   ii) Procedural History
      1. Trial court looked through original negotiations between sell, plaintiffs, and defendant and found no easement by implication b/c they had rejected possibility of creating easement over defendant's property
      2. Rejected creating easement by necessity b/c plaintiffs' had a driveway
      3. Found plaintiffs had prescriptive easement and ordered defendants to tear down the building they had built on that land
   iii) Result: prescriptive easement granted
   iv) Rationale:
      1. Prescriptive easement requirements: use of property that has been open, notorious, continuous and hostile for uninterrupted period
      2. Continuous = definite and certain line of travel for statutory period
         * Trucks used parcel to approach building but no two drivers used the same course b/c of differing abilities
      3. Hostility = question of fact determined in light of surrounding circumstances and relationship between the parties
         * Continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence
         * Evidence that defendant and plaintiff failed to negotiate easement
      4. Defendant doesn't need to be compensated for easement and having to tear his building down b/c plaintiffs' easement by prescription is good against all including defendant so there is no basis in law or equity to require them to compensate defendant for fair market value of easement
   v) Concurrence and dissent both said it was unfair for defendants to get no money and the concurrence said prescriptive easements should be laid out by legislature

G. **<u>Covenants</u>**

1. <u>Definition</u>: affirmative, but mostly negative use rights that run with the land and the particular interest (i.e. estate) in the land
   i. Can't acquire covenant by prescription, implication, necessity, or estoppel
2. <u>Requirements</u>:
   i. Valid contract (need consideration; may be payment)

ii. Intent
    i) Parties must have intended to bind successors in interest to property to the promise in original contract
    ii) Traditionally, intent was expressed as "to my heirs and assigns forever"
    iii) Best indication of intent is by an explicit clause in contract
    iv) Statutes might stipulate what one has to say to indicate intent to bind successors
iii. Promise has to touch and concern the land ("run with the land")
    i) Physical attributes of and actions with land
    ii) Does not include monetary payments
iv. Horizontal privity (between original contracting parties)
    i) Traditional American rule: promise must be made in conjunction w/land purchase
v. Vertical privity
    i) Traditional view: owner and successor must have the same estate in the property (i.e. life estate and life estate)
    ii) Assignment has vertical privity because owner conveys away the entire interest but a sublease can never have a covenant b/c owner keeps a future interest in land
    iii) Strong movement in law to eliminate this requirement
    iv) In practice, because you can screw the person you promised something to by not conveying away your entire interest in land (therefore successor is not bound by original contract), courts are willing to fudge vertical privity requirement

3. Traditional Remedy: damages
4. Modern Remedy -> can be mixed with damages or injunction (from equitable servitude)

5. Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank (**Relaxation of Vertical Privity**; **Grappling with "touch and concern land"**)
    i. Facts: Neponsit Realty Co. planned a housing development in which every deed had a covenant that said the owner of the property would be subject to an annual charge that would go towards maintaining roads, paths, parks, beach, sewers, and other public purposes. Covenant also said a property owners' association could be organized to handle the money for maintenance and should be enforceable by that association against every owner of property in the development.
    ii. Two legal issues:
        i) Does the promise to pay money for public maintenance touch and concern the land?
        ii) Does the Property Owners' Association have the power to enforce the covenants? (i.e. is there vertical privity?)
    iii. Result: Yes, it does touch and concern the land and yes, POA has power to enforce
    iv. Rationale
        i) Promise touches and concerns the land and its burden should run with the land b/c the covenant has an effect on the legal rights of the parties to the covenant (looks at substance, not form)
            1. By that conveyance of land, the grantee got title but also easement or right of common enjoyment with other property owners in roads, beaches, public parks, etc. -> to be enjoyed fully, the public places must be maintained -> so that the burden of maintaining public spaces rested on the public spaces that benefit from maintenance, the grantor attached the covenant to the land that enjoys the benefit (which was taken out of grantee's easement to enjoy it)
        ii) POA has power to enforce covenant
            1. Problematic b/c plaintiff didn't succeed in any of grantor's property rights

2. Allows it to sue anyway b/c it pierces corporate veil and says the association represents the interests of the homeowners so we're going to treat it light they're the collection of the homeowners and their interests
3. Also relied in substance rather than form to reach this conclusion

