**[THE CONCEPT OF PROPERTY]**

**[Theory of Property]**

The government defines property rights – this is the basic concept of legal positivism. One holds property only if and to the extent that they are recognized by government. Property rights are not absolute, they are relative. Much of property law is devoted to reconciling disputes between different owners or between an owner and the community**.**

Five Justifications to Property:

1. First Possession
2. Encourage/Reward Labor
3. Maximize Societal Happiness
4. Ensure Democracy
5. Facilitate Personal Development

**[Rule of Capture]**

*Pierson v. Post* is a leading example of the first possession approach to property. Property rights of a *ferae naturae* are acquired by the first person to take possession of an animal, a principle called the **Rule of Capture**. Mr. Pierson failed to demonstrate the three elements needed to acquire the right to the wild beast**: (1) pursuer manifests an unequivocal intention of appropriating the animal to this individual use; (2) deprive animal of his natural liberty; (3) bring him within his certain control.**

In *Popov v. Hayashi*, Popov sues for **conversion – the wrongful possession of personal property rightfully owned by another.** Applying the three factors of the rule of capture, both sides could argue some case. Court found that Popov established a “**qualified pre-possessory interest in the ball**.” This constituted to a qualified right which supported a cause of action for conversion, but did not establish a full right to possession that is protected from a subsequent legitimate claim (Hayashi’s) claim to the ball. The court ended up with an equitable solution – ordered the two to split the market price of the ball.

**[Right of Publicity]**

Cal Civ. Code 3344 (a) “any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner… for purposes of advertising of selling… without such person’s prior consent… shall be liable for any damages sustained by the person or persons injured as a result thereof.”

*Eastwood* Test states that the Common Law Right of Publicity may be pleaded by alleging:

1. D’s use of P’s identity
2. Appropriation of P’s name or likeness to D’s advantage
3. Lack of consent; AND
4. Resulting injury

In *White v. Samsung*, court found that the “likeness” of § 3344 does not exist here - the robot did not use another’s name, voice, signature, photograph or likeness in any manner. However, going to the Common Law Right of Publicity, court finds that the common law right to publicity is not so confined as to the *Eastwood* test. The Right of Publicity does not require that appropriations of identity be accomplished through particular means to be actionable. Held: The law will protect the celebrity’s sole right to exploit the value achieved by her name.

**[THE BUNDLE OF STICKS]**

Property is considered a “bundle of sticks,” which constitutes the rights to transfer (alienate), exclude, use and destroy. Property rights may be divided; e.g. a tenant only has the right to use and exclude, but not the right to transfer or destroy.

**[The Right to Transfer]**

The right to transfer/alienate is an important right for **real estate maximization**:

* During the financial crisis people’s right to alienate was diminished because no one was looking to buy a house
* Encourages conservation of property
* Supports liberty
* Ensure highest and most valuable use of property

The succession of ownership over time is called a chain of title. Each different owner is a different link in the chain. One can look up the deeds in the county record and go up the chain of title until it was first possessed by the government during the colonial times. All buyers of property should make sure the seller has the title to the house. **If two people have competing title claims to the same property, the person with the better chain of title will prevail.**

**Conversion** is a tort that protects against interference with possessory and ownership interests in personal property. To establish a conversion, a plaintiff must establish an actual interference with his ownership or right of possession… where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.

* In *Moore v. Regents of UC*, Mr. Moore had to prove that he owned his body cells after removal. Court finds that although he has a claim for lack of informed consent, he does not for conversions since:
  + CA law drastically limits any continuing interest of a patient in excised cells
  + The patent cell line derived from Moore’s cells cannot be Moore’s property
    - Cells are not analogous to the “likeness” in publicity cases
    - Lymphokines have the same structure in every human being
    - Patentned cells are neither legally nor factually the same as what was taken from Moore’s body
  + **Policy**: extending liability of conversion to this case would stifle free and useful economic activity – researchers would be deterred from important medical research in fear of the strict liability tort of conversion

Some types of personal property may be given away but not sold (e.g. body parts). The common law doctrine of **accession** provides that when a person uses his own labor or materials in good faith to fundamentally transform another’s property, he acquires titles to the final product.

**[The Right to Exclude]**

Each owner has a broad right to exclude any other person from his property. The SC has characterized this as “one of the most essential sticks” in the bundle.

**Tort of Trespass**: “One is subject to liability for trespass, irrespective of whether he thereby causes any harm to any legally protected interest of the other, if he intentionally… enters land in the possession of the other, or causes a thing or a third person to do so” R.2d § Torts

* Actor acts intentionally if he voluntarily enters onto the land – not necessary to prove he had a subjective intent to trespass or otherwise acted in bad faith.
* However, an entry made under privilege is not a trespass. The most common privilege is consent from owner. Another one is necessity (police officer in hot pursuit).

In *State v. Shack*, court found the ownership of real property does not include the right to bar access to governmental services available to workers living on the premises.

* **A man’s right to property is not absolute.** It was a maxim of common law that one should so use his property as to not injure the rights of others… the maxim expresses the inevitable proposition that rights are relative. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another.
* *Shack* refers to **Utilitarian Balancing: property rights exist to serve all people in society**
* Fundamental Rights (absolute) v. Property Rights (which are relative)
  + “Employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.”

**[The Right to Use]**

**The Spite Fence Rule**

In common law, spite fences were permitted under the absolute ownership theory. In modern law, spite fences are prohibited if they (1) serve no useful purposes or injure neighbors; and (2) are constructed with malicious intent.

**Nuisance**

The common law doctrine of nuisance is the traditional method used to resolve land use conflicts. A private nuisance is an (1) intentional, (2) non-trespassory, (3) unreasonable (most difficult factor to determine), and (4) substantial interference with (5) the use and enjoyment of the plaintiff’s land.

* The modern view is that the conduct is unreasonable if the “gravity of the harm outweighs the utility of the actor’s conduct.” R.2d §826(a)

**[The Right to Destroy]**

The taking of property by inheritance or will is not an absolute or natural right but one created by the laws of the sovereign power – Missouri Supreme Court

In *Everman v. Mercantile Trust co.*, court finds that a well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society.

* Public policy rationale against the destruction of a home in a historical site that would decrease the value of the neighborhood
* Probably could have destroyed the house in her lifetime, but not by leaving it in her will

**[OWNING REAL PROPERTY]**

Real property consists of rights in land and things attached to land, such as buildings, fences, and trees. Personal property refers to rights in moveable items (such as chairs and pens) and intangible things (such as patents and stock).

The need to develop land for productive use became a major theme in American property law.

**[Adverse Possession]**

Adverse possession is a method by which one may take title away from the true owner of the land.

* In *Van Valkenburgh v. Lutz*, the court did not grant adverse possession because Lutz had already won a case entitling him to an **easement (non-possessory right to use land).** This conceded that he knew he did not own the land as an adverse possessor.

**Adverse Possession is the most controversial concept in Property. There are Four Justifications:**

1. **Preventing frivolous claims:** Bars lawsuits based on stale, unreliable evidence, thereby protecting occupant from frivolous claims; provides occupant with security of title, encouraging the productive use of land
2. **Correcting title defects:** Technical mistakes often occur in the process of conveying the land; adverse possession protects the title of the person who actually occupies the land
3. **Encouraging development**: Adverse possession may be viewed as a legal tool to encourage economic development; reallocates title from the idle owner to the industrious squatter
4. **Protecting personhood:** A thing you have enjoyed and used as your own for a long time takes root in your being and cannot be torn away from you without you resenting the act… *Oliver Wendell Holmes* (1897)

**Proving Adverse Possession**:

* Clear and Convincing Evidence is the standard for Adverse Possession in most jurisdictions. This is higher than the “Preponderance of the Evidence,” but lower than the “Beyond a Reasonable Doubt” standard.
* There is a presumption that shifts the burden of proof to the adverse possessor.
* A successful claimant acquires title to the land when the statutory period ends, without any litigation. They may bring a **quiet title action** to obtain a court’s judgment recognizing the title to be entered into public records.
* **In adverse possession cases, the key facts are the time: draw a timeline so that you know the possible period that you are trying to claim for the adverse possessor. The most important issue is whether it was continuous or not; you need to meet each element for the continuous period.**

On Exam, First words should be: Adverse Possession is…Then address the biggest issue first, knock out all the other elements at the end.

**ELEMENTS**:

* **Actual**: Claimant must physically use the land in the same manner that a reasonable owner would given its character
  + **Constructive Possession**: If claimant has a faulty instrument and used only a small part of the property, she may claim the entire property
* **Color of Title**: Claims to title that appears valid but may be legally defective. Deeds are mere “colors of title,” actual title is gained through following the chain of title through deeds; the chain of title needs to reach back to a land patent in order to truly possess the land.
  + Although the deed or other writing is faulty, this gives the claimant the color of title; some state statutes require this to claim adverse possession (goes to good faith factor too)
* **Exclusive**: Claimant’s possession cannot be shared with the owner or with the public in general; this does not mean keeping the public out as a requirement, but rather exercising the rights of ownership rather than relinquishing ownership to the public generally
  + If it is used as a commercial property, having business invitees there does not count as general public, since store owner can always retain the right to exclude patrons
  + **Tacking**: Adverse possession periods of two or more successive occupants may be added together to meet the statutory period under the doctrine of tacking.
    - Tacking of adverse possession is permitted if the successive occupants are in privity
    - **Privity**: mutual or successive relation to the same right in property; one squatter may pass along continuous possession to another until the statutory period is complete
    - Tacking is only valid if conveyance of property from one adverse possessor to another is founded upon a written document – usually an erroneous deed
* **Open and Notorious**: Claimant’s possession must be visible and obvious, so that if the owner made a reasonable inspection of the land, he would become aware of the adverse claim
  + “Unfurling of the flag”: Claimant must act as though he is waving a flag on the property
  + If the area is large, it is harder to prove this element
  + Also take into consideration the condition, type and locality of land
* **Adverse and Hostile**: There must be no permission from the owner.
  + **Address the three states of mind**:
    - **Objective**: Most states do not look to the Claimant’s state of mind, just looks at whether the actions of the adverse possessor looked like a claim of right; i.e. used the land as a reasonable owner would
    - **Good Faith**: some states require that Claimant believes in good faith that he actually owned the land
    - **Bad Faith**: Rarely, states require bad faith, that the claimant intended to take the title from the owner
* **Continuous**: Period established by statute, can range from 5 – 40 years and can also vary depending on whether adverse possessor has color of title
  + **All other elements must be met for the continuous period** Adverse possessor does not need to be on the land the whole time; may use seasonally with intent to return or as a reasonable owner would use the property
    - An Abandonment (intentional relinquishing or property) resets the SOL
  + **Tacking:** May apply here as well, as the adverse possessor(s) can combine the period of possession with a predecessor as long as they have privity of estate (voluntarily transferred possession, no color of title required)
  + **Tolling**: Sometimes the SOL is delayed or expanded due to legal incapacitation, such as mental illness or a prison sentence.

**[INTELLECTUAL PROPERTY]**

* IP laws provide the owner with property rights, principally the right to exclude others from using the IP. IP Law arises from the first-in-time system for allocating entitlements.
* Most intellectual property is a “public good.” It can be consumed without reducing any other person’s consumption of it.

**[Copyrights]**

Copyright law protects original works of authorship, such as books, computer programs, plays, sculptures, and songs. Owners of copyright primarily holds a right to exclude – to prevent others from reproducing the work, creating derivative works, or public displaying of the work (**17 U.S.C. § 106)**. Owner may also transfer the copyright to others or destroy it by abandonment.

* The Constitution authorizes Congress to “promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” **U.S. Const. Art. I § 8.** 
  + Federal copyright laws arise from the portion of this clause concerning “authors and writings”
  + Serves utilitarian goal to promote the progress of science and the useful arts
* **The 1976 Copyright Act affords protection to “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102 (a). The three requirements of copyright are:**

1. **Originality:** work must be independently created with a minimal degree of creativity
2. **Work of authorship:** eight categories recognized by statute – literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works
3. **Fixation:** work must be written, recorded, or otherwise embodied in some physical form. It must be “sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated,” for a period more than transitory duration.

* Registration and Notice are NOT required; Copyright can be valid without affirmative action by the government. Notice requirement was abolished in 1989 in order to meet international standards.
* Sonny Bono Copyright Term Extension Act **(CTEA) (1998)**
  + “Mickey Mouse Protection act,” which extends all terms of all existing and future copyrights by an additional 20 years, making the copyright term for new works equal to the **author’s life plus 70 years**

In *Feist Publications v. Rural Telephone Service Co.*, court found that facts are not copyrightable, but compilations of facts generally are. Copyright protection extends only to those components that are original to the author.

* **The *sine qua non*** (indispensable ingredient) of copyright is originality. To qualify, the owner must independently create the work with some minimal degree of creativity; even a slight amount will suffice, but some creativity must exist. Originality does not signify novelty; a work may be original even though it closely resembles another so long as the similarity is fortuitous, not the result of copying.
* **Primary Objective** of copyright law is not to reward authors but to promote the progress of science and useful arts. To this extent, copyright assures author right to original expression but encourages others to build freely upon the ideas – this is known as the **fact/expression dichotomy**. Copyright protects the manner in which an idea is expressed, not the idea itself
* **To establish infringement, two elements must be proven: (1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original**.
  + **The most important defense in copyright law is fair use. The fair use doctrine allows minor use of a copyrighted work where the use does not materially affect the rights of the copyright owner.** The fair use doctrine avoids rigid application of copyright laws that would “stifle the very creativity the law is designed to foster.”
  + **Fair Use Defense 17 U.S.C. § 107**
    - The fair use of a copyrighted work… for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.
    - Factors to consider (p.253)

**[Patent]**

Patent law protects new inventions, such as cell lines, machines and medicines.

