I) Property Defined

A) Blackstone's Definition

"Property is that sole and despotic dominion which on e man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."

- Supports the idea that Contract and Tort law are dependent on Property law
- Must have property in order to have a contract or torts claim
- Lawson thinks this view is more accurate, more in line with practice

B) Jeremy Bentham's Definition

"Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."

- Supports the idea that Property law is dependent on Contract and Tort law
- Without the protection of contracts and tort actions there could be no property
- Most academics find this view more accurate

C) Black's Law Dictionary

"That which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government."

- Supports both the Blackstone and Bentham definitions
- First sentence is Blackstone's version and second sentence is like Bentham's

II) Acquisition of Property

A) Capture, Find & Conquest

i) Wild Animals

(1) Basics of Land Ownership

(a) Un-Owned Land

- No such thing as un-owned land
- In original 13 colonies—state owns any non-privately owned land
- In all other states—the federal govt. owns any non-privately owed land

(b) Ad Inferos Principle

Cuius est solum, eius est usque ad coelum et ad inferos = For whomsoever owns the soil, it is theirs up to the sky and down to the depths.

- Old Roman rule that you owned everything above and below your land
- No longer strictly followed because of impracticability (air travel, space exploration, etc.), of owning everything up to the heavens
- Rule still applies strictly to things below the property—but remember that the boundary will be a diagonal towards the Earth's core

(c) Objects Attached to Land

- Those things attached to the land are owned with it, e.g. rocks, trees, grass
- Rights to different parts can be split up by deed

(d) Unattached Things
- E.g. wild animals
- Not owned with the land, BUT—land owner has exclusive right to turn the animal into an object of ownership

(2) *Pierson v. Post*- The NY Court of Appeals applied the rule of capture in finding for Pierson who shot and killed a fox on an unpossessed wasteland just before Post, who had been hunting the same fox for some time, was able to shoot the fox.
- The majority relied on treatises to find the rule that the first to possess a wild animal by killing, mortally wounding or capturing it wins
- The dissent reasoned the rule should give ownership to the claimant with the first reasonable opportunity to kill, mortally wound or capture
- The dissent/majority difference illustrates the difference between formalist and consequentalist approaches to law
- Important that owner of the land was not a claimant
- The rule of capture codified and still used in almost all jurisdictions

(3) Principle of Relative Ownership
- Courts will settle ownership claims in favor of the party with the better claim—not the best claim
- The better claim will be that of the first possessor
- Lawson calls the Irving Principle in honor of the "Ballad of Irving", the 142nd fastest gun in the west
- Could look at as a battle of the losers
- The winning claimant's right is only good against those in the same position of the other claimant or those worse off
- The absolute owner (Blackstonian owner in Lawson's terms), has the best claim and can beat all others if before the court
    - For instance, the land owner in *Pierson* could have beaten both the hunters' claims if the land owner was in court

(a) **Example:** *Bradshaw v. Ashley*- The Supreme Court of the US settled an ejectment action between two claimants, neither of whom could prove title, in favor of the claimant who had occupied the property first.
- Although one of the claimants supposedly had title, the Court found it no good, so both parties were trespassers
- The first trespasser wins

(b) **Rationale:**
- The Blackstonian owner often isn't around or doesn't press his claim
- If courts only settled claims in favor of Blackstonian owners a large number of claims would be discouraged
- In olden days, and maybe now, people would settle those claims on their own—by duel for instance—and we just can't have that

(4) *Reese v. Hughes*- The Supreme Court of Mississippi rejected a man's replevin action against the hunter who killed the man's fox after it escaped from the man's land.

- The doctrine of farae naturae, which gives the rule of capture from *Pierson* also says wild animals are wild again when they escape
- The exception is an animal with animus revertendi, or intent to return
- The court denied the plaintiff's animus revertendi argument and also found that it did not matter that the fox was a non-native species
- This court applied majority rule—some courts go other way on farae naturae point and non-native species point

ii) Wild Minerals

(1) *Hammonds v. Central Kentucky Natural Gas Co*.- The Kentucky Court of Appeals relied on analogy to farae naturae in ruling against a plaintiff claiming the gas company trespassed on her land by storing natural gas in a natural reservoir beneath her property.

- The court reasoned that once the gas was placed back in the ground it was un-owned again and the gas company wasn't liable for it
- This was favorable to the gas company because if it was liable as the owner of the gas Hammonds could have gotten an injunction from the court and been in a very powerful bargaining position
- Not necessary to prove damages for trespass action so Hammonds could have easily gotten injunction

(2) *Lone Star Gas Co. v. Murchinson*- The Texas Court of Civil Appeals rejected the *Hammonds* Rule and sustained a conversion action against a defendant who was removing gas owned by the gas company from a natural reservoir beneath his property.

- Murchinson was trying to take advantage of the farae naturae rule by taking gas that was theoretically un-owned
- Court rejected *Hammonds* Rule on two bases:
    - Formal- The gas is actually more analogous to a fox on a long leash because although it does cross the property line it isn't going anywhere
    - Consequentalist- Absurd to decide billions of dollars of oil and natural gas law on the basis of the little used farae naturae doctrine
- Texas gets around the trespass problem illustrated in *Hammonds* by requiring proof of damages when trespass by gas action

(3) Morals of the Mineral Story:

- Formalism- Although property law may occasionally talk the consequentalist talk it almost always backs it up with a formalist distinction, at least more so than other common law areas
- Statutes- Nearly every state has a statute that would deal with this problem; in property law always look for a statute first
- Chaos Theory- Because property law has developed over so long a time span small changes in the law a long time ago can have profound consequences when applied to modern situations

iii) Wild Wallets

(1) Found Property

(a) General Rule:

- The loser wins if he makes a ruckus and the finder can kiss his tuckus.
- NOT finders keepers, losers weepers
- Probably codified in statutes
- Loser of property is the one with the Blackstonian claim to it

(b) Exceptions:

- Abandonment- If the loser intended to give the property up forever they can't change their mind after someone finds it
- UCC §2-403- This UCC section is designed to protect good faith purchasers from actions by a loser of property. The loser will have a conversion action against the merchant, but none against the purchaser
- Statute of Limitations- If the statute of limitations for an action has expired than the finder keeps the property free and clear

(c) Causes of Action:

- Replevin- An action to recover possession of personal property
- Conversion- An action to recover damages for value of personal property

(d) Common Law Categories:

*** Categorization is question of fact so deferential review on appeal***

- Provide means for determining whether the loser, finder, or land owner gets to keep the property
- The loser usually has the Blackstonian claim and the second best claim is a finder who also owns the land where the property is found
- But, losers often don't claim, and finder often doesn't own the land—so dispute is between land owner and the finder of the property
- Lost/mislaid distinction is the most commonly cited
- Categorization depends on loser's intent, which is necessarily hard to establish when the loser isn't present in court

(i) Lost Property- Prior possessor was unaware of the parting at the time it occurred

- Presumption that the finder keeps the property, but exceptions:
  - Trespassers can't win—possibly an exception, see *Favorite*
  - Contracts can expressly provide for who retains found property, common in cleaning service contracts, e.g.
  - When things are found in really private places of a land owner's property, courts will hesitate before awarding to the finder—not a true exception, just hesitation

(ii) Mislaid Property- Prior possessor was aware of the parting at the time, but did not intend the parting to be permanent

- Possession usually awarded to the land owner
- Consequentalist rationale: hopefully the loser will retrace their steps and find the property where they last left it

- But, this creates a disincentive for the finder to report the find

(iii) Abandoned Property- The prior possessor was aware of the parting at the time and intended the parting to be permanent

- Presumption for finder
- Treated much the same as lost property; same exceptions?

(iv) Treasure Trove- The prior possessor hid the property intending to come back for it. It is usually limited to coins or currency of some kind that are sufficiently old to warrant an assumption that the prior possessor is dead or undiscoverable.

- Presumption for the finder
- Treated the same as lost property
- Lawson said not to worry about

(e) How to Become a Finder

- Like with wild animal, question is possession
  - Ship raising example, must be the one to raise it
  - Barry Bonds ball example, can be simultaneous possession
- Also must be intent to possess the property; can't be accidental
  - Kids playing catch with sock example

(f) Examples:

(i) *Favorite v. Miller*- The Supreme Court of Connecticut ruled against a defendant finder who knowingly trespassed on the plaintiff's property in search of pieces of a statute of King George that was destroyed by colonists at the beginning of the Revolution.

- The high court reasons that the trial judge erred in attempting to classify the property despite the length of time that had passed
- Although the high court didn't reclassify the object they found the finder could have no claim because of the trespass
- The court did reason the finder could have recovered if he proved the trespass was trivial or technical

(ii) *Benjamin v. Lindner Aviation , Inc*.- The Supreme Court of Iowa affirmed the trial judge's finding that a packet of bills left in the wing of an airplane were mislaid property and belonged to the owner of the airplane rather than the service company or company employee who found the bills.