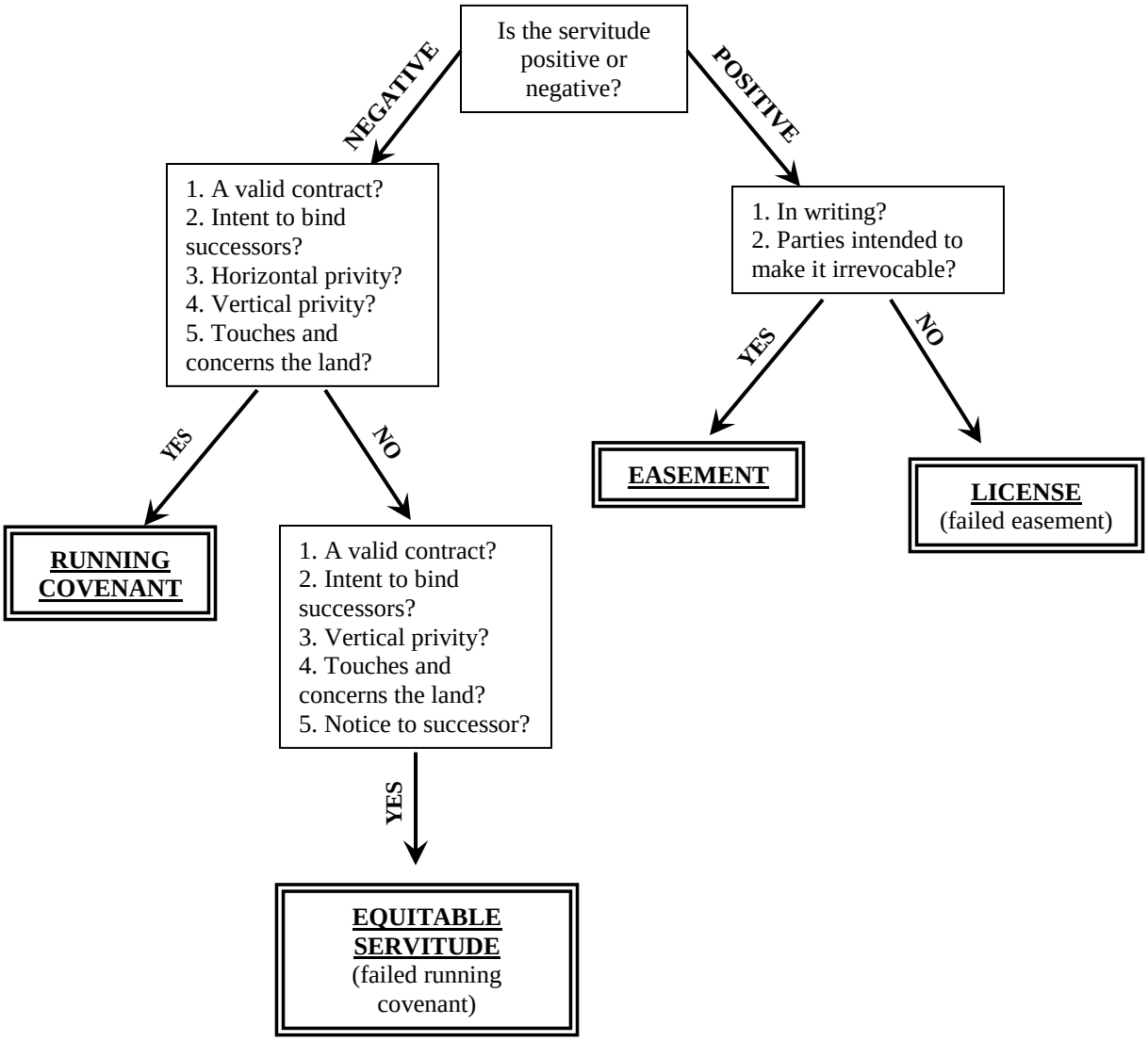
H. **Equitable Servitudes**

1. Definition: servitude created in equity, not law that runs w/land and estate in that land
   i. Failed running covenant becomes an equitable servitude
   ii. Used to evade horizontal privity requirement in covenants
   iii. Can be positive and negative, but in practice they are mostly negative
2. Requirements:
   i. Valid contract (so need consideration; can be payment)
   ii. Intent – original parties intended to bind successors in interest
   iii. Promise touches and concerns the land
   iv. Notice – person who bought the land knew about the original promise
      i) Can be satisfied with recording statute, but depends on jurisdiction what documents must be publicly available or on file with local planning agencies
      ii) Residential subdivisions: Most courts would require a more plausible showing of notice than owners being on notice b/c they could inferred from circumstances that it was a residential neighborhood BUT less than technical doctrine would suggest
   v. Vertical privity
3. Remedy: injunction (b/c it's in equity); but more mixed now w/covenant remedy of damages

4. Case Study – Tulk v. Moxhay
   i. Facts: Plaintiff sold piece of ground to Elms and the deed contained a promise that Elms, his heirs and assigns should keep and maintain the land as a garden. Land was conveyed away many times until it finally ended up with defendant whose deed did not have a covenant in it but defendant knew about the promise when he bought the land. Defendant sought to build something on the land but plaintiff filed for an injunction
   ii. Result: Defendant not bound by promise
   iii. Rationale
      i) That one is bound to perform an obligation of which he has notice but just because one has notice does not mean he has an obligation

5. Case Study – Sanborn v. McClean (**Relaxation of Notice Requirement**)
   i. Facts: McLeans own a lot that has their house on it as part of a residential development. McLeans built a gas station at the rear of their lot. Plaintiffs claim gas station will be a nuisance per se and is in violation of a restrictive covenant barring use of land other than for residential purposes. McLeans say no restrictions appeared in their chain of title and they had no notice of any restrictive covenant.
   ii. Result: There is an equitable servitude here
   iii. Rationale: McLean didn't need to ask his neighbors about the restrictions BUT he did have notice by looking around him from his land and noticing that all the residences were built and lots occupied by residences that it could be inferred there was a general plan against using the land for anything other than residences