**[Trademark]**

Trademark law protects words, names and other symbols which are used by merchants to distinguish their goods and services from those offered by others.

**[ESTATES AND FUTURE INTERESTS]**

**Introduction to Estates**

The basic timeline is present possessory estates 🡪 future interests. The whole of the interests in the timeline must equal 100%. First recognize who holds the present possessory interest, and then find who holds the future interests (grantor or third parties).

**Transferring Interest**

* **Deed:** The grantor (while alive) conveys or grants real property to the grantee. The completed transfer is called a Conveyance or Grant.
* **Will/Devise:** Testator or Testatrix devises the will and the person who is getting the property is called devisee
* If you have a will, the presumption is that your intent is to convey everything/ convey the biggest possible estate (this is more economically efficient, we want to promote the policy of the market)
* Whatever you do not disclose by will, it goes by intestate succession (so make sure your will encompasses everything)
* A holographic will is written entirely in handwriting of the decedent and signed by her. In about half of the state, such a will is valid even though it does not comply with the formalities necessary for a regular will.
* **Intestate Succession:** If a person dies without a will, the property will be distributed according to state statutes, usually to closet living relatives
* If you are alive, you do not have heirs, only *heirs apparent*
* You do not decide who your heirs are, they are decided by state statutes
* The property “Descends” to your heirs if you die intestate, the persons who receive property are called *next of kin*
* If X dies intestate, a state will typically distribute as follows:
* *Issue and Surving Spouse*: lineal descendants, children, grandchildren, and spouse will share equally
* *Parents and their issue*: If no spouse or issue, property will be distributed to parents then their living issue (brothers and sisters)
* *Ancestors and Collaterals*: If decedent does not leave a spouse, issue, parents, or issue of parents, the property goes to any surviving ancestors or any surviving collaterals (all other persons related by blood, i.e. cousins)
* *Escheat*: If the decedent has no living relatives, property belongs to the state under the doctrine of *escheat*, just like land reverted to the king if a landowner died without heirs

**Restraints on Alienation**

One of the core principles of our property law system is the freedom of alienation. Utilitarian theory holds that transferability is necessary to ensure the productive use of land.

A restraint on alienation is a provision in a deed or will that prohibits or limits a future transfer of property. If such a provision expressly prohibits the future transfer of a fee simple, it is void as against public policy.

* **Disabling restraint**: a restraint that prevents the transferee from transferring her interest: “O conveys to B, and any conveyance by B is void”
* Not a true fee simple since the right to transfer doesn’t exist
* **Forfeiture Restraint:** restraint that leads to a forfeiture of title if transferee attempts to transfer: “O conveys to B, but if B ever tries to sell the estate, than to D”
* **Promissory restraint**: restraint that stipulates that the transferee promises not to transfer her interest: “O conveys to B, and B promises that she will not sell the estate”
* **Contractual damages**/this type of promissory restraint is frowned upon

**[Modern Freehold Estates]**

The concept of recognizing both the right to present possession and rights to future possession is the foundation of our modern estates system. There are two types of present possessory estates: freehold estates (six freehold estates, categorized by duration), and non-freehold estates (modern leasehold between landlord and tenant.)

If the language of a deed or will is ambiguous, the court will interpret it in accordance with the transferor’s intent. But if the intent cannot be determined, the court will apply a rule of construction – **presumption that the transferor intends to convey the largest possible estate.**

**The Fee Simple Absolute**

* 99% of real property in America are owned this way
* Holder has all the rights in the bundle of sticks
* Complete ownership lasting until the end of time – owner can do whatever she wants with it, has the whole bundle of rights, without any limitation or condition
* There is no future interest that accompanies the fee simple absolute

**O conveys to “B and his heirs”**

* “To B” is the *words of purchase* which identify the grantee
* “And his heirs” simply means that O is conveying a fee simple; these are *words of limitation* that convey no interest to B’s heirs
* Even if it only said “O conveys to B,” almost all states presume that the grantor intends to convey a fee simple unless he uses words of limitation that specifically convey a different estate

The Fee Simple is freely:

* **Alienable**: it can be sold or given away during the owner’s lifetime
* **Devisable**: it can be transferred by will at death
* **Descendible**: it can pass by the laws of intestate succession if the owner dies without a will

**Presumption in favor of Fee Simple:** if the words of a conveyance or devise are ambiguous, the presumption favors a fee simple. Given the modern need for maintaining an efficient market in land, the law favors free alienation.

**Every time you see “and his heirs” or “and her heirs,” automatically substitute with “in fee simple.” This will save you from mis-analyzing estates in 99% of cases.**

* **Any time you use the words “in fee simple,” it is potentially indefinite**

**Fee Simple Defeasible**

The Fee Simple Defeasible is an estate that may end upon the occurrence of some future event. There are three types:

**Fee Simple Determinable**

**“To A so long as daffodils grow on the premises”**

* + May last infinitely but ends automatically when the specified condition is met
  + The future interest is always a Possibility of Reverter by transferor
  + Freely alienable, devisable and descendible, but durational condition applies to any transferee

\*\*Any time you give away a fee simple determinable, it is not a complete interest, so the grantor always has a possibility of reverter

**Fee Simple Subject to Condition Subsequent**

**“To A and her heirs, but if daffodils cease to be grown on the property, then I the grantor have the right to reenter and take possession”**

* May last infinitely but ends when condition occurs AND the transferor takes action
* Fee Simple Subject to Condition Subsequent 🡪 Power of Termination or Right of Re-Entry in Grantor
* Fee simple subject to a condition subsequent is freely alienable, devisable and descendible, but any transferee is bound by the condition
  + In common law, the right of entry could not be assigned or devised; today this future interest is alienable, devisable and descendible in most jurisdictions

Example: O conveys to “B and her heirs as long as the land is used as a farm, and if it is not, then O may reenter and reclaim.”

* “To B” are *words of purchase*
* “And her heirs” are *words of limitation*
* “As long as” are *words of duration*
* “Land is used as a farm” are the condition
* O has the power of termination
* Typical words “provided that,” “on condition that”… and if this happens, then “O can reclaim”
* If they stop using the farm as a farm, O can knock on the door and kick them out; O has title
* If B or heirs or whoever bought the property says no, O can bring an action against them

**Fee Simple Subject to Executory Limitation**

**“To B and heirs so long as it is used as a farm, then to C,”**

* The condition needs to be met before the interest transfers to C
* Also has words of duration or condition that create the other two fee simple defeasible estates
* **The distinguishing characteristic is that the future interest is held by a transferee, not the transferor**
  + If O conveys “to B and heirs so long as it is used as a farm, then to C,” because the future interest is held by C rather than retained by O, B holds a fee simple subject to an executory limitation
* Fee simple subject to an executory limitation is also alienable, devisable and descendible, any transferee is also subject to the condition.
* The future interest that follows this is an executory interest, which is freely alienable, devisable and descendible

**Life Estates**

The duration of a life estate is measured by the lifetime of a particular person. When the person dies, the estate terminates. Life estate is created by language that clearly indicates this intention, such as “to B for life.” The words “for life” are the traditional *words of limitation* creating this estate.

“To B for the life of C” is still a life estate – it is just measured by the life of C. B’s estate is called **a life estate *pur autre vie* (for the life of another).**

**An ordinary life estate is alienable, but not devisable or descendible.** Because the estate ends at the holder’s death, no estate is left to transfer.

* But a grantee who holds a life estate pur autre vie can devise his estate or allow it to pass by intestate succession to his heirs.
* If B holds a life estate measured by his own life and then sells his interest to D, D has a life estate pur autre vie. When B dies, D’s estate ends.

**When an owner in fee simple transfers a life estate, a future interest arises automatically.** When an owner transfers less than his entire state, there is a gap in the durational timeline that must be filled to for the future.

The future interest that follows a life estate is usually a reversion or a remainder. Distinction turns on who holds the interest:

* The future interest retained by a grantor is a reversion
* But if O conveys to “B for life, then to C,” because the future interest here is held by a third party, it is a remainder

**Life Estate Absolute**

**“To A for life, (then to B and her heirs)”**

* A has the possessory estate for life, (then once A dies B has the contingent remainder in fee simple absolute)
* Grantor would have a reversion that become possessory upon A’s death, which will add up to 100%

**Life Estate Determinable**

**“To A for life as long as daffodils are growing on the premises, then to B”**

* Lasts for life OR when the condition is met, ends automatically
* If A dies before the daffodils cease to grow, grantor has the possibility of reverter and reversion
* B has an executory interest

**Life Estate Subject to condition subsequent**

**“To for life as long as daffodils are growing on the premises, then I the grantor have the power of termination”**

* Lasts for life OR when the condition is met the grantor can reclaim
* The future interests may be Power of Termination, Possibility of Reversion, or Executory Interest

**Legal and Equitable Life estates**

An ordinary life estate (legal life estate) is rarely created today. However, a special type of life estate (equitable life estate) has continuing importance in the modern trust. A trustee holds legal title to the trust property and manages the assets as a fiduciary for the benefit of the trust beneficiaries, who holds the equitable title. The equitable life estate is the most frequent type of present interest. A typical trust may say “O Conveys to T in trust for the use of B for her life, then to C.” T is a trustee who is given the legal fee simple. B and C are the trust beneficiaries, who have, respectively, an equitable life estate and an equitable remainder.

**Common Law Doctrine of Waste**

In general, this doctrine imposes a duty on the life tenant or term-of-years tenant to use the property in a manner that does not significantly injure the rights of the future interest holders. In many jurisdictions, doctrine of waste does not apply to a person holding a defeasible fee simple

* In *Woodrick v. Wood* (OH 1994), court held the destruction of a barn by the life tenant, although objectionable to the future interest holder, does not constitute waste on the property
  + However, the Crockett court found that the person with the present interest should be able to make reasonable use of the land to her benefit and should not be charged with protecting the property for the mere benefit of the revisioner.
  + The relevant inquiry is always whether the contemplated act of the life tenant would result in diminution of the value of property… here it does not.

At common law, anything that altered the identity of leased premises was waste, regardless of whether the act happened to be beneficial or detrimental to the remainder interest. In US, a future interest holder may obtain damages or injunctive relief if the life tenant commits voluntary or permissive waste. However, most states do not recognize ameliorative waste. The modern view is that substantial alteration is permited if it does not result in decrase in value of the property.

**Types of Waste recognized by Common Law:**

* **Voluntary Waste: results from affirmative act significantly reducing value of property (demolishing valuable house)**
* **Permissive waste: results from failure to take reasonable care to protect the estate (making minor repairs or paying property taxes)**
* **Ameliorative waste: affirmative act that leads to increase in property value (building in a swimming pool)**

**[MODERN FUTURE INTERESTS]**

A future interest is an existing, non-possessory property right that may become possessory in the future. Once a future interest is transferred, the grantor no longer possesses the future interest. Future interests are a valuable property right though it is non-possessory. The holder may sell his future interest or use it as security for a loan. He can prevent the current possessor from committing waste, and may also be entitled to payment if the property is taken by condemnation. Upon death, holder may transfer his future interest by devise or by intestate succession.

**There are two groups of future interests, depending on the identity of the holder:**

**Future interests retained by the transferor**

* Reversion
* Possibility of Reverter
* Right of Entry

**Future interests created in a transferee**

**Remainders are future interests in a transferee that: (1) is capable of becoming possessory immediately upon the expiration of the prior estate; AND (2) does not divest (or cut short) any interest in a prior transferee**

* *Capable of being possessory*: it does not have to be guaranteed, but the possibility of possession is enough
* *Does not Divest*: a remainder “waits patiently for the preceding estate to expire before it becomes possessory “to B for life, then if D becomes president, to D”

If the grant said “to B for life, but if D becomes president, to D” however, then D’s becoming president means he can gain possession and cut B’s estate short. In this example, D has an executory interest, not a remainder

**Vested Interests**: Vesting does not mean that the transferee must take, they only need to know whether the interest will vest or not. Some future interests like executory interests only vest when possessory; others vest before becoming possessory, like C’s interest in B to life then to C.

**[THREE TYPES OF VESTED INTERESTS]**

**A remainder is vested if (1) it is created in an ascertainable person AND (2) it is not subject to a condition precedent other than the natural termination of the prior estate**

* Must be created in an **ascertainable person** (needs to be both alive and identifiable at the time of transfer)
  + Suppose O conveys to “B for life, then to D’s heirs”… if D is alive, then his heirs are not ascertainable, so the remainder in D’s heirs is not vested
* There can be **no condition precedent:** A condition precedent is a condition that must be met *before* the remainder can become possessory, *other than* the natural termination of the prior estate.
  + Suppose O conveys, “to B for life, then to D if D becomes president” 🡪 D must meet a special condition before his interest can become possessory, so his remainder is not vested.

**Indefeasibly vested remainder (Vested remainder absolutely vested)**

**“To A for life, then to B”**

* B now holds a future interest (a remainder), but when A’s life estate ends B will have a fee simple absolute estate.
* B’s remainder is certain to become possessory.

**Vested remainder subject to complete divestment**

**“To B for life, then to D, but if D does not survive B, then to E”**

* This is a remainder that is vested, but subject to a condition subsequent
* D is an ascertainable person and does not have a condition precedent
* However, his interest is ready to become possessory *unless a specified event occurs* (D dies before B); therefore, if D dies before B, his interest will be terminated, or **divested**, so D has a vested remainder subject to divestment

**Vested remainder subject to partial divestment (subject to open)**

**“To A for life, then to B’s children”**

* This is a vested remainder held by one or more living members of a group or class that may be enlarged in the future
* Suppose that at the time, D has two children, E and F. The remainders in E and F are vested because they are ascertainable and there is no condition precedent.
* However, E and F may have to share the property in the future to later born children of D who are not presently ascertainable, so their interests are a vested remainder subject to open, sometimes called a vested remainder subject to partial divestment.