- First, the court construed the state's lost property statute as applying only to property classified as lost instead of superseding all the categories of found property
  - Some states apply statute to all categories
- The court affirmed the trial finding that the property was mislaid
- Then, the court found that the owner of the premises was the owner of the plane itself rather than the owner of the hangar where the plane was stored
  - This finding is more consistent with the logic that aims to help a prior possessor in locating his mislaid property
- A dissenter reasoned the property was abandoned

- Probably could have gone either way, but deferential review

(2) Bailments & Accessions

- Sometimes applicable to law of found property
- If prior possessor shows up after ownership awarded to land owner or finder, than owner or finder treated as gratuitous bailee

(a) Bailments

- A bailment is a voluntary entrusting of goods
  - The bailor is the one who does the entrusting
  - The bailee is the one entrusted with the goods
- In the absence of an express agreement, the responsibilities of the bailee depend on the type of bailment:
  1. Gratuitous bailment in favor of the bailee- A bailment where the bailee alone benefits, such as a person borrowing something
     - The bailee is liable for slight negligence
  2. Gratuitous bailment in favor of the bailor- A bailment where the bailor alone benefits, such as a person watching someone else's stuff
     - The bailee is only liable for gross negligence
  3. Reciprocal bailment- A bailment where both parties benefit
     - The bailee is liable for ordinary negligence
- A minority of jurisdictions have done away with the differing standards of care and hold all bailees liable at the standard of reasonable care
  - These jurisdictions reason the normal standard of care is flexible enough to account for what benefit, if any, the bailee is receiving
- Bailee's and bailor's rights against each other interpreted as if contract
  - Even if no express contract, interpret as implied contract
  - Bailee's acceptance must be specific to the goods transferred
    - Exact value need not be known, but compare the following:
    - Fox fur in coat pocket example where bailee not liable because fox fur unknown to bailee
    - Clothes in car trunk where parking company liable because tourist area and bailee should have assumed stuff in trunk
  - If gratuitous bailment in bailee's favor, bailee can use item for intended use
- Both bailor and bailee have rights against third parties
  - Bailee can have tort action for interference
  - Bailor can have independent action for conversion
  - BUT, if bailee brings successful action, bailor only has action against the bailee
- Bailment Examples:
  - *Peet v. Roth Hotel Co.*- The Supreme Court of Minnesota sustained a conversion action against a hotel that lost a ring left with the front desk by the plaintiff to be given to a hotel guest on the basis that there was a reciprocal bailment.
    - The court rejected the argument that there was no bailment because the exact value of the ring was not known

        - The court also adopted the minority approach that a normal standard of care will apply to all bailments
    - *Ellish v. Airport Parking Co. of America, Inc*.- An intermediate appellate court in New York construed the agreement between the user of an airport parking lot and the lot owner as a license for the use of space rather than a bailment and therefore barred the plaintiff user from recovering for her stolen car.
        - If there had been a bailment there would have been a rebuttable presumption of negligence on the bailee's part
            - Some jurisdictions put an absolute burden on the defendant to prove non-negligence
        - The court relies heavily on it finding that the relationship between the plaintiff and the parking lot was impersonal and the lot lacked sufficient control to be considered a bailee
        - A ticket dispensed to the plaintiff via an automatic machine disclaimed all liability for theft, but the court ruled such a limitation of liability was not enforceable
        - A dissenter reasoned there was a bailment saying the court erred in distinguishing automated parking lots from non-automated ones

(b) Accessions

- Accession is variously defined, but relates to the improvement of existing property by someone other than the owner
    - If not objectively an improvement, than issue is conversion
- Can sometimes apply to land; accidental garage building example
- Two issues to deal with:
    1. Who gets to keep the property?
        - Turns on what the principal good is; the prior possessor keeps the good if it is still the principal good, otherwise goes to improver
        - Three ways principal good might change:
            a. Inseparability- If original good is separable from the improved good without damage, than principal good unchanged
                - See e.g. *Bank of America* case
            b. Magnitude of Value- If labor has been added so that the value has been increased by a great (like 25x great), magnitude than the principal good is the improved good
                - See e.g. *Wetherbee* case
            c. Physical Transformation- If labor has transformed the original good into something totally different than principal good is improved good
                - E.g. a ball of yarn into a sweater
        - Rules above on the assumption of good faith—bad faith improvers won't be given property or damages
    2. Does anybody owe the other damages?
        - If the improver wins, improver pays damages to prior possessor
        - If improver loses, prior possessor never owes for damages

- Possible exception for goods added and deemed inseparable, see *Bank of America* case

- Accessions Examples
  - *Wetherbee v. Green*- A defendant who in good faith made barrels out of timber cut from the plaintiff's land was allowed by the Supreme Court of Michigan to pay damages for conversion rather than give up the barrels which were estimated to be worth twenty eight times the value of the timber used to make them.
    - The defendant had an invalid lease on the timber rights from a former partner of the plaintiff's and so acted in good faith
  - *Bank of America Corp. v. J & S Auto Repairs*- The Supreme Court of Arizona ruled that a repair shop that installed a new engine and transmission in a van abandoned at the shop was entitled to the value of the parts laid in if the parts were inseparable from the van.
    - The court found that improvers are never entitled to damages for the value of their labor and the increased value of the good
    - The court also considers two tests of inseparability, opting for the first because it is more likely not to result in unjust enrichment
      1. Added goods are inseparable from the original good when they cannot be removed without damage to the original good
      2. Added goods are inseparable from the original good when separation would destroy the usefulness of the improved good

iv) Wild Land

(1) Common Law System

(a) Principle of Relative Title

- Just like relative ownership of personal property—courts award judgment to claimant with better, not necessarily best, claim
- The Irving Principle in Lawson speak
- Still, sometimes need to prove absolute ownership for land transfers so better system for determining absolute ownership

(b) Causes of Action

(i) Ejectment = Action to recover real property
- Only establishes a better claim than the person ejected

(ii) Quiet Title = Action to defeat others' claims in real property
- Establishes the best among many claims
- BUT, only those with notice of the action are required to assert their claims at the time of the action
- The winner of a quiet title action could still be beat by a prior possessor who didn't have notice of the quiet title action

(c) Deeds and Transactions

(i) Quit Claim Deed
- Grantor transfers all his claims to the land, without making any guarantee as to the quality of those claims
- Risk on buyer of prior possessor showing up with better claim
- Buyer might be willing to accept risk because:
  - Price of transaction lower

- Buyer able to research title more cheaply than seller
- Professional custom to use quit claim in some areas

(ii) Warranty Deed

- Grantor guarantees that his claim is the best—guarantees absolute ownership
- Risk on seller of prior possessor showing up with better claim
- At common law, warranty deed made six different covenants
- Deed that makes some but not all of the covenants—guarantees something less than absolute ownership—is a special warranty deed

(iii) First Transfer Rule

- If a grantor makes the same grant to two people, than the grantee of the first grant has the better claim
- Same as rule of first possession in personal property
- Embodiment of relative title principle
- The losing grantee might have an action for damages against the grantor if the grant was a warranty deed

(d) Title Searches and Title Insurance

- In the US, proof of absolute ownership would require a claimant to trace their interest in the land back through all the transfers to the original grant of land from a sovereign government

(i) Searches

- Deeds usually contain a record of previous transfers
- Documents are usually stored by the county—but recording is not required by most states
- Lots of technicalities might screw up the claim—e.g. a signature by a person that was a minor at the time
- Title investigations never perfect because too expensive to investigate all the possible problems

(ii) Insurance

- Title insurers are able to profit by assuming risk of prior possessor showing up with better claim
- Risk usually fairly low and insurers develop skills and resources to minimize cost of search
- Usually only insure against defects discoverable through the search process—wouldn't cover an adverse possession claim

(e) Example:

Leach v. Gunnarson- The Supreme Court of Oregon ruled that a grantor breached the covenant against encumbrances in a warranty deed because he did not specifically except a neighbor's right to dam and divert the flow of a spring even though the dam was obvious to the grantee.