      i) Not an easement b/c it's a negative restriction
      ii) Not a covenant b/c it was never recorded (so failed to comply with recording statute for covenants)
      iii) Equitable servitude -> pattern of residential uses is sufficient notice
   iv. NOTE: Most property people regard this case as a wacky matter of doctrine

6. Eagle Enterprises, Inc. v. Gross (**Restrictions on touch and concern the land**)
    i. Facts: Developer conveyed property in subdivision to Baums that said it would supply to them water for domestic use only from a well on the developer's property in exchange for payment from Baums. This promise was intended to run with the land and bind successors in interest. Appellant is successor in interest to developer and Gross is successor to Baums. Gross's deed does not have provision about purchasing water and neither did any of the deeds after Baum's deed. Gross refused to accept or pay for water offered by appellant b/c he built his own well on his property. Appellant sued for fee.
    ii. Result: equitable servitude exists
    iii. Rationale
        i) Although intention of original parties was clear, the covenant must still touch and concern the land
        ii) Relies on Neponsit precedent about paying fee for maintenance of public spaces
        iii) This covenant does not substantially affect the ownership interest of landowners in the residential subdivision b/c:
            1. Appellant hasn't claimed that subdivision would be waterless without its water (especially b/c covenant is only for ½ year)
            2. Price of water wouldn't increase a lot if Gross terminated appellant's service
            3. Obligation to receive water from appellant resembles a personal, contractual promise to purchase water rather than significant interest attached to property
        iv) Reluctant to enforce it b/c covenant provision has no outside limitation (end date) and so burdens future owners by binding them no matter how they use the land


Is the servitude positive or negative?
NEGATIVE
POSITIVE
1. A valid contract?
2. Intent to bind successors?
3. Horizontal privity?
4. Vertical privity?
5. Touches and concerns the land?
1. In writing?
2. Parties intended to make it irrevocable?
YES
NO
YES
NO
RUNNING COVENANT
1. A valid contract?
2. Intent to bind successors?
3. Vertical privity?
4. Touches and concerns the land?
5. Notice to successor?
EASEMENT
LICENSE
(failed easement)
YES
EQUITABLE SERVITUDE
(failed running covenant)