**[TWO TYPES OF CONTINGENT INTERESTS]**

**Contingent Remainder: If a remainder is not vested, it is contingent. Thus, a contingent remainder is a remainder that is EITHER (1) given to an unascertainable person OR (2) subject to a condition precedent.**

**“To B for life, then to the heirs of D”**

* Because the heirs of D are not ascertainable, they hold a contingent remainder
* **In all condition precedents, there is a contingent remainder**

**Executory Interest (always contingent):** A future interest in a transferee that *must* divest another estate or interest to become possessory.

* **Springing Executory Interest** divests the transferor
* **Shifting Executory Interest** divests the transferee
* **No legal difference between the two**

**“To B for life then one year after B’s death, to d and his heirs”**

* D does not have a remainder, because D’s interest is not capable of becoming possessory at the expiration of B’s life.
* However, D has a springing executory interest that will cut off O’s fee simple (regained after B’s death).

**One of the characteristics of an executory interest is that it jumps out and cuts off an estate when it could have lasted longer; As soon as E marries, O’s estate loses the Fee Simple Determinable and E owns a Fee Simple Absolute**

**[Rules for furthering Marketability]**

In common law, vested remainders were freely transferable but contingent remainders could not be conveyed by deed or will. Today, both are alienable, devisable and descendible in all jurisdictions. If the wording of a conveyance was ambiguous, judges presumed that the grantor intended a vested remainder thereby maximizing the marketability of the land.

**[The Rule Against Perpetuities]**

***“No interest is good unless it must vest, if at all, no later than 21 years after some life in being at the creation of the interest.”***

* The rule does not require that an interest ACTUALLY vest; the interest just cannot have the possibility that it MAY vest too late past the period; however, even if the interest COULD vest tomorrow, it is void if it MAY vest past the period
  + Whenever there is a condition precedent not tied to a person, “when the Brooklyn bridge falls,” it is a void interest because it can happen at any point.
* **An interest “vests” when the title uncertainty is removed (condition precedent is met). Many future interests “vest” only by becoming possessory**
* The perpetuities period is measured by adding 21 years to the date of death of the last individual who was alive when the interest was created
* If an interest is not *logically certain* to vest or forever fail to vest, it is void
  + **If the interest *might* vest too late, it is void when created (*ab initio*).**
* The “creation of interest” refers to a single moment in time; in an inter vivos transfer, this is when the deed is delivered; in the case of a will, when the testator dies
* “Lives in Being”
  + Courts recognize individuals in gestation as “in being” from time of conception. So a more exact phrasing of the rule is “the longest life from any reasonable number of lives in being plus 21 years plus any periods of gestation.”
  + Corporations, partnerships and government entities have potentially infinite existence and not considered “lives in being” for the purposes of this rule.

**Always ask: When will we know whether the condition will happen/estate will vest?**

**Rule Application:** **Determine whether it is logically possible for the interest to vest outside of the perpetuities period – if YES interest VOID**

1. Identify the contingent interest
2. List the lives in being
3. Consider whether anyone can be born who might affect vesting
4. Kill off the lives in being at some future date and add 21 years
5. Ask, is there any possibility that the contingent interest will vest after this point? If so, it is void; if not, it is valid

**Rule of Perpetuities only applies to THIRD PARTIES whose interests are not vested.**

* Contingent remainders
* Executory Interests
* Vested remainders subject to open
  + Class Gifts (Considered contingent because individuals may be added to the class in the future)
  + **Class Gift Rule: Every potential member of the class must be ascertained within the period of the rule AND every potential member of the class must be certain to vest or not vest with the period of the rule**
    - If the executory interest of **ONE** member of the class gift may vest after the perpetuities period, it is invalid.
  + The closing of class is governed by the **rule of convenience**; it closes when the prior estate ends and identified class members are entitled to possession.

**Jee v. Audley’s Class Gift:**

Audley’s will created a gift to a class – the daughters of Jees alive when Hall’s line of descendants died. The gift to the class is invalid if *any* daughter’s interest might vest too remotely. Because the Jees could have another daughter in the future, who was not alive at Audley’s death and therefore not a “life in being,” this daughter’s interest might vest many years after the original four daughters, Jees, Mary Hall, and her issues died.

* **Fertile Octogenarian** – “to my children for life, then to my grandchildren.” 🡪 O has two children, D and E and no grandchildren. Even if O is 80, he may have another child, H. O, D, and E could die, then 40 years later H might have his own child F. The contingent remainder would vest beyond the perpetuities period since F’s interest would vest more than 21 years after the death of the last life in being. F’s interest is void.

**[Rule Against Perpetuities MODERN REFORMS]**

**Wait-and-See:** If the facts turn out to be that the future interest which might have been 500 years actually does vest within 21 years, that is not too long to wait and see, and if it vests it will be valid

**Uniform Statutory Rule Against Perpetuities**: USRAP picks a period of time, like 90 years (instead of lives in being +21), and if it vests within 90 years, and in most cases they are, then it is valid

**Cy Pres:** Power of the Court to reform the testator’s words, to make the words more consistent with what the testator’s intent in a way that would vest all interests within the period

**Savings Clause:** A simple way to avoid the rule is to insert a savings clause in the document that may say “Notwithstanding any other provision in this instrument, any trust created hereunder shall terminate, if it has not previously terminated, 21 years after the death of the survivor of the beneficiaries living at the date the instrument becomes effective.” Because the trust ends no later than 21 years after the last beneficiary’s death, the rule is not violated.

**[CONCURRENT OWNERSHIP]**

**[Three Types of Co-ownership]**

Concurrent ownership gives each cotenant the right to use and possess the entire property.

1. Tenancy in Common: O conveys “to A and B”

* Each tenant in common has an undivided, fractional interest in the property.
* Each may transfer his interest to another person and each has the right to use and possess the whole parcel, even if his fractional interest is smaller than the interests of others.
* However when the property is sold, the proceeds will be divided according to the proportionate shares.

1. Joint Tenancy: O conveys “to A and B as joint tenants with right of survivorship”

* Joint tenants have an undivided right to use and possess the whole property
* Each joint tenant also has the *right of survivorship*. When A dies, A’s interest is removed and B automatically becomes the sole owner. Because of this right, a joint tenancy is neither devisable nor descendible.
* At common law joint tenants are only created when four unities are present:

1. Time: all joint tenants must acquire interests at the same time
2. Title: they must acquire title by the same instrument
3. Interest: They must have the same shares in the estate, equal in size and duration
4. Possession: They must have an equal right to possess, use and enjoy the whole property.

**If the unity of time, title or interest is missing, a tenancy in common is created.**

* If one joint tenant transfers her interest, the joint tenancy is severed. The transfer breaks the unities of time and title; the right of survivorship is destroyed; and the grantee becomes a tenant in common with the other concurrent owners.
* Historically, the common law favored the joint tenancy because the right of survivorship helped to eliminate fractional interests, thereby concentrating feudal services in a single person.
* **Straw Person:** A grantor may transfer to a third person so that the third party can transfer back to “A and B as joint tenants” in order to meet the unities of time and title requirements. However today many jurisdictions have eliminated the need for a straw person; a grantor may create a joint tenancy by conveying to herself and another person.
* **Will substitute:** The joint tenancy is often used as an inexpensive substitute for a will. Because A’s interest is destroyed when he dies, there is no asset that needs to go through probate – the complete title will immediately go to B It is common for a married couple to hold the family home in joint tenancy for this purpose, to save the time and expense of probate.

1. Tenants by the entirety: O conveys “to A and B as tenants by the entirety”

* Only married couples can hold property in tenancy by the entirety.
* Each tenant has an undivided right to use and possess the whole property and a right of survivorship.
* **While a joint tenancy can be severed unilaterally by any joint tenant, a tenancy by the entirety can only be ended by death, divorce, or the agreement of both spouses**
* In states that recognize this co-tenancy, neither spouse may transfer or encumber his or her interest
* This allows the holders to partially shield their assets from creditors

**In order to avoid ambiguity, attorneys use precise language:**

* **Tenancy in Common: To A and B as tenants in common**
* **Joint Tenancy: To A and B as joint tenants with right of survivorship**
* **Tenancy by Entirety: To A and B as husband and wife as tenants by the entirety**

If the wording is unclear, a court may ignore the grantor’s actual intent. However, the modern trend is to focus more on the grantor’s intent. In *James v. Taylor* (AR 1998), although the intent of the grantor was clear that she wanted to create a joint tenancy rather than tenants in common, the court did not honor the intent over the statutory language that required that the intent be shown in the “four corners of the deed.”

**[Severance]**

A joint tenant may sever the joint ownership at any time by transferring the property. Severance extinguishes the principal feature of the estate – the ***jus accrescendi*** or right of survivorship. Thus, a joint tenant’s right of survivorship arises only upon survival, and then only if the unity of the estate has not been destroyed by voluntary conveyance, by partition proceedings or by any other action which operates to sever the joint tenancy

In *Tenhet v. Boswell* (CA 1975), court held that A’s lease to Boswell for 10 years did not sever the joint tenancy between A and B. **A joint tenant may, during his lifetime, grant certain rights in the joint property without severing the tenancy. But when such a joint tenant dies his interest dies with him, and any encumbrances placed by him on the property become unenforceable against the surviving joint tenant.**

Minority Title theory: Mortgage is seen as conveyance of title to the mortgage, severing the joint tenancy because it destroys the unities of time and title

Majority Lien theory: Mortgage is viewed merely as a lien to secure repayment of the debt, it does not end the joint tenancy because the unities are preserved

Secret Severance

* Statutes in a few states require that the deed effecting severance be recorded in order to prevent the severing joint tenant from trying to claim sole title if he outlives the other joint tenant
* Cal. Civ. Code 683.2 states that a joint tenant may sever unilaterally but may not secretly sever without the fulfillment of several requirements; it does not create the obligation to tell the other tenant but it must be recorded so the whole world has constructive notice of the severance

**Homestead Protection**

* Typically in every state the home of the debtor is protected against creditors
* A creditor who has filed a lien against your home in an attempt to collect a money judgment must comply with California’s homestead laws (Code of Civil Procedure § 704.710; 704.850)

Creditors cannot attach property that has survived the joint tenancy (the debtor husband owes nothing when he’s dead); if the wife died first the creditor can go after the property.

* In *Dang v. Smith* (Cal. App. 6th 2010), court did not attach debtor’s wife’s joint property with deceased debtor’s debt to creditors.
  + **An encumbrance against property held in undivided interests – whether a joint tenancy or a tenancy in common – attaches only to the interest of the tenant whose obligation the encumbrance secures**.
  + A creditor may sometimes avert this risk by causing the joint tenancy to be severed before the debtor dies… this strips away the right of survivorship by converting the joint tenancy into another form of ownership – typically tenancy in common.
  + But California’s courts have consistently held that the attachment of a judgment lien, without more, does not affect a severance; to do that, the creditor must sell the property under a writ of execution.
  + **It is very difficult, if not impossible, for a debtor’s home actually to be sold at an execution sale.** Where a dwelling is owned in common with a non-debtor, the difficulties of execution are compounded by two factors. First, only the debtor’s interest is subject to execution. Second, it can be sold at execution only if it is appraised value exceeds the value of any homestead exemption plus the total value of joint encumbrances on the entire property. **This places severe limitations on the situation in which a sale of property held in co-tenancy between the judgment debtor-homestead claimant and another party can be ordered.**

**[Partition]**

Partition: Any tenant in common or joint tenant has the right to sue for partition of the property. A partition judgment ends the co-tenancy and distributes its assets.

**Types of Partition:**

* In kind: First thing judge will look at is whether the partition is possible; we also want to honor the co-owner’s intentions; Judge will give 20 acres to one the other 20 acres to the other
* By Sale – statutory remedy doesn’t necessarily mean it isn’t equitable
* Equitable Remedy

In theory, partition in kind is preferred but in practice partition by sale is used more commonly. Partition in kind tends to fragment property rights, which may lead to the underutilization of land. People may find it easier to divide property than to recombine it.

**Agreements not to partition: Traditionally, such an agreement was viewed as an invalid restraint on alienation. Today most jurisdictions allow an agreement against partition if it is reasonable in duration and purpose. (R.2d Property: Donative Transfers § 4.5**

**[Cotenant Rights and Duties]**

All jurisdictions have developed default rules that establish the rights and duties of cotenants, where the parties did not have an agreement with terms that govern their duties and rights.