- The grantor claimed there was an exception for obvious encumbrances, but the court found that the exception only applied to public utility and infrastructure related right of ways
- Court's rule is majority common law rule

(2) Recording Statutes Systems

- Most states now use recording statutes to alter the rule of first transfer
- The statutes encourage recording deeds with the county in order to facilitate more accurate title searches
- Way to justify putting responsibility of title search on buyer
- Most title searches only go back eighty years or so
- Some jurisdictions stipulate that a search of "X" years is good enough; claims based on defects from before that time are no good
- If a deed was not recorded through the fault of the recorder's office, there is usually no remedy
    - The county will probably have governmental immunity
    - And the individual employee isn't a deep pocket

(a) Race Statutes

- The grantee who records their grant first has the best claim
- See North Carolina example, p. 1159
- Introduces a valuable consideration requirement, but doesn't define consideration—definitely not market value, but something not trivial
- Does not require good faith on the part of the second grantee

(b) Race-Notice Statutes

- The grantee who records first has the best claim if the grantee received the grant in good faith
- See Wisconsin example, p. 1159
- Includes valuable consideration requirement
- Does not define what good faith means—requires more than lack of notice, requires some investigation, but how diligent?
- Examples:
    - *Gregerson v. Jensen*- A grantee who failed to record their deed nevertheless had their claim affirmed by the Supreme Court of Utah against a subsequent grantee who also did not record their deed.
        - The jurisdiction had a race-notice type statute, but because neither party had recorded, the court followed the common law rule of first transfer
    - *Messersmith v. Smith*- As between two grantees the Supreme Court of North Dakota ruled for the party who recorded his deed last because the first recorded deed was not properly notarized and thus ineligible for recording.
        - The dispositive issue was the first recording grantee's failure to have his deed properly notarized

(c) Notice Statutes

- Subsequent grantee has better claim (regardless of recordation), if prior grantee did not record and subsequent grantee had no notice
- See Massachusetts example, p. 1159
- Doesn't include valuable consideration requirement
- Good faith not required either

- Example:
    - *Guerin v. Sunburst Oil & Gas Co.*- The grantee of oil rights to some land had his claim before the Supreme Court of Montana defeated by a prior grantee even though the prior grantee failed to record his deed because other deeds in the title history made reference to the prior grantee's interest.
        - Montana's recording statute is a pure notice type statute
        - The court reasoned that the subsequent grantee had constructive notice because of references to the prior grant contained in deeds granting other interests in the same land

B) Adverse Possession

i) Theoretical Basis

- Many scholars say adverse possession is an anomaly because it is the lone area of the law where a wrong can develop into a right
- But—adverse possession is really just a statute of limitations—the anomaly is that so much is required over and above the running of the limitations period
- Rationale is purely formalist and retains no relevance to modern policy; in ye olde England, land possession carried various social and political rights that legal society was unwilling to confer simply because a limitations period ran
- It was also much harder to watch over the vast quantities of land commonly held at the time

ii) Property Tax Requirement

- Western states commonly require that an adverse possessor pay the property tax on the land he is claiming
- The limitations period runs from the date when the possessor starts paying tax
- Developed as a way to put large scale western landholders on notice that someone is attempting to claim their land; they just check with the county
- States with a tax requirement traditionally have shorter limitations periods

iii) Common Law Requirements

- Besides running of the limitations period, the following is also required
- Whether a requirement is satisfied is a **question of fact**; deferential review

E----- Exclusive
N-----Notorious
C-----Claim OF
R-----Right
O-----Open
A-----Actual
C-----Continuous
H-----Hostile

(1) Exclusive

- Doesn't necessarily mean only one occupant; can be a team of people cooperating to possess the property
- Can't be an adverse possessor and the rightful owner
- Can't be competing adverse possessors

(2) Notorious & Open

- The two go together—not separate issues
- Essentially, the use the adverse possessor engages in must be obvious; it can't be hidden or under cover of night or something like that
- Usually the actual use requirement will prevent problems here, but two possible problems arise:
    1. Theoretically possible, but unlikely scenario: A has a cave entrance on his property and starts giving paid tours through the cave. It turns out the cave (under the ad inferos principle), is actually partially B's property. Assuming all other requirements met, adverse possession of the cave by A?
        - The court decided it was not open and notorious even though the dimensions of the cave made it obvious that part of the cave had to be under B's property.
        - It would have been problematic to recognize adverse possession here because then an adverse possessor might be able to claim land by tunneling under it.
    2. Much more common scenario: A builds a garage on what he thinks is his own property. A later survey shows that a small portion of the garage is actually over the property line. Assuming all other requirements met, adverse possession by A of the portion of B's property under the garage?
        - Issue is that the garage is open and notorious, but it's not necessarily open and notorious that the garage encroaches
        - About half of jurisdictions apply a reasonableness standard—B loses the property if it's reasonably apparent that A's garage is encroaching
        - The other half apply constructive knowledge of the property boundaries to B and A wins

(3) Claim of Right

- Roughly three ways to look at, all involving adverse possessor's intent
    1. Good Faith Required- An adverse possessor must think they have a valid claim to the land
        - Second most popular jurisdiction-wise
    2. Bad Faith Required- An adverse possessor must know the land is not rightfully theirs to start with
        - Used to be more popular, but steadily declining of late
    3. Who Cares- Court won't look at adverse possessor's intent
        - At least plurality, maybe a majority approach
- The Helmholz Effect which suggests that, regardless of a jurisdiction's approach, bad faith adverse possessors rarely win as an empirical matter
    - When the other requirements are close questions, the bad faith of the claimant may skew the court against him
    - Also, because appellate review is deferential hard to correct possible trial bias on this question

(4) Actual
- Actual use required, not just actual possession
- Most courts apply a reasonableness test that asks what a reasonable or average owner of the property would do with it
- Some affirmative, usually productive, use must be made of the land
- One scholar suggested that the actual use requirement disincentivizes the preservation of wilderness and makes for bad environmental policy

(5) Continuous
- Continuous does not mean constant
- But how long a break is allowed varies substantially by jurisdiction
    - Compare *Jarvis* where a one year hiatus was allowed to *City Services* (cited in class), where three weeks was too long
- Again, a reasonableness test in most cases where variation is allowed for different types of property and courts ask what an owner would do
- About half of jurisdictions allow for seasonal continuity where the land is located in a place where seasonal use is all that's practical

(6) Hostile
- Has nothing to do with the adverse possessor's intent
- Just a requirement that the occupation be non-permissive
- Fairly obvious because an owner can't bring an ejectment action against someone on the property by permission

(7) Possible Problems

(a) Governmental Immunity
- Federal land cannot be acquired through adverse possession
- States set their own rules, but presumption is against adverse possession
- States also regulate the rules for locally or municipally owned land, again with the presumption against adverse possession
    - Note that, in some circumstances, the Vermont statute in *Jarvis* allowed for acquisition of municipally owned land

(b) Timing
- Open/Notorious and Continuous requirements effectively equivalent to the discovery rule in torts
- The limitations period starts from the time ENCROACH is satisfied
- UNLESS, the prior possessor is unable to *sue* or *know* of wrongful occupant—then some jurisdictions will toll the limitations period
    - Might not be able to know because of incarceration, military service
    - Might be unable to sue because minority status, incompetence

(c) Burden of Proof
- Wrongful occupant may be plaintiff or defendant; plaintiff in quiet title action or defendant in ejectment action
- Whichever, wrongful occupant bears burden of proving ENCROACH

(8) Example:
- *Jarvis v. Gillespie*- The Supreme Court of Vermont ruled in favor of a wrongful occupant despite challenges as to the actuality, continuity, openness, and hostility of the occupant's claim to locally owned land.

C) Purchase
- Personal property covered in UCC class
- Real property covered in Real Estate law class

D) Gift
- Transfer by will or intestacy covered in Trusts & Estates
- Transfer inter vivos can be problematic
  - Same type of gratuitous promise enforcement problems as is Contracts
  - General rule is to recognize gifts when:
    - Donor intends to give gift
    - Donee accepts the gift
    - The gift is actually delivered
      - So the problem boils down to defining delivery—the more a symbol is accepted, the more antagonistic to formality concerns
      - Also problem that broad application of inter vivos transactions might undermine the use of wills

III) Estates in Land

- Grants have words of purchase and words of limitation
  - Words of Purchase = who the grant is transferred to
  - Words of Limitation = language defining what type of interest is created
- Think of the possible future interests in property as infinite pathways of possible branches—not just a timeline

A) Present Interests
- Present interest is a right to use and possess the property in the present moment
- There is always only one present interest in a given piece of property
  - Note that the present interest may be owned by more than one person
- There are four categories of present interests, but only deal with two here
  1. Fee Simple – See below
  2. Fee Tail – Not really used in America anymore, so not covered
  3. Life Estate – See below
  4. Tenancy – See Landlord-Tenant Law
- When construing a grant the old presumption was that a grantor grants a life estate, but now the presumption is that a grantor grants all of whatever he has

i) <u>Fee Simple</u>
- Formally defined by the words of limitation "and his heirs"
  - Used to be an absolute requirement that the "and his heirs" words be used
  - Now, because of change in presumptions for grant construction, not an absolute requirement, but most people still use so as to be safe
- Substantively defined by two properties (usually)
  - Potentially infinite
    - Exception for fee simples that are defined by the life of an animal
  - Freely transferable