General Rule:

* Each tenant is entitled to his proportionate share of all rents and profits derived from the land.
* There being no ouster, cotenant who is not living in the property cannot ask for rent from the occupants
  + An ouster occurs when a cotenant in possession refuses to allow another cotenant to occupy the property. Following an ouster, the possessor is liable for the ousted tenant’s pro rata share of rental value
  + Following an ouster, the ousted tenant is effectively an adverse possessor. Ousted tenant must assert his interest within the statutory period or risk losing it entirely.
  + Ouster between cotenants must be very express: ouster would go to the hostile factor of adverse possession
* One cotenant improving, not repairing, the property cannot expect payment from the cotenant not living there. However in a partition action:
  + Cotenant who makes needed repairs will receive a credit for these costs
  + Cotenant who improves the property receives a credit equal to the increased market value produced by the improvement

Summary of Rights of Cotenants

* Equal right to possess the whole
* Equal right to lease
* Obligation to share rents and profits
* Equal obligation to pay expenses (mortgage, property taxes, repair)
* Right to partition

**When one cotenant lives in the home and the other does not:**

**Rules from *Esteves v. Esteves* (NJ 2001):**

* On a sale of commonly owned property, an owner who has paid less than his pro-rata share of operating and maintenance expenses of the property, must account to co-owner who has contributed more than his pro-rata share
* Nonpossessory tenant has no obligation to make any contribution to the latter. All tenants in common have a right to occupy all of the property and if one chooses not to do so, that does not give him the right to impose an “occupancy” charge on the other.
* Notwithstanding those general rules, when on a final accounting following a sale, the tenant who had been in sole possession of the property demands contribution toward operating and maintenance expenses from his co-owner, fairness and equity dictate that the one seeking that contribution allow a corresponding credit for the value of his sole occupancy of the premises.

**A cotenant in possession does not owe any rent to a cotenant out of possession, absent an ouster.**

* An ouster occurs when a cotenant in possession refuses to allow another cotenant to occupy the property. Following an ouster, the possessor is liable for the ousted tenant’s pro rata share of the rental value.
* Following an ouster, the ousted tenant is effectively an adverse possessor. Ousted tenant must assert his interest within the statutory period or risk losing it entirely.

**The majority rule is that a possessory cotenant that makes improvements on the property is not entitled to payment but a cotenant who makes needed repairs will receive a credit for these costs from the non-possessory tenant in a partition action; the cotenant who improves the property receives a credit equal to the increased market value produced by the improvement**

**[MARITAL PROPERTY]**

**Separate Property System (Most states use this)**

During the marriage

* The basic rule is that property is separately owned by the spouse who acquires it
* Under this system, the creditors of a particular spouse can only attach the separate property of that spouse

Divorce

* At divorce, most separate property states require equitable distribution of the property owned by each spouse
* Court divides property in a “just and fair manner,” considering spouses’ incomes, standard of living, contributions during marriage, age and health, special needs and length of marriage
* Property subject to distribution is any property acquired with the earnings of either spouse during the marriage, although a few states also include property acquired before the marriage
* Some states presume that equal distribution is appropriate absent special concerns
* Judge has broad discretion to decide how the property should be divided

Death

* Most states offer the surviving spouse a **forced share** or **elective share** of the decedent’s estate, which means that the survivor has a choice:
* Take under the decedent’s will
* Receive a defined portion of the estate, usually 1/3 or ½ share
* If the spouse dies devising all of his property to his daughter, the surviving spouse can claim his forced share of the deceased spouse’s property
* A dying spouse may intentionally avoid the forced share by giving her property away *before* she dies; In many states, the forced share applies to gifts made for this purpose

**Communal Property System (9 States including CA)**

During Marriage:

* All earnings during the marriage and all assets acquired from those earnings are owned by both spouses equally
* Marriage is a partnership: the spouse who works inside the home contributes as much as the spouse who works outside the home
* If one spouse buys a vacation home taking title in her name only, the vacation cabin is still community property owned by both spouses
* Each spouse holds an equal, undivided share in the community property, although neither can transfer that share to a third party
* Neither spouse has a right of survivorship; property acquired before marriage or after marriage by gift or inheritance remains the separate property of the individual spouse

Divorce:

* All community property is divided between the spouse; in some states each receives an equal share, in others the assets are allocated using equitable distribution factors
* A spouse will retain the stocks and bonds he/she acquired before the marriage as separate property

Death:

* The decedent may devise her half of the community property and all her separate property as she desires
* The other half of the community property belongs to the surviving spouse
* No forced share to the survivor

**Tenants in Entirety**

At common law, every conveyance to a married couple was presumed to create a tenancy in entirety. Today, only half of the states recognize this cotenancy. In states where it is still permitted, tenancy in entirety offers significant protection from creditors.

**Professional Degrees:**

* In *Guy v. Guy*, professional degree not considered marital property
* Practical problem of assigning a monetary value to the degree
* A few courts hold that graduate degrees and professional licenses are property since they represent investments in the economic partnership of the marriage and the product of the parties’ joint efforts
* A few courts (including NJ) hold that reimbursement should cover ALL financial contribution towards the former spouse’s education, including household expenses, educational costs, school travel expenses and any other contributions

**Premarital/Prenuptial agreement**

* An engaged couple may avoid the marital property system by contract
* The most commonly adopted standard is the Uniform Premarital Agreement Act
* Under the Act, a premarital agreement is enforceable against a party *unless* (1) the party did not sign it voluntarily or (2) the agreement was unconscionable when made, the party did not receive fair and reasonable disclosure from the other party, did not expressly waive the right to receive such disclosure, and could not reasonably have learned the relevant information

**Unmarried Couples and Palimony Actions**

* If a couple lives together unmarried, the surviving cohabitant is not entitled to a forced share
* In *Marvin v. Marvin* (1976), the Supreme Court of CA held that a cohabitant could have enforceable rights in the property of the other cotenant even without an express contract - an implied contract or “tacit understanding” might suffice
* In *Gormley v. Robertson* (COA WA; 2004), court held that the meretricious relationship doctrine to cohabitants should apply to same-sex couples as well:
  + Court exercised broad discretion in distributing property
* However, many courts hold that a palimony claim can only be based on an express contract between the cohabitants (like NJ, enacted into law through a senate bill)
  + Cohabitation Agreements can work to negate implied contracts and make the arrangement explicit, but it cannot include promises about sex (against public policy and the whole agreement will be void.)
* Some jurisdictions refuse to recognize palimony; many courts emphasize that agreements involving sexual relationships outside of marriage are contrary to public policy
* Other courts reject claims based upon domestic or “housewifely” services

Rights of cohabitants today under *Marvin* to get the non-titled person property:

* Enforcement of express contracts to share property
* Enforcement of implied contracts “ “
* Enforcement of express contracts to pay for services
* Quantum meruit (implied contract to pay for services)
* Unjust enrichment
* Resulting Trust: A gives B money to buy property in B’s name to deed it to A at a later time (maybe after A goes through his divorce or to get rid of his creditors first)
* Constructive Trust: Owns title by fraud

**[LEASING REAL PROPERTY]**

Today, most jurisdictions view the lease as a hybrid, governed by both property law and contracts law.

**[Discrimination in Right to Exclude]**

**The Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq.** **is the most important statute regulating the landlord’s right to exclude:**

* **This section makes it illegal to refuse to sell or rent after making a bona fide offer... to any person because of race, color, religion, sex, familiar status or national origin.**
* **Also illegal to make, print, or publish an ad that indicates any preference based on race, color, religion, sex, etc.**

**Compare Fair Housing Act with California’s Fair Employment and Housing Act:**

* **Also prohibits based on sex (including pregnancy, childbirth, or medical conditions related to them, as well as gender and perception of gender), sexual orientation, marital status, national origin, ancestry, familiar status, source of income, or disability.**
* **Also prohibits based on person’s medical condition or mental or physical disability, personal characteristics, such as a person’s physical appearance or sexual orientation not related to the responsibilities of a tenant, or a perception that a person is associated with another person who may have any of these characteristics**

**Exemptions from the Fair Housing Act:**

The anti-discrimination provisions of the FHA do not apply to two types of property:

* Rooms or units in dwellings containing living quarters occupied… by no more than four families living independently of each other, if the owner… occupies one of such living quarters as his residence
* Any single-family house sold or rented by an owner if he owns less than three houses and does not use a real estate broker or agent in the sale or rental

In *Fair Housing Council v. Roommate.com* (9th cir. 2012), the court held that a “Bedroom” was not a “dwelling” in the FHA… FHA does not apply to the sharing of living units.

* Ambiguous definition of “dwelling”
* Court looks to intent of Congress
* Constitutional implications (personal privacy inside the home)

In *Neithamer* (USDC DC, 1999), court applied *McDonnell* test to find discrimination:

* To establish a discrimination case in housing, use *McDonnell* factors to establish prima facie case:
* P is member of protected class
* P applied for and was qualified to rent the property in question
* D rejected P’s application
* Property remained available thereafter
* D then needs to provide a nondiscriminatory reason for its decision, to which P can argue that it is only a pretext for discrimination.
* In some cases, P can establish a prima facie case with statistical evidence which shows that a D’s conduct has a disparate impact on a group of people in a protected class.

**Civil Rights Act of 1866, 42 U.S.C. § 1982,** provides additional protection against racial discrimination: All citizens of the US shall have the same right, in every State and Territory, to inherit, purchase, lease, sell, hold and convey real and personal property.

**State Statutes Barring Discrimination**

* State statutes may provide greater protection than federal law
* State law may also prevent a landlord from refusing to rent to an unmarried heterosexual couple
* Courts are split on whether a landlord can refuse cohabitation based on a religious belief
* CA court held that a landlord who refused to rent to a tenant whose income was less than 3x the rent was NOT discriminating based on the tenant’s economic status

**Proving Discriminatory Intent**

Burden shifting under the Fair Housing Act:

* P has burden to establish prima facie case of discrimination
* In some cases, P can establish this with statistical evidence which shows that a defendant’s conduct has a disparate impact on a group of people in a protected class
* D has burden to establish a legitimate, non-discriminatory reason for his conduct
* P has burden to prove that the reason is a mere pretext for discrimination

**[Selecting the Estate]**

**FOUR TYPES OF NON-FREEHOLD ESTATES**

**Term of Years Tenancy**

* Fixed duration which is agreed upon in advance (six months, two years, 100 years)
  + E.g. “From June 1st 2012 to May 31st 2013,” “From June 1st, 2012 for six months”
* Once the term ends, tenant’s possessory right automatically expires, and landlord may retake possession of the premises
* Commonly used in commercial leases and often seen in residential leases

**Periodic Tenancy**

* Automatically renewed for successive periods unless the landlord or tenant terminates the tenancy by giving advance notice
* Month to month tenants must give or get one month’s advance notice to the other

**Tenancy at Will**

1. No fixed ending point
2. Continues only so long as both the landlord and the tenant desire
3. Often the tenancy rises by implication, without an express agreement
4. Today most states require advance notice to end this tenancy, usually equal to the period of time between rent payments
5. Tenancy terminates automatically if either party dies, the tenant abandons possession, or the landlord sells the property

**Tenancy at Sufferance**

* Created when a person who rightfully took possession of land continues in possession after that right ends (If you didn’t originally have the rightful possession, then you’re just a trespasser)
* Arises from occupant’s improper conduct, not from an agreement
* The wrongful possessor becomes a holdover tenant. Common law gave landlord two options:
* Treat him as a trespasser and evict him
* Renew T’s tenancy for another term

**Lease v. Licensee**

* A license is a personal privilege to use the land of another for some specific purpose; in contrast a lease transfers the exclusive right of possession to the tenant

**Three Aspects of Negotiating the Lease that merit special attention:**

* **Statute of Frauds**: a lease of real property for a term of more than one year cannot be enforced unless it is in writing. Under this standard, the key lease terms (parties, property, duration and rent) need to be in writing and signed by the party against whom enforcement is sought
  + Month-to-month periodic tenancy is exempt from this rule.
* **Standard forms:** Landlord and tenant usually negotiate the key terms of a residential lease, but the typical tenant is then asked to sign a preprinted standard lease form, without any meaningful opportunity to negotiate other terms.
  + Courts have tried to circumvent unfair terms through interpretation and other techniques. In contrast, extensive bargaining often precedes the execution of a commercial lease.
* **Rent Control:** In a few states, local ordinances may limit the amount of rent that a residential landlord can charge, especially in large cities.
* Typical rent control establishes a “Base rent” for each unit, and then allows landlords an automatic increase for all units each year
* Individual landlords make seek discretionary increases in light of special circumstances
* Rent control seems to be withering away
* Where the ordinance remains in force, it supersedes the ability of landlord and tenants to negotiate rents; in these cases, landlords want tenants out
  + Ways to get rid of tenants:
    - Be a stickler about the lease and evict the tenant upon violation: Potted plant on the porch? Having more than a certain number of people over?
    - Pay the tenant to leave; pay $50K to have the tenant voluntarily vacate (SF)
    - Rent a unit or room to a family member to utilize the exemption clause to “select roommates” and evict the tenant

**Creating the Tenancy – CA Statutes**

* Section 1943: Presumption is month-to-month
* Section 1944: If term unspecified, presumed to be for period parties select for payment of rent
* Section 1945: Lease expires, presumed to have renewed for same time not exceeding one month

**[Delivering Possession]**

Whether explicitly stated or implied, one of the covenants in the lease is that the landlord must deliver possession.

* **The American Rule:** Landlord merely covenants the exclusive right of possession to the new lessee, and promises that possession will not be withheld by himself or by one having paramount title. Does not guarantee actual delivery of premises.
  + Under this rule, the landlord has no duty to put the lessee in possession if there is a trespasser or a holdover tenant
  + CA clearly adopts the American Rule in 1862, but subsequent case law with doctrines like covenants of implied warranty point to a chance that CA would move to the English Rule with regards to residential premises
* **The English Rule:** Requires that when the lease is silent on the point, the landlord deliver actual possession of the premises at the beginning of the term. Failure to do so is a breach of the implied undertaking that the lessor will deliver possession, and landlord is liable to lessee for damages.
  + Under this rule, the landlord must get rid of the trespasser or holdover tenant and put the lessee in actual possession
* **Despite the split authority on whether the landlord must deliver physical possession, all states agree that the landlord is required to deliver the legal right to possession when the lease term begins**
  + Most states apply the American rule, but the English rule applies to any lease where the federal government is a party

**[CONDITION OF THE PREMISES]**

Many poor urban tenants living in abysmal conditions in the early 1900’s ignited the revolution of landlord-tenant law:

1. Many residential landlords insisted on the use of standard form leases and refused to bargain for any changes
   1. These forms typically placed the burden of repair on the tenant, who lacked the skills, knowledge and resources to fix defects
   2. If the form was silent on repairs, the tenant was still responsible for making repairs under the common law doctrine of permissive waste
   3. Even if the lease did assign the repair burden on the landlord, the promises in a lease were seen as an **independent covenant** at common law
      1. Even if landlord breached his promise to repair, tenant could not terminate the lease for this breach, but the tenant could sue for breach (while still living there and paying rent during the litigation)
      2. For most tenants, this theoretical remedy was meaningless
2. One response was the development of zoning ordinances and the adoption of housing codes which require that each dwelling meet certain minimum living standards: hot and cold running water, heating, plumbing facilities, safe wiring, watertight walls and roofs, and
   1. Housing codes were weakly enforced in most urban areas
   2. Tenants were reluctant to report problems, fearing a rent increase or eviction
   3. Even when tenants reported landlords, the penalty on the landlord was a small fine, often less than the cost of repairs

**Independent Covenants in Leases**

* Even if the landlord promises conditions, such as promising to keep the roof leak-free, the tenant’s rent is not conditioned upon this covenant so if the landlord fails to fix the roof, tenant cannot withhold rent
  + Tenant can only sue in court for the breach of contract
  + Tenant should keep paying the lease so the landlord does not have an excuse to evict you or state that the tenant too breached the contract
* In other words, tenants’ duty under the contract (to pay rent) continues despite landlord’s failure to perform his duties listed in the contract (the lease)
* In a dependent covenant, the rent is in exchange for the performance of the landlord’s duties

**IMPLIED COVENANT OF QUIET ENJOYMENT**

* A promise by the landlord (express or implied) that he would not wrongfully interfere with the tenant’s possession
* The promises in a lease are independent covenants, so the landlord’s breach of this implied covenant did not excuse the tenant’s discontinuance of rent
* Umbrella rule: has this implied covenant been breached through actual or constructive eviction?
* Mostly used by commercial tenants, can be used by residential tenants
  + Commercial tenants have more bargaining power, i.e. Nordstrom’s can bargain whatever it wants to when it’s coming into a mall
  + However there is a trend for revising some of the traditional rules to provide enhanced protection for the small-scale commercial tenant
  + Commercial lease are still seen as a land conveyance

**Actual eviction is an exception to this rule. If the landlord physically evicts the tenant, this breaches the covenant of quiet enjoyment and ends the lease; the duty to pay rent terminates upon eviction.**

Actual Eviction Examples:

* + - * **Priority of Interests: Determined by the recording system and order of records**
        + Bank forecloses on apartment complex and because the bank holds the **senior interest*,*** meaning the bank has a recorded bank loan, secured by a mortgage, which took place before the lease between the apartment complex and the tenant. The tenant has constructive notice of the mortgage through the county record (tenant knew or should have known), and because the tenant has a **junior interest**, it is wiped out by the senior interest and the bank can foreclose the property and evict all tenants – at this point tenant’s duty to pay rent terminates
      * **Lesser is Unknowingly a Trespasser**
        + Tenant pays a fake owner to rent an empty home, when the real owners return, tenant is evicted by someone with paramount title because tenant’s lease is invalid
        + Tenant no longer owes a duty to pay rent to anyone once evicted
      * **Lesser shows up and there’s a holdover tenant**
        + Landlord messes up and leases the place to someone before the previous tenant moves out; Landlord here violates the implied covenant of quiet enjoyment by failing to provide possession
        + Tenant leaves and no longer owes a duty to pay rent

**Constructive eviction** derives from this exception for actual eviction, stating that conduct other than actual eviction might so substantially interfere with the tenant’s possession that it was the **functional equivalent of actual eviction.** This doctrine is mostly used by commercial tenants.

**Constructive Eviction** **Requirements – ALL FIVE MUST BE MET:**

* **Substantial Interference**
* Some sort of wrongful conduct by the landlord (an affirmative act or an omission when he is under a duty to act) that interferes with the tenant’s enjoyment of the premises
  + Omissions can consist of:
    - Failure to perform an obligation in the lease
    - Failure to adequately maintain and control the common area
    - Breach of a statutory duty owed to the tenant
    - Failure to perform promised repairs; or
    - Allowance of nuisance-like behavior
  + “The interference with occupancy is of a nature that the property cannot be used for the purpose for which it was rented” (*JMB Properties Urban Co. v. Paolucci*)
    - In *Kaminsky*, the court found sufficient the patients’ lack of access to the office of a practicing physician when the leased purpose was “an office for the practice of medicine” (*Kaminsky*)
* **Permanent**
* Needs to be repeating or regularly occurring (the word “permanent” is a little misleading)
* Has it “substantially” interfered or was it only a one-time occurrence
* “Material and permanent act” is a “question of degree” in *Fidelity Mutual Life v. Kaminsky*
* **By Landlord or Landlord’s agent or someone under the landlord’s control**
  + If the acts or omissions causing the substantial interference is by truly third-parties, it is no longer the landlord’s problem, but the tenant’s problem
    - **But many courts and R.2d of Property recognize an exception to this principle if the landlord has a legal right to control the third party conduct**
      * In *JMB Properties*, court found it sufficient that the substantial interference, the loud stereo store next door, was under the landlord’s control because the landlord could have negotiated with the stereo store, another tenant of his, not to violate a certain noise level
  + In *Kaminsky*, although the abortion protesters were causing the interference, the court focused on the landlord’s failure to provide security, not on the “third parties” or the protesters who were disrupting business by congregating and trespassing
    - Dr. Kamisnky abandoned the premises not because of the trespassing protestors, but because of Fidelity’s lack of response to his complaints about the protestors
      * Here, there was an **express covenant of quiet enjoyment** in the lease, which included Fidelity providing security on Saturdays
      * The landlord would want to do this to build a legal shield: the landlord now gets to define what “quiet enjoyment” entails, and had he followed through with security, he would’ve had a defense in court
* **Landlord needs notice and a reasonable time to fix it**
* Sometimes there is implied notice because you rented the premises with the condition already there
* **Prompt abandonment by Tenant**
* Problem needs to be so substantial that the tenant can no longer live there, so the prompt abandonment idea is to show that it must have been pretty bad
* If you do not promptly leave, you may waive your right to claim constructive eviction
  + In *JMB v. Paolucci*, the defendant waived any claim of constructive eviction by remaining on the premises for an unreasonable time after the rise of the unlivable condition
    - Tenant even renewed the lease for 6 years, negating his “substantial” element in a way
* However, sometimes tenants cannot just move right away; must tolerate defects because they can’t afford the move, so courts allow a reasonable time to leave
* **Problematic Element:**
  + Procedurally, tenant needs to give landlord “reasonable time to fix” the problem
  + If tenant too promptly abandons, the tenant may have had the requirement of “permanent” or “substantial” wrong; maybe the landlord was going to fix it in a reasonable time

**Procedural Steps to establish Constructive Eviction**

In general, a tenant seeking to rely on constructive eviction must:

* Notify the landlord about the problem
* Give the landlord a reasonable period to fix the problem
* Vacate the premises “promptly” and “within a reasonable time”

**The tenant must be current on the rent until time of abandonment.**

* Withholding rent is not a remedy for constructive eviction; it is a remedy for breach of implied warranty of habitability.
* Tenants wants the landlord, not himself, to be the reason for the eviction.
  + If Tenant defaults on the land prior to abandonment, then the landlord can state he is evicting the tenant because of a default on rent
* However some states (and R.2d P) allow the tenant to remain in possession and recover damages on a constructive eviction theory

**IMPLIED WARRANTY OF HABITABILITY**

This doctrine was the most significant accomplishment of the landlord tenant revolution in protecting residential tenants from defective housing conditions.

* Recognized today in almost every state either through case law or statutes
  + Statutes are based on the Uniform Residential Landlord and Tenant Act §2.104, which requires the landlord to do whatever is necessary to put and keep the premises in a fit and habitable condition and imposes specific duties as well.
* Most courts today would hold that a waiver of the warranty is invalid as against public policy
  + If the lease said things like “I agree to let my LL walk into my apartment any time” or “I agree not to sue my LL for breaches in the future,” these clauses are void
* Most states only recognize this for residential leases, but in some states, like Utah, this implied warranty does apply to commercial leases as long as the breach has a “significant inducement to the consummation of the lease or to the purpose of which the lessee entered the lease”

**Common Law v. Modern Trends:**

* Leasing of real property was viewed primarily as a conveyance of land for a term, where the typical lease was for agricultural purposes
  + Today the law of property is applied to landlord/tenant transactions
* Under the rule of “**caveat emptor**,” it was the tenant’s duty to inspect the premises before entering a lease to be sure the premises are fit for the purposes
  + Today most tenants lack the necessary knowledge to inspect the property effectively
  + Caveat Emptor (let the buyer beware) assumes an equal bargaining position between landlord and tenant; however, tenants frequently have no choice but to rely on the landlord (just as consumers rely on the manufacturer)
  + Today’s tenants are in a poor position to bargain effectively for express warranties and covenants
* Landlord had no duty to make repairs; Under the doctrine of waste, it was the tenant’s implied duty to make most repairs
  + Most tenants today generally lack the necessary skills or means to make repairs

The implied warranty of habitability has been adopted to protect the tenant as the party in the less advantageous bargaining position, just as in consumer law, implied warranties are designed to protect ordinary consumers who do not have the knowledge, capacity or opportunity to ensure that goods which they are buying are in a safe condition. This doctrine reflects the legislative intent to ensure decent housing.

* In *Wade v. Jobe* (1991), Supreme Court of UT adopts Implied Warranty of Habitability for a plaintiff’s house that was **red tagged** (rather drastic property report that the premises were a health and safety hazard and unfit for human occupancy)
  + “Consistent with prevailing trends in consumer law, products liability law, and the law of torts, we reject the rule of caveat emptor and recognize the common law implied warranty of habitability in residential lease”

1. Extends law to their state based on current trends of other states and policy:

* Tenants have less bargaining power
* Tenants do not have the necessary skills to effectively inspect or make repairs
* **Public Policy Arguments*, supported by below*** (Judges can’t just make policy up, needs some evidence)
* Health and Safety concerns for the tenants
* Housing codes are a legislative recognition of the importance of safety standards

**Application of the Implied Warranty of Habitability**

* Landlord is required to maintain “bare living requirements” and keep the premises fit for human occupation
  + Failure to supply heat or hot water, for example, breaches the warranty
* Landlord is not required to keep the premises in perfect condition at all times
  + Evidence of minor deficiencies such as minor water leaks, wall cracks or a need for paint does not suffice to show breach
* Relation to Housing Codes and Regulations – **Use** **HEALTH & SAFETY as the standard**
  + Landlord can still have minor housing code violations or other defects without breaching
  + Substantial compliance with building and housing code standards will generally serve as evidence of fulfillment of a landlord’s duty to provide habitable premises
  + Evidence of violations involving health or safety, by contrast, will often sustain a tenant’s claim for relief
  + A code violation is not necessary to establish a breach so long as the claimed defect has an impact on the health or safety of the tenant

**Procedural Requirements to use Implied Warranty of Habitability**

In order to use this doctrine, a tenant must:

1. Notify the landlord about the defects
2. Allow a reasonable time for the landlord to make repairs
3. Sue for breach of contract (independent clause)

Tenant NOT required to vacate the premises

* Compare with Constructive eviction; this is the better solution for poor urban tenants

**Remedies & Damages under Implied Warranty of Habitability**

1. Under the prevailing contemporary view, the residential lease is a contractual transaction
   1. **Dependent Covenants:** Tenant’s obligation to pay rent is conditioned upon the landlord fulfilling his part of the bargain
2. **Available Remedies for Breach:**
   1. Tenant can withhold rent, depriving the landlord of the rent during the default, thereby motivating the landlord to repair the premises
      1. **Landlord can’t just evict the tenant for nonpayment because breach of the implied warranty is a defense to an eviction action**
   2. Tenant can withhold rent and use the funds to repair the defects
   3. Tenant can continue to pay full rent during the period of uninhabitability then bring an action to establish the breach and receive a reimbursement for excess rents paid
   4. Tenant can occupy or vacate the damages than sue for damages (see how to measure damages below)
3. **Available Damages:**
   1. Special damages may be recovered when, as a foreseeable result of the landlord’s breach, the tenant suffers personal injury, property damage, relocation expenses, or other similar injuries
   2. General damages are recoverable in the form of rent abatement or reimbursement to the tenant. There are different ways of measuring the amount of rent abatement:
      1. Fair rental value of the premises as warranted less their fair rental value in the unrepaired condition
      2. Contract rent less the fair rental value of the premises in the unrepaired condition
      3. However, methodological difficulties in both of these measures, combined with the practical difficulties of producing evidence on fair market value, limit the efficacy of these measures dealing with residential leases
   3. Percentage Diminution approach places more discretion with the trier of fact
      1. Under this approach, the tenant’s recovery is the percentage by which the tenant’s use and enjoyment of the premises has been reduced by the uninhabitable condition
      2. Trial court must carefully review the materiality of the particular defects and the length of time such defects have existed
      3. Practical approach as it will generally obviate the need for expert testimony (which is also subjective/imprecise) and reduce the cost and complexity of enforcing the warranty of habitability (*Wade v. Jobe*, UT, 1991)

**[LANDLORD TENANT LAW]**

**[TRANSFERRING THE TENANT’S INTEREST]**

As a general rule, the tenant and the landlord are both entitled to transfer their interests to third parties. This promotes the freedom of alienation.