- Can be either absolute or defeasible
  - Absolute when only something outside the grant would terminate
    - E.g., the grantee having no heirs, or of course the sun going nova
  - Defeasible when some language in the grant itself provides an event in which the fee simple is terminable

ii) Life Estate

- Formally, usually defined by words of limitation "for life"
- Substantively, defined by a human's life
  - Can be the grantee's life
    - This is presumed when the words of limitation "for life" are used
  - Can be someone else's life
  - Can be a number of people's lives
    - In this case, the grantor may specify the shortest or longest possible time span, e.g. "for Hines Ward's or Ryan Seacrest's lives, whomever dies first" or "whomever dies last"
    - If defined by a life other than the grantee's, and the grantee dies before the measuring life ends, than grantee can convey remaining interest
- Can also be either absolute or defeasible, on same terms as fee simple

iii) Defeasibility

- There are three categories of defeasible interests
  1. Subject to executory interest – where the future interest is created in someone other than the grantor
     - Set this one aside for now
  2. Determinable – where the future interest is a possibility of reverter held by the grantor
  3. Subject to condition subsequent – where the future interest is a right of entry held by the grantor
- Usually construe the grant according to the grantor's intention
  - If the grantor actually specifies which type of interest they are trying to create, than courts usually respect that
  - When no explicit language as to which type of interest is intended, look to the grammar of the grant, or in some cases for certain words or phrases
    - In terms of grammar:
      - Where the words of limitation seem to be all one thought, construe as a fee simple determinable
      - Where the thought seems interrupted, construe as subject to a condition subsequent
    - In terms of specific language or punctuation:
      - So long as, while, or until all indicate a determinable interest
      - Upon condition, but if, so that, provided, or a comma all indicate an interest subject to condition subsequent
  - Some courts favor construction as subject to condition subsequent
    - California doesn't allow determinable interests at all
- Very few limitations on what conditions can be written into grants
  - Can't make transfer of interest a condition of a fee simple
  - Can't have a condition that's against public policy, or sometimes frivolous

- **Example:** *Maurenholz v. County Board of School Trustees*
  An Illinois appeals court construed a grant providing "this land to be used for school purposes only" as a fee simple determinable followed by a possibility of reverter, though it later affirmed a verdict that the condition was unbroken.

iv) The Doctrine of Waste

- Evolved to deal with the possible conflicts of interest where the present and future interests in a piece of land are held by different parties
  - A person with a present interest in land will want to maximize the value of the property over a shorter time period
  - A future interest holder will want the land's value protected for future use
- Two types of waste:
  - Voluntary Waste – where the present interest holder takes some affirmative action that unreasonably devalues the future interest
    - Does not include depreciation or normal wear and tear
    - Easier to prove and thus more common
  - Permissive Waste – where the present interest holder fails to take some action that the present interest holder is under a legal duty to undertake
    - Difficult to prove because difficult to show legal duty
- Parties can avoid disputes over conflicts of interest by negotiating specific duties and prohibitions into the grant
  - But, lots of grants are from wills, so no opportunity to negotiate
- Often hard to figure out appropriate remedy
  - Common law remedy was for present interest holder to lose their interest and interest reverted to the grantor—but as waste invoked more commonly, less harsh remedies are used
  - Uncertain duration of life estates can complicate things
  - Sometimes hard to place a dollar figure on damage done to property value
  - Leads to plaintiffs often seeking injunctive relief
- **Example:** *Meyer v. Hansen*
  A seller of a hotel, who kept a possibility of reverter in the event the buyer defaulted on payments under their installment contract, successfully sued for waste based on unspecified damage done by the buyer to the hotel.
  - The court ruled that either the diminution in value or cost of repairs calculation would be a valid remedy because here both figures the same

B) Future Interests

- Unless the present interest is a fee simple absolute, there will be a future interest
- There can be multiple future interests
  - Landlords commonly have both a possibility of reverter (in the event of unpaid rent or some other condition), and a reversion (when the lease ends)
- Future interests always have a first name and a last name
  - The first name is the type of future interest it is
  - The last name is the type of present interest it would become

i) Future Interests in the Grantor

(1) Reversions

- Arise when the grantor grants away a lesser interest
  - Life estate < fee simple, and tenancy < life estate
  - Applies even when a life estate holder grants a tenancy that is longer (999 years say), than a life could possibly be
    - Possibility that lease will be canceled, in which case the interest will revert to the grantor
- If the grantor does not have a fee simple, a reversion might arise when the grantor grants the same type of interest, e.g. a life estate from a life estate

(2) Rights of Entry & Possibilities of Reverter

- Remember, possibilities of reverter come from determinable interests and rights of entry come from interests subject to condition subsequent
- There are three differences between the two:
  1. For a right of entry to become a present possessory interest the condition must be broken *and* the holder must either:
     a. Sue for possession
     b. Take some action manifesting intent to take possession
     - Rights of entry unique in this respect, all other future interests become possessory immediately upon the condition occurring
     - So really a right of entry is just a right to take possession
     - Sometimes called a power of termination
  2. Rights of entry are sometimes non-transferable
     - Always an exception allowing the right of entry to be transferred to the present interest holder
     - Again unique to rights of entry, all other future interests freely transferable just like present interests
  3. Not all states recognize determinable interests, so sometimes it's not possible to have a possibility of reverter
- Number 1 is the big deal usually

ii) Future Interests in Other People

(1) Executory Interests

- Any future interest, not a remainder, held by someone besides the grantor
- Two types, but don't really need to know:
  - Shifting – Those executory interests that failed item #3 below
  - Springing- All other executory interests

(2) Remainders

- A future interest in favor of a transferee so as to become possessory upon the expiration of all prior interests simultaneously created, and not divesting any interest except an interest left in the transferor
- Better to think of as a four item checklist:
  1. Created by the grantor in someone else
  2. Must be possible for the future interest to become a present interest immediately upon expiration of the preceding present interest
     - Sometimes a gap between the present and future interests is written into the grant, e.g. one week later or after the funeral

3. Cannot divest any interest
    - Another interest is divested if the future interest takes the interest from the present interest holder upon occurrence of some condition
    - Lawson describes as a requirement that the future interest wait patiently for the present interest's expiration
    - Best bet is to construe grammar same as with defeasibility
        - Grammar that flows doesn't divest an interest
        - Grammar that doesn't flow does divest an interest
    - Don't worry about the exception for divesting an interest in favor of the grantee
4. Cannot follow a possessory fee simple
    - Simple; if the present interest was a fee simple of any kind, than the following future interest cannot be a remainder

- There are four types of remainders, but we only need to know two:
    a. Contingent Remainders – all remainders that aren't vested
    b. Vested Remainders – two item checklist
        1. Must have an ascertainable beneficiary
            - An ascertainable beneficiary is either:
                - Designated by name
                - Designated by an abstract category where at least one person fits the category description
            - The beneficiary must be ascertainable by the time the future interest takes effect—otherwise definitively fails to vest
            - If the beneficiary is defined as an abstract class and one person meets the description, but others might meet the description in the future, then the interest is subject to open
        2. Must be no conditions precedent other than expiration of the prior present interest
- When construing types of future interests, remember a few things
    - A future interest is created in the grant where the present interest from which the future interest arises is created
    - A future interest's name and legal properties are assigned at the time when the interest is created
    - Sales and other transfers of future interests do not change the name or legal properties of the interest
    - The name and legal properties of a future interest can change because of changes in events in the world
        - If there was no ascertainable beneficiary at the time of the grant, but one becomes ascertainable than the contingent remainder becomes a vested remainder
        - If a condition precedent is satisfied some time after the grant is created, than a contingent remainder becomes a vested remainder
        - If a condition precedent becomes impossible to satisfy than the interest definitively fails to vest

iii) Rule Against Perpetuities

(1) Theory

- Land is most valuable as a fee simple absolute
- The more different interest, the harder it is to assemble a fee simple
  - Hard to put a value on interests of indeterminate length
  - Hard to put a value on interests that depend on a condition
- The Rule Against Perpetuities evolved as a way to limit people's ability to screw up the marketability of their land
- Unfortunately, often vary complex and sometimes seems repugnant in light of modern emphasis on freedom of contract
  - Only survives intact in a dozen states
  - Lawson estimates it will be gone entirely in 10 years

(2) The Rule and Lawson's Three Criticisms

- As stated by Professor Gray, "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest"
- Lawson thinks it sucks for three reasons:

(a) Inconsistent

- Certain types of future interests are worse for marketability than others
  - Contingent remainders, possibilities of reverter, some executory interests and rights of entry all could theoretically depend on a condition that could last forever
  - Vested remainders only real problematic when subject to open
- But, the Rule Against Perpetuities is both over and under inclusive
  - Under inclusive because it doesn't include possibilities of reverter or rights of entry
  - Over inclusive because it does apply to some executory interests that don't cause marketability concerns