* **Privity of Contract** – They both have rights and duties under contract law
* **Privity of Estate** – relationship arising under property law with duties and rights arising simply from the possession, regardless of contract law

**Common Law distinctions between Sublease v. Assignment from *Ernst v. Conditt* (TN 1964):**

**Assignment of the lease:**

* Conveys the whole term, leaving no interest or reversionary interest in the grantor or assignor
* T2 is directly and primarily liable to Landlord for payment of rent.
* T1 may, for his own protection, have the implied right to re-enter the perform the lease in the event of a default on the part of T2
* Privity of estate would exist between T2 and Landlord
* Can still have words such as “sublet” and sublease”

**Sublease**:

* T1 grants an interest in the leased premises less than his own, or reserves to himself a reversionary interest in the term
* T1 is directly and primarily liable to Landlord
* No privity of estate exists between Landlord and T2, and T2 could not be liable to Landlord on the covenant to pay rent and the expense of the removal of improvements, **unless** under the third-party beneficiary rule of contract law
  + **Third-party beneficiary:** The principle of contract law that states that if A makes a promise in a contract with B in order to benefit C, C may enforce the promise against A.

**Modern Rule:**

Look to the intent of the parties in construing deeds and other instruments

* The fact that Rogers expressly agreed to remain liable to complainants for the performance of the lease does not create a reversion nor a right to re-enter in Rogers, either express or implied
* Obligations and liabilities of a lessee to a lessor, under the express covenants of a lease, are not in anywise affected by an assignment or subletting to a third party, in the absence of an express or implied agreement which amounts to a waiver
* After an assignment or sublease, the original tenant remains liable for full performance in the lease because privity of contract still exists between original tenant and landlord

1. The landlord could expressly release the tenant from future liability in a **novation**

**Objective Test:**

* Majority approach
* If the tenant transfers his right for all of the remaining lease term it is an assignment
* If the tenant does not transfer all of his right of possession, it is a sublease
* In most jurisdictions, a transfer that reserves a contingent right of re-entry in the default of a provision of the lease is still considered to be an assignment

**Subjective Test:**

* Minority approach
* Look to the intention of the parties
* Under this approach, it would be possible to have a sublease for the entire remaining term of the original lease

**Assignment: A triangular relationship: By an assignment of a lease, the privity of estate between the lessor and lessee is terminated but privity of contract still remains.** Privity of Contract continues between LL and tenant; it also arises between tenant 1 and tenant 2. But privity of estate now exists ONLY between LL and T2. T1 no longer has a property right in the leased premises. LL and T2 now have mutual rights and duties as a matter of property law, even though there is no contract between them.

**Mutual Rights and Duties that arise from privity of estate:**

* Perform all covenants in the original lease, which “run with the land”
* However, a covenant that has nothing to do with the use or occupancy of the premises does not bind either party. E.g. a clause about who pays attorneys fees if litigation occurs

**Sublease: Two separate relationships: Neither the privity of contract nor lease is affected by a sublease.** A sublease essentially involves two separate landlord-tenant relationships. T1 subleases part of her interest in the leased premises to T2. T1 retains the right to possession for the remaining term of the lease (if any under minority view).

In this situation, LL and T1 still have privity of contract and privity of estate, which continues their mutual rights and duties. But a new landlord-tenant relationship arises between T1 and T2; accordingly, T1 and T2 also have privity of contract and privity of estate, which creates rights and duties between those two. There is no legal relationship between LL and T2.

**Limits on Tenants’ right to transfer:**

* **If the lease is silent, it is strictly construed against the landlord that tenant may freely assign or sublet.**
* **Lease may simply prohibit any transfer or permit a transfer only if the landlord consents**
  + However, if the L accepts the check from T2, he waives his right to limit the transfer.
* **Sole Discretion Clause**: The lease might provide that L may refuse consent for any reason whatsoever in his “sole discretion”
* **Reasonableness Clause:** The lease might provide that L may refuse consent only on a “commercially reasonable” basis.

1. T2 has bad credit score

* **Silent Consent Clause**: The lease might require L’s consent, but contain no standard to guide L’s decision.

In *Kendall v. Ernest Pestana, Inc.* (CA 1985), court held that where a commercial lease provides for assignment only with the prior consent of the lessor, such consent may be withheld only where the lessor has a commercially reasonable objection to the assignee or the proposed use.

* **The *Kendall* standard is still a minority rule but it seems to be the modern trend for commercial leases.**
* **In 1989, the state legislature “codified” Kendall by adopting Cal. Civ. Code §1995.260**
* If a commercial lease requires the landlord’s consent for transfer but provides no standard for giving or withholding consent, the restriction on transfer shall be construed to include an implied standard that the landlord’s consent may not be unreasonably withheld
* Tenant has burden of proof on unreasonableness, a question of fact

**Iowa Supreme Court found that landlord’s refusal was commercially reasonable when:**

* Sublessee would compete with another tenant, an existing grocery store
* Sublessee planned to install kitchen equipment which would require alterations in the building structure
* Food odors could travel from sublesse’s store through the ventilation system to spaces occupied by other tenants; and
* Deliveries to the sublessee could interfere with delivers to the landlord’s own business in the same building

**Rule in Dumpor’s Case (1603): Consent by a LL to one assignment has the effect of waiving any right to prohibit subsequent assignments – generally obsolete rule**

* It is generally obsolete, but still want to draft the lease to get around this rule

**[ENDING THE TENANCY]**

**Four ways:**

* **Fulfillment of the Lease:** In most cases, the term ends and T simply vacates and L retakes possession
* **Surrender:** T and L could mutually agree to terminate the lease early
* **Abandonment:** If T vacates the premises before the lease term expires and stops paying rent. This can be an implied or expressed offer to surrender
  + R.2d Property: Abandonment occurs when the tenant vacates the leased property without justification and without any present intention of returning and he defaults in the payment of the rent.
    - If tenant vacates the premises with justification – for example due to constructive eviction – no abandonment occurs
  + **Landlord’s Remedies under abandonment:**
    - **Sue for all rent**: L could keep the premises vacant until the lease term expired, then sue T for all accrued rent
    - **Terminate the lease**:L could treat T’s abandonment as an implied offer of surrender and terminate the lease
    - **Mitigate damages and then sue for rent:** L could mitigate his damages by re-letting the premises to another tenant, retaining that rent, and then suing T for balance
* **Eviction**: T stops paying rent and remains on the premises, where L retakes possession
  + Ways to Evict:
    - **Self Help:**
      * Traditionally allowed to physically enter the premises and cause T to leave
      * May only use a reasonable amount of force (this includes changing locks)
        + Landlord’s means of entry must be peaceable (can’t beat someone up)
    - **Judicial Process**
      * In most courts today, a landlord must sue the tenant and secure a judgment ordering eviction (*Berg v. Wiley*)
      * Landlord can enforce the judgment through police
  + In general, the landlord may terminate a periodic tenancy for any reason, other than discrimination.
    - Statutory presumption imposes a burden upon the landlord to produce evidence of legitimate non-retaliatory reasons to evict a tenant. The tenant may then be afforded a full and fair opportunity to demonstrate pretext. The burden of proof on the affirmative defense of retaliatory termination of the lease remains upon the tenant. If the landlord does not meet the burden producing evidence of a non-retaliatory reason, the statutory presumption would compel a finding of retaliatory lease termination.
  + Only a few states require a good cause to evict a tenant from an apartment, house, or similar dwelling, but require good cause when the owner of a mobile home park seeks to evict a tenant living in a mobile home
  + Most states protect tenants from retaliatory eviction:
    - States disagree on which tenant conduct is covered, whether the doctrine applies to the refusal to renew a term of years tenancy, whether it applies to commercial tenancies and whether the doctrine also covers increases in rent/and or decreases in services

**In *Sommer v. Kridel* (NJ 1977), court held that: (1) a landlord has the obligation to make a reasonable effort to mitigate damages in this type of situation, and (2) silence by the landlord after an offer to surrender may be construed as an acceptance and terminate the lease.**

**Application of the contract rule requiring mitigation of damages to a residential lease may be justified as a matter of basic fairness. (Applying contract law here again, the movement away from property law)**

**Duty to mitigate consists of making reasonable efforts to re-let the apartment. In other words, L must treat the apartment as if it was one of his vacant premises.**

* Ordinarily, we would require the tenant to bear the cost of any reasonable expenses incurred by a landlord in attempting to re-let the premises, but no such expenses were incurred in this case

**As part of his cause of action, L shall be required to carry the burden of proving that he used reasonable diligence in attempting to re-let the premises. In assessing whether the L has satisfactorily carried the burden, the court shall consider, among other factors:**

* Whether the L offered or showed the apartment to any prospective tenants, advertised it, put a sign in the window, employed a realtor
* Tenant may attempt to rebut such evidence by showing that suitable tenants were rejected
* L not required to accept less than fair market value or substantially alter his obligations as established in the pre-exiting lease

The possibility that a L may lose the opportunity to rent another empty apartment because he must first rent the vacated apartment does not stand because there is “no reason to believe that absent this vacancy the landlord could have succeeded in renting a different apartment to this individual”

* Each apartment may have unique qualities which make it attractive to certain individuals
* Here, there was a specific request to rent the apartment vacated by the defendant

**Today, almost all states follow the *Sommer* approach: after abandonment, the landlord must either terminate the lease or mitigate damages. Doctrine applies both to residential and commercial leases.**

* **However under the Restatement, the traditional no-mitigation rule continues, reasoning that it discourages abandonment**

**[Security Deposits]**

Security Deposit is anything you give to the LL to associate it with the lease

* Default in the rent
* Repairing damages EXCLUSIVE of ordinary wear and tear
* Clean to return it to the same condition it was when you started to rent it

LL must notify you what changes they would have to make, to give you time to clean up the damages yourselves (dirty oven, hole in walls).

**[PRIVATE LAND USE PLANNING]**

Privately planned communities are regulated by land use restrictions known as covenants, conditions and restrictions (CC&Rs).

Common law principles evolved to deal with the conflict between a private owner’s plan and the policy of productive use of land:

* **Easements**: Land cannot be used unless the owner has adequate access to it, which may require an easement across land owned by another. This is a right to use someone else’s property.
* **Land Use Restrictions**: An owner might agree to restrict the use of his land by creating a real covenant or an equitable servitude
  + The most common public restriction are zoning laws
    - E.g. Can’t just turn a single-family home into a commercial building
* **Nuisance Law**: resolves the comparatively rare situation where one owner’s sue seriously interferes with another owner’s use

The Restatement merged these doctrines into “**the servitude**.” It provides a streamlined set of principles for creating, enforcing, modifying or terminating a servitude, recognizing servitudes as useful devices and rejecting the historic approach that emphasized the free use of land, sometimes to the frustration of parties’ intents.

**[EASEMENTS]**

An easement is a non-possessory right to use the land of another person. An easement is a valuable, real, and independent interest in land, and a dominant owner may sell his interest to the servient owner (even though servient owner actually owns the land on which the easement lies). A servient owner may also adversely possess an easement on his land (even though you can’t adversely possess your own land, you can adversely possess an easement on your land since the easement is not your interest.)

**[Easement Terminology]**

Property:

* **Dominant Tenement/Dominant Land** is the land benefited by the easement.
  + A landlocked lot is benefitted by the easement since the easement will attach to the land even at sale, increasing the value of the land by not making it landlocked
* **Servient Tenement/Servient Land** is the land burdened by the easement.

Parties:

1. **Dominant Owner**: Easement holder
2. **Servient Owner**: Owner of the servient land

Appurtenant v. In Gross:

**Appurtenant Easement** benefits the holder in her use of a specific parcel of dominant land. Most easements are appurtenant and the transfer of the dominant land automatically transfers the benefit of the easement to the grantee

* **Involves two or more pieces of property**

**Easement in Gross** is not connected to the holder’s use of any particular land, but personal to the holder

* **Involves one piece of property**
  + E.g. the Hunting Club in *Millbrook* had an easement in gross to hunt foxes on the land
  + In some states, an easement in gross is transferable only if it serves a commercial purpose; however the modern trend is to allow the transfer of an easement in gross *unless the parties had a contrary intent*
* Exclusive Easement in Gross
  + If the right is exclusive to the easement in gross-holder, he can divide utilization of the rights granted
* E.g. I tell Adam he can come onto my property and pick all of my apples, he has the exclusive right, he can hire help to pick all the apples
* E.g. Fox Hunt club in Millbrook had exclusive right to hunt fox on the land and bring others to hunt
* Non-Exclusive Easement in Gross
* The right is not exclusive to the easement in gross-holder, the servient owner (who granted the right to the holder), may grant the rights to others; the in gross holder may not share his right.

Affirmative v. Negative:

* **Affirmative Easement** allows the holder to perform an act on the servient land, such as to cross it. Most easements are affirmative.
* **Negative Easement** allows the holder to prevent the servient owner from performing an act on the servient land

**[Creating the Different Types of Easements]**

**[Express Easement]**

The most common type of easement is the express easement. This rises only with the agreement of the owner whose land is burdened. This is the only type of easement with the owner’s agreement, where the servient owner voluntarily creates the easement through grant or reservation.

* **Grant**: Servient owner grants an easement to the dominant owner
* A owns Lots 1 2 and 3, adjacent to each other
* A sells B the title to Lot 2, and also grants him the pathway to get to Lot 2 from Lot 1
* **Reservation**: Dominant owner grants the servient land to the servient owner, but retains or reserves an easement over that property.
* Traditionally, an express easement by reservation could only be reserved in favor of the dominant owner. Today, most sates allow this easement to be reserved in favor of a third party

The easement remains attached to the land even when it is conveyed to a new owner, just like any other encumbrance, unless the grantee is a bona fide purchaser. The removal of the need for an easement created by express grant does not affect the right to the easement.

**There is a Requirement that the express easement is recorded in a writing sufficient to satisfy the Statute of Frauds**

* **A carefully drafted easement will include:**
* **Identity of parties, who may actually use the easement? Only family members? All people? Horses?**
* **Descriptions of the servient land and the dominant land**
* **Term of the Easement, term of years or permanent?**
* **Description of the exact location of the easement on the servient land; and**
* **Statement of the purposes for which the easement may be used**
  + E.g. Driveway only used to reach the road, cannot park on it, etc, and specify what hours of the day they may use it

**Litigation will usually center around what the terms meant to “maintain the easement” if you are the easement holder**

**Express Easement v. License v. Profit**

A license is an informal permission that allows the holder to use the land of another for particular purpose and may be revoked at any time.

A profit is a right to enter the land of another to remove minerals, gravel, timer, game, or other natural resources. Today most courts apply the same rules to both profits and easements; Restatement describes profits as a specialized form of easement.

* E.g. you may come onto my property to pick apples off my tree

In *Millbrook Hunt, Inc. v. Smith* (1998), court held that the dominant owner had a right to hunt fox on the land when a grant expressly indicated that the dominant owner reserved an absolute right to fox hunt for a term of 75 years.

* Easement and licenses in real property are distinct in principle
* Easement implies an interest in land ordinarily created by a grant, and is permanent in nature
* License is not an interest in land but a mere personal privilege to commit some act on the land of another without possessing any estate therein

**[Implied Easement by Prior Existing Use]**

* **Always think about the INTENT of the parties**
* **Requirements**:
  + **Severance of title to land held in common ownership**
    - Requirement of a common owner because if the common owner had used the easement previously, wouldn’t the owner have intended the easement to continue and had just forgotten to include it into the severance
  + **An existing, apparent and continuous use of one parcel for the benefit of another, at the time of severance**
    - Existing and apparent: broad concept, the easement may not be visible from just looking at the residence
    - Continuous: intended use of the easement is permanent
  + **Reasonable necessity for that use**
    - Must be beneficial or convenient for the use of the dominant tenement, but need not be essential
    - This element is satisfied if the alternative access cannot be obtained without a substantial expenditure of money or labor
    - In the restatement, the third element is “reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use”
    - Some jurisdictions may require a **stricter necessity** than reasonable when it is an easement by reservation

In *Van Sandt*, the common owner sold off the servient parcel of the land, reserving the right to use the easement to herself. Court ruled that the buyer knew the house was equipped with modern plumbing, and the plumbing had to drain into a sewer. “It was an apparent easement as that term is used in the books.” **Court rules this as NOTICE, but the express easement would have terminated if buyer of servient estate did not receive proper notice.**

* **An easement created by implication arises as an inference of the intentions of the parties to a conveyance of land.**
* **The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance** (the intent of the seller was obviously to reserve the easement for her use)
* **If land may be used without an easement, but cannot be used without disproportionate effort and expense, an easement may still be implied in favor of either the grantor or grantee on the basis of necessity alone**

**In *Van Sandt,* Bailey was the common owner and at the time she sold the property, there was an existing, apparent and continuous use of the sewer**

* **Needs to be apparent to the servient owner at the time of severance**
* **“Notice” 🡪 here, it was that the servient owner knew the house was equipped with “modern planning” and the plumbing had to drain into a sewer**
* **INTENT: we look at the common owner’s intent at the time of severance**
* No facts to show whether Bailey had an actual intent to have the sewer line left in place
* **So we ask what they would’ve done had they thought about the issue, to imply intent**
* **Had she thought of the issue, Bailey would’ve expressly reserved the easement**

**When we talk about common owner, we are thinking of prior to and at the time of severance**

Quasi-Easement: looks like an easement during the time of common ownership

* When one utilizes part of his land for benefit of another part, it is referred to a s a quasi easement and the part of the land which is benefited is the quasi dominant tenement and the part which is utilized is the quasi servient tenement
* The quasi easement is not a legal relation but the expression will describe the particular mode in which the owner utilizes one part of the land for another
* If the owner of the land conveys the quasi dominant tenement, an easement corresponding to such quasi easement is ordinarily regarded vested in the grantee of the land, provided that the quasi easement is of an apparent, continuous and necessary character
* **Upon the transfer of the quasi-servient tenement there is an implied reservation of an easement in favor of the conveyor**

**\*\*Immediately rule out easement by necessity and implied when you see a fact pattern without a common owner.**

**Three types of Notice:**

* **Actual**
* **Constructive –** if it is recorded, buyer is “charged” with what is on the record – “should’ve known” – the dominant tenement should always record express easements so future owners of the servient estate is on notice
* **Inquiry**

**The modern trend is that a bona fide purchaser should be charged with notice of underground utilities – buyer has duty to investigate whether sewage system enters the property.**

Factors Determining Implication of Easement or Profits (Restatement)

* Whether claimant is the conveyor or conveyee
* Terms of conveyance
* Consideration given for conveyance
* Whether claim is made against a simultaneous conveyee
* Extent of necessity of the easement or the profit tot eh claimant
* Whether reciprocal benefits result to the conveyor and conveyee
* Manner in which the land was used prior to conveyance
* Extent to which the manner of prior use was or might have been known to parties

Comment j. To draw such an inference, the prior use must have been known to the parties at the time of the conveyance, or, at least, have been within the possibility of their knowledge at the time.

**[Easement by Necessity]**

In common law, when, as a result of the division and sale of commonly owned land, one parcel is left entirely without access to a public road, the grantee of the landlocked parcel is entitled to a way of necessity over the remaining lands of the common grantor or his successors in title. Easement is said to exist so long as the necessity exists.

* **Landlocked –** no legal right to access the land from a public road
* **Balance** – public’s interest in access to landlocked property against uncompensated landowner

In general, the owner of the servient land is entitled to select the route for an easement by necessity, so long as it is reasonable.

**Requirements**:

1. Severance of title to land held in common ownership; and
2. Strict necessity for the easement at the time of severance (Division results in creating a landlocked parcel)

* A minority of courts require only reasonable necessity: the easement must be beneficial or convenient for the use of the dominant parcel, not absolutely necessary
* Berge court adopted a middle position: “the lack of reasonably practical access”

**Restatement**: Requires only reasonable necessity. A conveyance that would otherwise deprive the land of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights unless the facts shows the parties had a contrary intent.

* What is necessary depends on the nature and location of the property, and may change over time. Access by water, while adequate at one time, is generally not sufficient to make reasonably effective use of property today. Land access will almost always be necessary, even though water access is available.

**Justifications:**

1. Implied intent of the parties
2. Public policy favoring the productive use of land

**The law is clear that an easement by necessity will not arise if this would contradict the actual intent of the parties.**

In *Berge v. State of Vermont* (VT 2006), Court ruled that without use of the road across the state land, plaintiff would have no reasonably consistent, practical means of reaching his property; rather, he would be subject to the constant vicissitudes of motorboats, weather, and water conditions.

* “Since the easement is based on social considerations encouraging land use, its scope ought to be sufficient for the dominant owner to have the reasonable enjoyment of his land for all lawful purposes”
* Our case law has long made practical access to a public road the linchpin of the easement-by-necessity doctrine

**Prescriptive Easement**

A prescriptive easement arises through the adverse use of another’s person’s land. There is a similarity between the elements that must be met for prescriptive easement and those necessary for adverse possession.

* Difference is that prescriptive easement makes some easement-like limited use of the disputed land, without occupying or possessing the disputed land

**Requirements**:

* Adverse and Hostile (Adverse use of another’s land)
  + “Adverse” does not mean animosity or personal hostility, the un-communicated mental state of the person is irrelevant
  + Adverse means the use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one
  + Adverse use is a wrongful use, made without the express or implied permission of the owner of the land. If the owner does not object, most states presume adversity
  + This creates a cause of action by the owner against the person claiming the prescriptive easement; no prescriptive easement may be created unless the person claiming the easement proves that the owner could have prevented the wrongful use by resorting to law
* Statutory Period (In most states, the period is the same as the period required for adverse possession)
* Tacking may be used to satisfy the prescriptive period if there is privity between the users
* Open and Notorious (Adverse use was actually known to the owner of the land, or so open and notorious and visible that a reasonable owner of the land would have noticed the use)
* Continuous (Reasonably identified starting and ending point, line, and width of the land that was adversely used, and the manner or purpose for which the land was adversely used)
* Actual
* Only affirmative easements can be acquired by prescription
* Exclusive Use (only some states require, since with an easement it is very normal for the owner to use the land as well)

**[Easement by Estoppel or Irrevocable License ]**

* **Does not require a writing**

**Requirements**:

* Landowner allows another to use his land, thus creating a license
* The licensee relies in good faith on the license, usually by making physical improvements or by incurring significant costs

**Policy Justification:** It is reasonable and economical for the law to reward a diligent user of the land with an easement by prescription at the expense of the absentee owner

The licensor knows or reasonably should expect such reliance will occur

**Public Trust Doctrine**

The PTD provides that navigable waters and certain related lands belong to the government as a trustee for the benefit of the public. If the government sells such property to a private owner, his title is subject to the public’s right to use the land for fishing, navigation, swimming, and similar activities.

In *Kienzle v. Myers*, court held that property owner’s reasonable reliance on an adjacent owner’s permission for use ripened into an easement by estoppel when previous owners agreed to share a 207-foot trench with the connector line went through another property.

* Restatement:
* If injustice can be avoided only by establishment of a servitude, the owner of land is estopped to deny the existence of servitude burdening the land when the owner permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief
* The rule covers the situation where a land owner or occupier gives permission to another to use the land, but does not characterize the permission as an easement or profit and does not expressly state the duration of the permission
* A servitude is established if the permission is given under such circumstances that the person who gives it should reasonably foresee that the recipient will change position on the basis of that permission
* The rule simply states that if an owner misleads or causes another in any way to change his or her position to that party’s prejudice, the owner is estopped from denying the existence of an easement
* “Prejudice” is used in this context as synonymous to “detriment”

Most courts call easement by estoppel an irrevocable license, but some courts do not recognize either doctrine. Most authorities agree that there is no functional difference between the both.

**[Interpreting Easements]**

Conflicts may arise between the easement holder and owner of the servient land about the manner, frequency and intensity of the use of an easement. When the servient owner overburdens or signfincanlty burdens the easement, the easement terminates.

In *Marcus Cable Associates v. Krohn*, the court held that plaintiffs may no longer use the easement because television transmission is not a more technologically advanced method of “delivering electricity,” which is what the language of the original easement allowed.

* Common law recognizes that certain easements may be assigned to a third party, as long as the third party’s use does not exceed the rights expressly conveyed to the original easement holder
* The contracting parties’ intentions, as expressed in the grant, determine the scope of conveyed interest
* Grant’s terms should be given their plain, ordinary and generally accepted meaning – thus if a particular purpose is not provided for in the grant, a use pursuing that purpose is not allowed
* Common law recognizes some flexibility: the manner, frequency and intensity of an easement’s use may change over time to accommodate technological development, **but such changes must fall within the purposes for which the easement was created, as determined by the grant’s terms**
* An express easement encompasses only those technological developments that further the particular purpose for which the easement was granted
* Court may not adopt an easement interpretation based on public policy unless that interpretation is supported by the grant’s terms
* Court may also not grant a use that does not serve the easement’s express purpose, whether or not it results in any noticeable burden to the servient estate

**The scope of an easement is measured by the parties’ intent as expressed in the words used, broadened by changes in the manner, frequency and intensity of the intended use that are due to technological advances and do not unreasonably burden the servient estate.**

**You cannot use easements to benefit non-dominant land. This would be a misuse of the easement – majority terminates in this situation and the minority enjoins the misuse.**

**E.g. A has an easement across B’s lot to get to his land. A buys other land surrounding the area and starts using the easement to get to the non-dominant additional land. This is where B can take action to terminate or enjoin.**

**Restatement:**

* Manner, frequency and intensity of the use may change over time to accommodate the normal development of the dominant estate
* The servient owner may relocate an easement as long as this does not significantly lessen the utility of the easement, increase the burdens not eh easement holder, or frustrate the purpose of the easement

**Terminating Easements**

An express easement may terminate on its own terms; “to be used for 50 years.” Easements may also be terminated by:

* Abandonment – see case below
* Condemnation of the servient land, where the easement holder is entitled to just compensation
* Estoppel – if the servient owner substantially changes his position in reasonable reliance on the holder’s statement that the easement will not be used in the future
* Merger – if one person obtains title to both the easement and the servient land, then the easement terminates; but it must be the same interest! If A owns a fee simple in black acre and gains a life estate in white acre, the two parcels have not merged
* Misuse – if the holder seriously misuses the easement, it may be ended through forfeiture
* Release – the easement holder may release the easement to the servient owner by executing and delivering writing that complies with the statute of frauds; easement holder may receive money for releasing the interest

In *Preseault v. United States,* court held that the fee simple title to all three parcels in dispute remained with their original owners, subject only to the burden of the easements in favor of the railroad – which did not encompass the government turning the railroad line into a hiking trail.