(b) Stupid Timing

- Doesn't allow certain types of interests to exist at all
- If concern is not screwing up marketability for too long, better to give interests a time period within which the condition can be satisfied
- Many of the "bad" interests would definitively fail to vest within a certain time, and thus don't pose marketability concerns

(c) Dumb Assumptions

- Instead of using a fixed period, allocates weird some life in being plus twenty one years period
- Based on assumption that twenty one years is about a generation and so marketability will clear up within that time

(3) Operation

- Applies to:
  - Executory Interests
  - Contingent Remainders
  - Vested Remainders Subject to Open

- An interest survives the rule if there is a person during whose lifetime plus twenty one years the interest will be a type of interest not subject to the Rule Against Perpetuities
  - That person's life, if one exists, is known as a validating life
- Three types of people might be a validating life:
  1. Ascertained beneficiaries of the grant
  2. People who can affect who is a beneficiary
     - Applies when beneficiary is an abstract class
     - For instance when the class is children, the children's parents
  3. People who can directly and uniquely affect the grant's conditions
- Rule of thumb that if there is a condition not tied to a person's life span, the interest will violate the rule

IV) Co-Tenancies

➢ Five types of concurrent interests
- Property of a marriage – take Family Law
- Partnerships – take Business Organizations
- Condominiums – not covered anywhere at BU
- Joint Tenancy – read on young Jedi
- Tenancy in Common – the answer lies ahead

➢ Naturally, we only study the latter two types of interests

A) Joint Tenancies & Tenancies in Common

i) <u>Similarities</u>
- Both operate the same when all the co-owners are alive
  - Every co-owner has an absolute, unconditional right to use and possession
- Each co-owner's financial obligations and rights apportioned according to its financial stake in the property
  - For instance, two investors that go in 60/40 on a piece of property split the taxes on the same basis and split any profits on that basis as well
  - Doesn't change the fact that both have a 100% right to use and possession
- Parties can alter the stakes or rules by contract
  - But many co-ownership arrangements created by a will, so no negotiations

ii) <u>Differences</u>
- Mostly have to do with what happens when one co-owner dies

(1) Survivorship
- Joint tenants have a right of survivorship—when one co-owner dies, the remaining co-owners' interests expand to fill the void left by the decedent
  - The expansion is proportional, so if there were three tenants to start and then one dies, the remaining tenants would each have a half
- A tenant in common can pass their interest by will or intestacy
- A joint tenant can't pass their interest upon their death
- The last surviving member of a joint tenancy is left as the sole owner and may then transfer their interest

(2) Encumbrances
- Survivorship impacts any encumbrances on the decedent's interest
  - If a joint tenant dies with encumbrances on the land, the surviving joint tenants are not liable on the encumbrances
- Any encumbrances on the interest of a tenant in common transfer with that tenant's interest

(3) Advantages
- The advantage of a tenancy in common is flexibility
- The advantage of a joint tenancy is administrative ease of transfer—assuming you want to transfer to your other joint tenants

iii) Creating a Joint Tenancy
- Presumption for vague grants is that a tenancy in common is intended
- Two requirements, besides the Four Unities below, for creating a joint tenancy

(1) Live in a state that allows joint tenancies
- Not all do, or some restrict to married persons

(2) Manifest an intention to create a joint tenancy
- Safest language to use is:
  "To ***blank*** and ***blank***, as joint tenants with right of survivorship and not as tenants in common."
- **Example:** *Hoover v. Smith*
  The Supreme Court of Virginia upheld the trial court's refusal to enforce a woman's right of survivorship upon the death of her husband because the grant, though providing for a "joint tenancy and not a tenancy in common," did not mention the right of survivorship.
  - Court required more than most, but to be safe use the language above

iv) Maintaining a Joint Tenancy; The Four Unities

(1) Unity of Time
- All joint tenants' interests must be granted at the same time

(2) Unity of Title
- All joint tenants' interests must be granted by the same legal instrument

(3) Unity of Interest
- All joint tenants must have the same financial interest in the property

(4) Unity of Possession
- All joint tenants must share an identical portion of the timeline
- In other words, the same type of interest, e.g., fee simple, life estate, etc.

v) Destroying a Joint Tenancy
- Destroying any of unities severs joint tenancy; becomes a tenancy in common
- If more than two joint tenants and something severs a unity with respect to only one interest, than that interest holder a tenant in common and the others remain joint tenants
  - For instance, if one joint tenant transfers his interest, than the transferee is a tenant in common with the others who remain joint tenants
- If parties are holders of a tenancy in common and wish to create a joint tenancy, they can convey their interests to a lawyer who can then convey their interests back in a form that complies with all four of the unities

- Some particular legal acts might destroy a joint tenancy:

(1) Mortgage

- Effect varies by state, depends on theory of mortgage
- Lawson estimates a 50/50 split
  - Title Theory of Mortgage – views a mortgage as equivalent to a sale and buyback of a property
    - Destroys the unities same as a transfer would
  - Lien Theory of Mortgage – views a mortgage as an encumbrance
    - Does not destroy the unities
    - But, then problem that if the tenant holding the interest with the mortgage dies, the encumbrance goes away
    - Lenders have responded in one of two ways:
      1. Don't lend to joint tenants without all tenants' signatures
      2. Lobbied for statutes that grant an exception to the usual rule for encumbrances and place the mortgage on the remaining joint tenants

(2) Lease

- Again, varies by jurisdiction
  - Strict approach is that a lease destroys the unity of possession because the lessor joint tenant has a reversion while the other joint tenants hold a present interest
  - Less formal approach reasons that if a clear intent is required to create a joint tenancy, than a clear intent must be present to sever
- **Example:** *Tenhet v. Boswell*
  The Supreme Court of California opted for the less formal approach in deciding whether one joint tenant's short term lease to a third party without the other's consent destroyed the remaining tenant's right of survivorship when the lessor tenant died unexpectedly.
  - The court suggested that a long term lease might be enough to manifest an intent to destroy the unities

(3) Divorce

- Divorce doesn't *necessarily* sever a joint tenancy
- A divorce court is free to make whatever arrangement of the property
  - May just alter possession rights
  - Might destroy co-ownership altogether
- **Example:** *Porter v. Porter*
  The Supreme Court of Alabama ruled that by awarding exclusive possession rights to the wife, a divorce court did not sever a joint tenancy held by a man and his first wife and therefore the first wife was entitled to her right of survivorship when the man died after marrying again.

B) Co-Tenants' Remedies

i) For Interference with Use

- Because all co-owners have a 100% right to use and enjoy the land, there are few options for recovering against each other
- Generally, the following options are available:
  - Physical Partition – A court could physically divide up the land between the owners, but:
    - Land not fractile; nearly impossible to divide land such that roughly equal sized and valued portions
    - Dividing land usually decreases the value of the parts, especially for agricultural usage
  - In Kind Partition – Basically liquidation; selling the property and dividing of proceeds according to each co-owner's contribution, but:
    - Requires an accounting to determine each party's contributions to the value of the land
    - Expensive and difficult process to affect
  - Recover Rents – Sometimes a party may be able to obtain a portion of the rents generated by another party's use of the land
    - Only a minority of jurisdictions allow a co-owner that is not in possession to recover from another co-owner that is in possession
    - When neither party is in possession, one co-owner can recover part of the *actual* rents from the other co-owner
      - But actual rents may not be worth much
  - Ouster – When one co-owner makes it impossible for the other co-owner to enjoy the rights of use and enjoyment, the law calls it an ouster
    - Law is extremely uncertain as to what acts make it impossible for the other co-owner to use, so far from a sure remedy
    - Also doesn't sever joint ownership
    - And requires ousting co-owner to pay rent to the ousted co-owner
- **Example:** *Swartzbaugh v. Sampson*
  A husband, who co-owned property with his wife, was sued by his wife after leasing his interest a boxing promoter who built a boxing pavilion on the property, but obtained a favorable judgment in the California Supreme Court.
  - The plaintiff sought to have the lease invalidated, but the court declined
  - The plaintiff's best remedy, as a joint tenant, is probably to wait for the husband to die and to take over through rights of survivorship

ii) For Improvements & Obligations

- Mandatory obligations (taxes, mortgages, e.g.), are easy cases
  - Enforce with an action for contribution
- Non mandatory obligations (repairs, e.g.), are tougher
  - Likely to trigger an accounting which will make it not worth it
- Usually no recovery against other co-owners for improvements made
  - But, party that pays for improvements gets to keep any profits derived therefrom and gets value for contribution if an accounting occurs

V) Landlord-Tenant Law

A) Nature of Leases

i) Types of Leases

- Fall into three categories for purposes of this class
- Categorized based on what terminates the tenancy
- But almost all leases are defeasible
  - Usually a right of entry if rent not paid
  - Often other conditions as well

(1) Term of Years

- Has a definitive start date and end date

(2) Periodic

- Automatically renews for a specified term unless notice given
- At common law, notice required at least one full period in advance
  - If notice late, than applies to next period
  - No more than six months notice required, so if term longer than six months, only need six months' notice
- Different notice rules often provided by local statute
- Sometimes lease itself specifies how/when notice to be given
- Common law not clear on what constitutes notice
  - Best for parties to specify in lease
  - Sometimes statutes cover

(3) At Will

- Terminates upon notice or death of one party
- Notice can be at any time, unless statute provides for some minimum
- Other types of lease not terminated by death unless a specific defeasibility condition makes them so

(4) Universal Rules

- Following rules apply to all types of leases:
  - When date of termination specified, tenant holds until midnight
  - Notice effective upon receipt by landlord—no mailbox rule
    - Often changed by statute

ii) Transferability of Leases

(1) Privities

- Lease creates two sets of rights between landlord/tenant
  - Privity of contract – lease contains contractual rights and liabilities
  - Privity of estate – lease is a transfer of property rights and liabilities

(2) Effect of Transfers

- Differences between the rights and liabilities don't matter much, unless one party transfers their interest under the lease
  - If transferred by sublease, than a new set of privities is established between the old tenant and the new tenant
    - Privities between old tenant and landlord still intact
    - No privities between landlord and new tenant

- If transferred by assignment, than privity of estate between landlord and tenant moves to landlord and new tenant; privity of contract remains between landlord and tenant
  - No longer privity of estate between old tenant and landlord
  - Usually will be privity of contract between old tenant and new tenant because some sort of contract between them

- **Example:** *Hannan v. Dusch*
  A tenant who was unable to take possession under a lease because of a holdover tenant sued the landlord, alleging an implied duty to put the tenant into possession of the premises, but a Virginia appellate court found for the landlord.
  - The court considered both the American and English rules
    - American Rule – No duty to put the tenant into possession, so tenant only has an action against the holdover tenant
    - English Rule – Implied duty to put the tenant into possession, so tenant has an action against the landlord
  - Significance has to do with theories of privity
    - If emphasize privity of estate—tenant primarily buying a slice of time—than American Rule makes most sense
    - If emphasize privity of contract—tenant investing in set of rights and liabilities—than English Rule makes most sense

- **Example:** *First American National Bank v. Chicken Systems, Inc*.
  A bank, acting as landlord under a lease, sued the assignee of the original tenant seeking rent not paid by the assignee's assignee, but was denied recovery by a Tennessee appellate court because no privity existed between the landlord and the assignee of the assignee.
  - No privity of estate between landlord and tenant's original assignee because privity of estate moved to current holder of interest
  - No privity of contract against tenant's original assignee because no contract between landlord and original assignee
    - Tried to recover on third party beneficiary theory, but court refused to find intent to benefit landlord
    - Usually not possible to recover as third party beneficiary unless intent to benefit landlord is express

(3) Construction of Lease Transfers

- Common law (majority) is that if anything less than the full leasehold interest is transferred, than transfer is a sublease
  - Could be less than full interest transferred if:
    - Less than full slice of time transferred, i.e. some days at end of lease kept by transferor
    - Less than full interest transferred, i.e. some future interest kept by transferor on a defeasibility condition
  - Some jurisdictions assume that defeasibility conditions from original lease are imported into the transfer
    - Allows courts to avoid strict rule in many cases because almost always some kind of defeasibility condition in lease

- Modern rule (minority) construes according to the parties' intent
- **Example:** *Jaber v. Miller*
  A tenant, holding interest in a property after successive transfers of the property, sues the transferor for the return of several promissory notes issued at the time of the transfer, claiming the transfer was a sub-lease rather than an assignment and so the promissory notes are no longer due after a fire destroyed the building.
  - The court went with the minority rule and construed the transfer as an assignment based on language used in the document

(4) Limitations

- Landlords almost always provide that a tenant may not transfer the lease without the landlord's permission
- Serves dual purpose for the landlord:
  - Ensures that tenant won't transfer to irresponsible/insolvent person
  - Ensures that if tenant is going to transfer for a profit, the landlord can force the tenant to share some of the profit
- Majority allow landlord to withhold consent for any reason
- **Example:** *Kendall v. Ernest Pestana, Inc*.
  The Supreme Court of California established a minority rule, holding that when a landlord's permission is required for transfer of a lease, the landlord may only withhold permission where commercially reasonable.

B) Remedies Against Landlords

i) Constructive Eviction

- At common law, lease covenants were construed as independent
- So, unless tenant specifically contracted for it, no breach by the landlord excused the tenant's duty to pay rent
  - Exception for breach of covenant of quiet enjoyment—if tenant evicted by third party with better possessory right, than rent excused
- Constructive eviction doctrine developed to mitigate harshness of common law
- Constructive eviction applicable where:
  - Landlord substantially interferes with the tenant's use of premises
  - Tenant must provide notice to landlord, allow reasonable time to fix the problem, and then vacate the premises
  - Can extend to interference by third parties if can prove that landlord controls their actions, e.g. third party is landlord's tenant also
- Risky, because requires tenant to leave premises without knowing whether a court will later find all the requirements met
  - Mass. mitigates by allowing for declaratory judgment before vacate
- Provides little remedy for tenant

ii) Implied Warranty of Habitability

- As to scope:
  - Usually only applies to residential leases
  - Varies whether applied only to subset of those leases
  - Usually cannot be waived

- As to standard:
    - Could rely on housing code, but:
        - Under inclusive because code is mostly technical type stuff that isn't what drove the implied warranty movement
        - Over inclusive because a lot of code violations don't really matter to the tenant
    - Could follow the spirit of the housing code
    - Could say substantial defects are breaches
    - Can't go all the way to absolutely uninhabitable
        - Too high a bar; goal is preventing habitable but extremely unpleasant living situations
- As to remedies:
    - Implied warranty is a dependent covenant, so if breached the tenant's duty to pay rent is excused
    - Often not worth it for tenant to sue landlord
    - Also not usually practicable for tenant to stop paying rent altogether because then would have to vacate premises
    - Sometimes repair and deduct type remedy allowed
        - Tenant can pay for repairs and deduct that amount from rent
        - Puts burden on landlord to bring suit if disagrees
    - If repairs not made, than burden on plaintiff to prove damages
    - Jurisdictions use three different formulas for establishing damages:
        1. Promised Rent – Fair Rental Value
            - Relies on false assumption that there is a market for substandard housing
            - Expensive for tenant to estimate a value because expert testimony will be involved
        2. Rental Value if Met Warranty Standard – Rental Value As Is
            - Same problems as with option 1
        3. Promised Rent x Lost % Usefulness
            - Better in that doesn't rely on false market assumption
            - But, still can be expensive to prove what % of usefulness lost
            - Still better than the other two options though
- **Example:** *Brown v. Southall Realty Co*.
  A tenant successfully defended against a landlord's suit for possession in a case where the landlord leased property that was, at the time of the lease, in violation of several elements of the housing code.
    - Early implied warranties case
    - Illustrates most narrow approach to standard of habitability
- **Example:** *Pugh v. Holmes*
  The Supreme Court of Pennsylvania decided to adopt an implied warranty of habitability in a landlord's action for unpaid rent against a tenant who lived in an apartment with a leaky roof, cockroaches, bad plumbing and no hot water.
    - The court used option 3 for damage calculations
    - Adopted standard that defect must be such that prevents use of a dwelling for its intended purpose to provide a place for habitation

C) Remedies Against Tenants

i) Abandonment & Surrender

- Lease can be terminated by an abandonment and a surrender
    - Possible to terminate only one or the other of privity of contract and privity of estate
    - But usually both terminated simultaneously
- Abandonment = Tenant's demonstration of intent to leave permanently
    - Think of as an offer to terminate the lease
- Surrender = Landlord's demonstration of intent to terminate lease
    - Think of as acceptance of offer to terminate lease
- Statute of Frauds usually requires a writing
- Surrender by operation of law can be pleaded based on landlord's conduct
    - If landlord rented to new tenant, e.g.
    - Landlord can rent to new tenant without constituting a surrender, but must manifest clear intent *not* to surrender
    - At common law, if landlord rented to new tenant for higher rent without a formal surrender, than tenant could recover the profit because technically tenant still the present interest holder
- Minority of jurisdictions impose duty to mitigate—landlord obliged to make reasonable efforts at finding new tenant
    - Minority, but modern trend in that direction
- Landlord can only recover rents due up to point of suit
    - Except, jurisdictions that impose duty to mitigate usually allow suit for future rents on anticipatory breach theory
    - Some leases also contain acceleration clauses that make entire rent on lease due in event of breach by tenant
        - Specifically prohibited by some jurisdictions
- **Example:** *Sommer v. Kridel*
  The Supreme Court of New Jersey ruled to impose on landlords seeking relief against defaulting tenants a duty to mitigate damages by making reasonable efforts to find a new tenant for the leased premises.
- **Example:** *Sagamore Corp. v. Willicutt*
  The Supreme Court of Connecticut ruled that a landlord seeking unpaid rent from a tenant could recover rents for the entirety of the lease term, even for rents not yet due under the lease, where the tenant manifested an intent to pay no further rent.

ii) Summary Remedies

- Landlord not necessarily better off if tenant still in possession
    - Tenant could easily be judgment proof
    - Ejectment actions take a long time in normal civil court
- At common law, landlords were allowed "self help" type remedies
    - Could lock out a tenant by changing locks
    - Could seize tenant's property to compensate for unpaid rent
    - Usually limited to situations that wouldn't involve violence

- Now most jurisdictions have forcible entry and detainer statutes
    - Prohibit landlords from exercising common law self help remedies
    - Establish streamlined process for settlement of landlord-tenant claims
    - Housing courts established by statutes usually limit litigation to the issue of possession
- Housing courts are problematic for two reasons:
    - Even though faster than civil court, still can be slow—landlord is losing money whenever defaulting tenant is still in possession
    - If litigation limited to issue of possession, than tenant unable to defend on basis of implied warranty of habitability
- **Example:** *Berg v. Wiley*
  A tenant, whose landlord had locked her out, sued for wrongful eviction and had judgment in her favor affirmed by the Supreme Court of Minnesota on a ruling that the state's forcible entry and detainer statute abrogated any common law right of the landlord to evict a tenant without a court judgment.

iii) Holdover Tenants

- Technically, called a tenant at sufferage
- Not a trespasser because entry was lawful
- At common law, landlord had option to renew the lease if tenant held over
    - Unclear what kind of notice landlord must give of intent to renew
    - Strict view was that option to renew arose immediately upon termination of the lease
- **Example:** *Commonwealth Building Corp. v. Hirschfield*
  An Illinois appellate court refused to enforce the landlord's option to renew a lease against a tenant that held over by ten hours, finding that a clause in the lease specifically addressing the possibility of holdover abrogated the landlord's common law right to renewal.
    - Landlord also could have been prevented from recovery because part of reason for holdover was broken elevators—so partially landlord's fault

D) Housing Discrimination

i) 42 USC §§1981 & 1982

- Originally interpreted as applying only to state conduct
- Extended to private conduct in 1968 *Jones v. Alfred H. Mayer* decision based on the 13th Amendment
- Only prohibits racial discrimination
    - Race as defined in 1866; so national origin and a very few religious classes protected as well
- Both broader and narrower than the Fair Housing Act
    - Broader because applies to many more contexts and is an absolute prohibition without any of the FHA's exemptions
    - Narrower because limited to race; no other protected classes
- **Example:** *Shelley v. Kraemer*
  The Supreme Court held that racially restrictive covenants in deeds to land are not per se unconstitutional because only private conduct, but that enforcement of the covenants by courts would be unconstitutional state action.

ii) Fair Housing Act

- Modeled after the Civil Rights Act of 1964

(1) Scope
  - Originally only applied to race, national origin and religion
  - Extended to gender in 1974
  - Extended to familial status and disability in 1988

(2) Prohibited Conduct
  - §3604(a) says sellers can't refuse to deal on prohibited basis
  - §3604(b) says can't impose different terms on prohibited basis
  - §3604(c) prohibits discriminatory advertising
    - The DOJ has said it will not enforce the Act against stated sex preferences in shared housing, female roommate wanted, e.g.
  - §3604(d) prohibits lying about availability
  - §3604(e) prohibits realtors from inducing or discouraging transactions on a prohibited basis
  - §3604(f) separate section for disability based discrimination
    - Discrimination defined differently, see §3604(f)(9)

(3) Exemptions
  - 3603(b) Mrs. Murphy exemption
    - Applies to all conduct except §3604(c)
    - Exempts single family housing sold or rented by the owner and also owner occupied four family housing
  - §3607 exemptions
    - §3607(a) allows discrimination on basis of religion by religious organizations providing housing for religious purposes
    - §3607(b) allows government to limit the number of occupants and also allows housing for older persons to exclude based on familial status

(4) Stating a Claim
  - Unclear whether discriminatory treatment must be proved or whether discriminatory effects also actionable
    - Discriminatory effect enough in Title VII employment context
    - Some lower courts have extended rule to Fair Housing Act
    - Some courts only allow recovery for discriminatory effect against government landlords/sellers
    - Discriminatory treatment claim definitely easier to make because large sample size required to state statistically significant claim of discriminatory effect
  - Proof structure for discriminatory treatment claim:
    - Burden on plaintiff to establish membership in protected class and an injury (declined application, adverse lease term, e.g.)
    - Then burden shifts to defendant to prove non-discriminatory reason for plaintiff's injury
    - Then plaintiff can rebut defendant's argument

- Plaintiff can establish discriminatory effect, which leads to inference of discriminatory treatment unless rebutted by defendant, in a couple ways:
  - Government and some private agencies send test tenants/buyers to deal with target landlord/seller
  - For larger landlords/sellers, sometimes enough evidence on basis of historical record of applications and transactions
- Usually, any type of remedy, including plaintiff's fees, available

(5) Case Law

- **Example:** *Harris v. Itzhaki*
  A black tenant sued her landlord under the Fair Housing Act, invoking testing evidence and direct evidence discriminatory treatment to have recovery affirmed by the 9th Circuit.
- **Example:** *United States v. Starrett City Associates*
  The 2nd Circuit ruled that New York City's largest apartment complex could not give preferential treatment to white applicants in an effort to maintain a certain balance of white and minority tenants.

iii) State & Local Legislation

- The federal law is a floor, not a ceiling
- State and local legislation can and often does go farther—often broadening protection by including additional protected classes, sexual orientation, e.g.
- Even if protected classes same under local law, could be more protection because no exemptions or more prohibited conduct
- California is the broadest example, requiring commercial reasonableness

VI) Trespass & Nuisance

A) Trespass

i) Liability

- Trespass = intentional intrusion onto another's land
- Tort claim to vindicate possession rights to property
- No showing of damages required; liable even if no harm done while on land
- Intent only a voluntary act requirement; knowledge of whose land not required
- Keep in mind the ad inferos and ad coelum principles

ii) Remedy

- Injunctive relief is the customary remedy
- Don't have to show inadequacy of money damages

iii) Limitations

- Trespass action can only be brought by present possessory interest holder
- If entry onto land was rightful, than no trespass claim
  - No claim if entry by consent
  - Or if entry was to get at some personal property owned by defendant
- **Townshend Test** – For an invasion to be a trespass, it must be perpetrated by an object that can be seen, felt, and touched
  - Fact that an invasion is by particulate is a necessary but not sufficient condition for a trespassory invasion

B) Nuisance

i) Distinction from Trespass

- Trespass and nuisance are mutually exclusive
- If an invasion, but doesn't pass Townshend Test, than a nuisance
- Nuisance actions are available to anyone with an interest in the land
  - Includes future interest holders, and interests by servitude
- Injunction not customary remedy for nuisance

ii) Elements

(1) Non-Trespassory Invasion

- Invasions that flunk the Townshend Test are nuisance
- Not an insignificant requirement, see examples
- **Example:** *Nicholson v. Connecticut Halfway House, Inc*.
  The Supreme Court of Connecticut held that the prospective operation of a halfway house in a middle class residential neighborhood did not constitute a nuisance without any proof of an actual invasion.
- **Example:** *Jack v. Torrant*
  The Supreme Court of Connecticut held that the establishment of a funeral home in a residential nuisance did constitute a nuisance.
  - Most states have sort of an exception to the usual invasion requirement that applies to funeral homes in residential areas
  - Most states have kept the exception restricted to that context
- **Example:** *Arkansas Release Guidance Foundation v. Needler*
  The Supreme Court of Arkansas held that the actual establishment of a halfway house in a residential neighborhood did constitute a nuisance where there had been limited instances of untoward conduct by the house's residents.
  - Only legitimate distinction from *Nicholson* is that here the house was already operating and some minor incidents had been reported
  - Lawson says not really a distinction, just a different rule
  - Definitely the minority approach
- **Example:** *West Shore School District v. Commonwealth*
  A Pennsylvania appellate court followed the majority approach outlined in *Nicholson*, denying recovery to a plaintiff claiming a nuisance based on the establishment of a halfway house near a public school.

(2) Significant Harm

- Restatement §821(f) requires significant harm as would have been suffered by an ordinary person
- Essentially no egg shell plaintiff rule in nuisance

(3) Intent

- Like trespass, just a voluntary act requirement

(4) Unreasonable

- Two ways to establish defendant's conduct was unreasonable
  - Restatement §826(a) – the gravity of the harm outweighs the utility of the actor's conduct, or
    - Have to establish unreasonableness this way to get an injunction

        - Originally—in Restatement First—the only way to prove unreasonableness
    - Restatement §826(b) – the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.
        - Serious is necessarily something more than significant, but not clear how high a bar serious sets
        - Remember to contemplate burden on other potential defendants, not just defendant at issue
- Not a negligence requirement
- **Example:** *Morgan v. High Penn Oil Co.*
  The Supreme Court of North Carolina, ruling on a nuisance action against an oil refinery, held that to prove unreasonableness a plaintiff need not prove negligence against the defendant.
    - If the plaintiff doesn't prove that the defendant acted intentionally, than the plaintiff must show negligence on the defendant's part
- **Example:** *Estancias Dallas Corp. v. Schultz*
  A Texas appellate court held that an injunction against an apartment complex's air conditioning unit was proper where the plaintiff had demonstrated that the noise created by the unit outweighed its benefit.
- **Example:** *Crest Chevrolet v. Willemsen*
  The Supreme Court of Wisconsin applied Restatement §826(b) in holding a defendant liable for nuisance damages caused by water running off the defendant's land and pooling on the plaintiff's.
    - Water is an exception to the Townshend Test, so no trespass
- **Example:** *Boomer v. Atlantic Cement Co.*
  The Court of Appeals of New York, finding that the defendant's conduct did not warrant an injunction because of the benefit of the conduct to the community nonetheless awarded damages to a nuisance plaintiff.
    - The court elected to award permanent damages; compensation for all past and future damages
    - Demonstrates the approach that many courts were taking on their own before Restatement §826(b) was added

C) Coase Theorem

i) The Lawson Simplified Version

- Coase's article based on five propositions:
  1. Decision whether nuisance liability exists is essentially a decision as to whether the plaintiff has a property right to be free of that conduct
  2. In a world with no transaction costs, nuisance decisions wouldn't affect what use property is put to
  3. BUT, always transaction costs—so nuisance law does matter
  4. Neither factual nor legal causation analysis is a good basis for imposing nuisance liability
  5. Best approach is to approximate the no transaction costs world

VII) Servitudes

A) Licenses

i) Definition

- A license is an interest in land in the possession of another that entitles the holder to use the land and arises from consent of possessory owner and is not incident to an estate and is not an easement
- Not very valuable because revocable at will of the possessor
- Can become irrevocable in certain circumstances
- **Example:** *Shearer v. Hodnette*
  An Alabama appellate court reasoned that a plaintiff's license to use a private driveway held jointly by the defendant and others had become irrevocable because the plaintiff had shared the costs of maintaining the drive and had made possible substantial improvements to the drive.

B) Easements

i) Definition

- An interest in land in the possession of another which
  - Entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
  - Entitles him to protection as against third persons from interference in such use or enjoyment;
  - Is not subject to the will of the possessor of the land;
  - Is not a normal incident of the possession of any land possessed by the owner of the interest; and
  - Is capable of creation by conveyance
- Can be subject to defeasibility conditions, but can't be revoked by grantor
- Distinguish between affirmative and negative easements
  - Affirmative – Gives the holder a right to do something that would otherwise be a nuisance or trespass
  - Negative – Binding requirement that a party refrain from exercising some legal right involving their property
    - Almost always prohibited by law

ii) Methods of Creation

(1) By Deed

- At common law an easement created by deed could only be created for the benefit of one of the party's to the deed
  - Some states, California e.g., have done away with that rule
- **Example:** *Willard v. First Church of Christ Scientist*
  The Supreme Court of California, ruling a grant of an appurtenant easement to a church, decided to abandon the common law limitation on parties that could be benefited by an easement created by deed.

(2) By Implication

- Three requirements for an easement by implication:
    1. Easement must have arose at the time when unitary ownership of property was severed to create two pieces of property
    2. Use must have been so open and apparent at the time of purchase as to be considered permanent
    3. Use must be reasonably necessary for enjoyment of property
- Could view the requirements as a way to get at the parties intentions, but more likely a way to grant easements where lawyer screwed up the language in a deed or other grant
- **Example:** *Romanchuk v. Plotkin*
  The Supreme Court of Minnesota found that the purchaser of a house that had once been owned by the defendant, also the owner of the neighboring property, had an easement by implication to connect to the defendant's sewer.
    - As to the open and apparent requirement, the court found that even though the pipes were underground (and thus not visible), the sewer connection was apparent because the house had sinks, toilets, etc.

(3) By Prescription

- If one time use at issue, than tort (trespass or nuisance) statute of limitations applies
- If continued use at issue, apply statute of limitations that would apply to an action to recover possession of real property
- Also use ENCROACH elements, but some applied differently
    - Use can be regular rather than continuous
    - Three different theories of hostility:
        1. Lost Grant – Person claiming easement must have at some point had permission to engage in use
            - Traditional approach
        2. Hostility – Non permission required
            - Modern trend for this approach
        3. Evidentiary Presumption – Presumption that use is non permissive unless defendant can rebut
- **Example:** *Fischer v. Grinsbergs*
  The Supreme Court of Nebraska followed the evidentiary presumption theory of hostility in awarding an easement by prescription to a neighbor who had for many years shared a driveway with the defendant.

iii) Scope & Transfer

(1) Scope

- Where an easement is created by deed, up to parties to specify scope, location, temporal interest contained in easement
- Where easement by implication or prescription, up to court to decide
    - Difficult because scope dependent on value of easement, but when by implication/prescription parties haven't fixed a value
- Both parties bound to act reasonably in relation to other's interest

- **Example:** *Farmer v. Kentucky Utilities Co*.
  The Supreme Court of Kentucky held that a utility company with an easement by prescription to run electrical wires over the plaintiff's property also had a right to trim trees on the plaintiff's property insofar as the trees interfered with the utility company's easement.
- **Example:** *Penn Bowling Recreation Center v. Hot Shoppes, Inc.*
  The D.C. Circuit held the holder of an easement liable for acting outside the scope of the easement by using the easement for the benefit of a property other than the dominant tenement.

(2) Transfer

- Whether an easement survives transfer depends whether an appurtenant or in gross easement
  - Appurtenant – When created to benefit a particular property
    - Always transferable
  - In Gross – When created to benefit a specific person
    - Not transferable if in residential context
    - Usually transferable if commercial context
- Presumption for construction as appurtenant easement
- **Example:** *Martin v. Music*
  A Kentucky appellate court held that an easement, despite language naming the parties, was appurtenant and thus had survived the transfer to new owners of the property.
- **Example:** *Miller v. Lutheran Conference & Camp Assoc.*
  The Supreme Court of Pennsylvania held that an easement in gross had survived transfer because made for a commercial purpose, but found that it was only divisible to the extent that both parties to the division would be using the easement together.
  - Illustrates concern that in gross easements, through transfer and division, might increase the burden on the servient tenement

C) Running Covenants

i) Operation

- Developed as a way to end run around prohibition of negative easements
- Not an easement—a contract
- But, binds successors to property like an appurtenant easement would

ii) Common Law Requirements

- Must be a valid contract; offer, acceptance, consideration, etc.
- Must manifest an intent to bind successors
  - "intend to bind assigns" magic language, though not always required
- Must be horizontal privity:
  - American Rule – Promise must be made as part of a transaction involving the servient property
  - British Rule – Both parties must hold an interest in servient property
  - Minority Rule – No relationship required between parties
- The covenant must touch and concern the land

- **Example:** *Candlewood Lake Association, Inc. v. Scott*
  An Ohio appellate court ruled that a real covenant requiring the owner of property to pay dues as membership in a neighborhood association was valid against successors to the property.
- **Example:** *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*
  In enforcing a real covenant that a property not be used to open a grocery store, the Supreme Court of New Jersey held that instead of the traditional rule of touch and concern, a reasonableness requirement should be adopted.
  - The court set out the following eight factors as a gauge of reasonableness:
    - Whether the parties' intentions at the time of execution interfered with any existing law or public policy;
    - Whether the covenant impacted the consideration exchanged between the parties at the time of execution;
    - Whether the covenant's restrictions are clear;
    - Whether the covenant was recorded and whether the current obligee had actual notice of the covenant;
    - Whether the covenant is reasonable as to duration and area;
    - Whether the covenant is an unreasonable restraint on trade;
    - Whether the covenant interferes with the public interest
    - Whether, if the covenant was reasonable when executed, changed circumstances make it unreasonable now.