* The usual way an easement ends is by abandonment, which causes the easement to be extinguished by operation of law automatically upon abandonment
* Restatement: upon abandonment, the burdened estate is relieved of the burden of the easement
* In order to establish **abandonment** there must be in addition to nonuse, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence

**Land Use Restrictions**

These restrictions are usually created through a simple process authorized by statute. A developer can record a declaration containing covenants, conditions and restrictions (CC&Rs) against all the lots before any of them are sold. If a buyer later tries to violate the restriction, the other owners can enforce the restrictions against him.

Retroactive application not acceptable: If Lot 1 was sold without restrictions and Lots 2-20 were sold with restriction, then 1 goes to paint the house pink, the owners of 2-20 cannot sue for enjoinment. Lot 1 was free of restrictions when bought, so no restrictions today.

A **real covenant** allows the benefits and burdens of a restriction to “run with the land” to successive owners. In general, benefits run more easily than burdens.

* Promise concerning the use of land that benefits and burdens both the original parties to the promise and their successors
* Traditional remedy for breach is money damages
* Two sides: burden and benefit; duty to perform the promise is called the burden; the right to enforce the promise is the benefit
* Six elements must be proven for the burden of the promise to bind the promisor’s successors; only four elements required for the benefit to run to the promisee’s successors

1. Compliance with SOF
2. Original parties must intend to bind successors; needed intent is usually found in the express language of the document, but modern courts also look to the circumstances surrounding the situation to deduce intent
3. Covenant must “touch and concern” land, relating to the enjoyment, occupation or use of the property

* Height restriction is one of the classic examples that meets this requirement because it restricts the D’s ability to perform a physical action on their land
* **Strict Test**: must physically restrict use of land (burden) or must physically increase or enhances the land (benefit)
* **Bigelow Test (Relaxed Test)**: Relaxed Test (Bigelow test): reduces use, value or utility of the land (burden) or increases the use, value or utility of the land (benefit)
* In general, uniformity increases the value of the community
* “Utilize property only for commercial purposes” meets this standard because it limits how the land may be used
* “Cannot sue previous owner to recover environmental cleanup” does not meet this standard because it is a purely monetary obligation

1. Successor must have notice of the covenant through actual, record or inquiry notice

* Search chain of title
  + **Extended Search:** After F finds Developer as owner of a larger parcel and sees that the original land is now divided into 20 subdivisions, F should search out the other 19 deeds for the restrictions.
* Recorder’s office: Go up the Grantee Index until you find your grantor’s name
* Did Developer get good title?
* Did Developer do anything to encumber #17?

1. Horizontal privity between the original parties to the promise

* Mutual interests: in some states, horizontal privity requires that the original parties have mutual interests in the affected land; e.g. landlord-tenant, cotenants, owners of dominant and servient lands
* Successive Interests: in other states, there must be a grantor-grantee relationship
* **No requirement: the modern trend is to abandon this requirement altogether**

1. Vertical privity between original party and his successor

* Must receive the original party’s entire estate or ownership interest

In *Deep Water Brewing v. Fairway Resources*, the court ruled that a restaurant owner was entitled to enforce the 16ft height restriction covenant as one that runs with the land when it granted Key Development a right-of-way (easement) to build its development.

* While a party must consensually undertake assignment or delegation, the law of running covenants imposes a duty or confers a benefit upon remote parties, not because they consensually agree, but because the covenant bore a certain relationship to the land and because they stepped into a certain relationship with that land.
* A covenant touches and concerns the land if it is connected with the use and enjoyment of the land. A promise to do or refrain from doing a physical act upon the land, such as restricting the height, size, or location of structures is an example of a covenant that touches and concerns the land.
* In some general way, there must be an intent that a running covenant bind successors. Intent may be drawn from the language, including the nature of the covenant. If a covenant is found to touch and concern, this alone may be enough to show an intent that it should bind successors.

In *Tulk v. Moxhay*, the court found that when a piece of land is conveyed with a covenant to tend to a garden, then sold again in a deed that contained no similar covenant, the buyer is bound by the ocvenant as lon gas he had notice of the original covenant.

**Common Plan Exception – always check for in subdivisions!!**

Where a developer has manifested a common plan to impose uniform restrictions on a subdivision, all lots are burdened and benefited by the restrictions even if they do not appear in the chain of title to every lot (p.713) **However, there must be a writing, somewhere.**

A similar device, **the equitable servitude**, evolved in equity courts with less stringent requirements.

* The difference between the two lies in the remedy
* Equitable servitude is enforced by injunction
* Other standard equitable defenses are available against an equitable servitude claim

**Restatement:**

* Combines the two doctrines into one doctrine: **the covenant that runs at law**
* Elements:
* The owner of the property to be burdened intends to create a servitude
* Owner enters into a contract or conveyance to this effect that satisfies the SOF
* The servitude is not arbitrary, unconstitutional, unconscionable, or violative of certain public policies; e.g. it cannot unreasonably restrain alienation
* This standard abandons the requirements of touch and concern and horizontal privity
* Vertical privity is never required for a negative covenant and is required for an affirmative covenant only in certain situations
* Notice to successors is not required to create a valid servitude, but lack of notice is a defense to enforcement (p.715)

**Common Interest Communities**

A CIC is a planned residential development where:

* All properties are subject to comprehensive private land use restrictions
* Regulated by a homeowner’s association
* CIC typically created by a written instrument called a declaration, which has four basic parts:
* Homeowner’s Association: establishes the association that will administer the CIC, specifies association’s powers and provides for an elected board of directors or similar group
* Imposes CC&Rs or similar restrictions on all land within the CIC; Restrictions may be enforced as real covenants or equitable servitudes
* Requires all unit owners to pay monetary assessments which finance the operation of the association
* Generally provides that each unit owner holds fee simple absolute in his particular unit, an undivided interest in the common area of the CIC (swimming pool, tennis courts, meeting rooms), and a membership interest in the association. Alternatively, title to the common area may be held by the association on behalf of the unit owners

The typical CIC declaration provides that the association will:

* Maintain the common area of the CIC
* Enforce the CC&Rs
* Adopt and enforce rules to supplement the CC&Rs
* Collect assessments from the unit owners
* Take such other actions as are necessary to administer the CIC

**Enforcing Restrictions**

* It is comparatively simple for a developer to create legally-binding CC&Rs
* Disputes arise about whether the unit owner has a defense to enforcement
* Three defenses: (1) unreasonableness; (2) abandonment; and (3) changed conditions
  + Unreasonableness can be determined by weighing the burden v. benefit
  + Restriction is presumed to be reasonable and will be enforced uniformly against all residents unless the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restrictions benefits to the development’s residents, or violates a fundamental public policy (*Nahrstedt*)
* A restriction may be terminated by condemnation, estoppel, merger, prescription or release (like an easement)
* Validity of Specific Restrictions:
* *Shelley v. Kraemer*, Court held that a covenant which barred non-Caucasians from living on a particular street violated the Equal Protection Clause of the Fourteenth Amendment
* NJ Supreme Court considers the validity of a prohibition of sex offenders; never had to decide the merits due to procedural reasons
* Courts generally enforce CC&Rs that restrict or prohibit leasing units
* California Civil Code § 1360.5 provides that each owner of a unit in a common interest community may keep at least one pet, regardless of any contrary CC&R provision

**Restatement Test**:

* A servitude is valid unless it is “illegal or unconstitutional or violates public policy”
* A servitude violates public policy if it is: (1) arbitrary, spiteful, or capricious; (2) unreasonably burdens a fundamental constitutional right; (3) imposes an unreasonable restraint on alienation; (4) imposes an unreasonable restraint on trade or competition; or (5) unconscionable

**Defense to Enforcement:**

* Abandonment
* Unreasonableness
* Changed Conditions
* Other doctrines: condemnation, estoppel, merger, prescription, release, laches, unclean hands

**Abandonment**

Test: Party opposing enforcement needs to prove that existing violations are so great as to lead the mind of the average person to reasonably conclude that the restriction in question has been abandoned. This test is met when the average person, upon inspection of a subdivision and knowing of a certain restriction, will readily observe sufficient violations so that he or she will logically infer that the property owners neither adhere to nor enforce the restriction.

In most jurisdictions, a single violation would not constitute abandonment.

Courts should analyze the violations as to their number, nature and severity. If abandonment is still in doubt, courts should then consider the other two factors – prior enforcement efforts and possible realization of benefits.

Abandonment of one covenant does not suggest abandonment of other, albeit similar, covenants in the agreement.

In a modern CIC, CC&Rs almost always provide that they can be amended by a vote of the owners.

Architectural Review Committee: CC&Rs often include architectural review provisional discretionary decisions of these committees are often attacked in litigation

**Restatement** provides that a servitude may be enforced by “any appropriate remedy which ay include compensatory damages.” It notes that monetary relief may be more appropriate than an injunction where a servitude has little continuing utility because the purpose it was designed to serve is less important than when the servitude was created.

**[Judicial Review of the HOA**]

* Business judgment rule from corporate law: the HOA is not liable if the board made the decision in good faith and rationally believed that it was appropriate
* Reasonableness Standard: Most courts use this standard, which requires an association to act reasonably in the exercise of its discretionary powers (less deferential standard)

In *Fink v. Miller*, court finds abandonment where 21/29 homes by the end of 1985 did not follow the wood shingle roof requirement, although the HOA started enforcing the wood-only roof since 1985. Court found that thte violations of the wood shingle restrictive covenant are sufficiently widespread that it must be concluded as a matter of law that the restriction has been abandoned and is unenforceable.

In *Vernon Township Volunteer Fire Department, Inc. v. Connor*, the court does not find abandonment where the Culbertson Subdivision signed a restrictive covenant prohibiting the sale of alcoholic beverages on their land and there were two alcohol stores that opened 2 miles away from the land.

* Fire Dept argued that the covenant was invalidated because changed conditions in the immediate neighborhood effectively rendered the restriction obsolete.
* **Burden of proof was on the Fire Department to show that the original purpose of the restriction has been materially altered or destroyed by changed conditions, and that a substantial benefit no longer extends to Appellants by enforcement of the restriction**
* **As a general rule, restrictive covenant may be discharged if there has been acquiescence in its breach by others, or an abandonment of the restriction**
* **Changes in the character of a neighborhood may result in the discharge of a restrictive covenant (changes do not automatically invalidate a restrictive covenant, but the changes are material and relevant in determining whether a restrictive covenant should be enforced – do such changes alter or eliminate the benefit that the restriction was intended to achieve?)**
* **The word “neighborhood” is a relative term, and only the immediate, not the remote, neighborhood should be measured**

**[Interpreting CC&Rs]**

Restrictive covenants were narrowly construed at common law. Today we recognize these covenants are widely used in modern land development and ordinarily play a valuable role in utilization of land resources.

Restatement modern view: CC&R provision should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding the creation of the servitude, and to carry out the purpose for which it was intended

**[NUISANCE]**

**Public Nuisance**: Improper interference with a right common to the public, e.g. airport nearby

**Private Nuisance**: A non-trespassory invasion of another’s interest in the use and enjoyment of the land; almost all nuisances are private

**Private Nuisance elements:**

* Intentional: D’s conduct is intentional if he acts for the purpose of causing the harm OR knows the harm is resulting OR is substantially certain to result (purposefully and knowingly)
* Nontrespassory: Must not involve physical entry; noise, vibration, light and odors qualify as nontrespassory
* Unreasonable:
* Some jurisdictions use the gravity of harm test: unreasonable if it causes substantial harm, regardless of the social utility of the conduct
* Many states use the Restatement’s balancing test: If the gravity of the harm outweighs the utility of the conduct, it is unreasonable
* Some states use multi-factor tests that fall somewhere in between these two approaches
* Substantial Interference: there must be a “real and appreciable invasion of the P’s interests” (R.2d Torts)
* Use and enjoyment of land: D’s conduct must interfere with the use and enjoyment of land, e.g. causing physical damage to the property or personal injury to occupants

Traditional remedy for a nuisance was an injunction. Today courts usually balance the equities to determine if the appropriate remedy is an injunction or damages.

**[SELLING REAL PROPERTY] (p.529)**

Three major steps in a typical real property sales transaction:

1. **Purchase contract:** parties negotiate and sign a written purchase contract, and prepare to consummate the transaction
2. **Closing**: The contract is full performed at the closing; the buyer pays the purchase price, the lender advances the loan funds and the seller transfers title
3. **Title Protection**: Buyer protects title through title covenants, title opinion based on a search of public records, and/or title insurance policy

**[The Purchase Contract]**

The purchase contract is usually a standard, preprinted form supplied by a real estate broker.

1. Parties will fill in the price, method of payment, time for performance, and other terms.
2. Parties sign the contract
3. Prepare for closing:
   1. Seller’s title is examined
   2. Condition of the property is evaluated
   3. Buyer obtains financing from a bank or other lender
   4. Escrow is opened to consummate the transaction
   5. Various documents are prepared, including the deed, mortgage, promissory note and escrow instructions

Various problems may arise:

* **Statute of Frauds**
  + Every state has adopted an SOF which requires that a contract for the sale of an interest in real property must have:
    - **Essential Terms**: Identities of parties, price, property description
    - **Writing**: Can be a formal contract or an informal memorandum, or an electronic writing like an e-mail
    - **Signature**: Writing must be signed by the party sought to be bound
  + Failure to conform to SOF does not void a contract, just makes it unenforceable
  + **Exception – Part Performance**
    - An oral contract may be enforced if the buyer:
      1. Takes possession
      2. Pays at least part of the purchase price
      3. Makes improvements on the property (some jurisdictions only require #2 **or** #3)
* **Exception – Equitable Estoppel** 
  + An oral contract may be enforced if:

1. One party acts to his detriment in reasonable reliance on another’s oral promise
   1. E.g. party relies on oral agreement and sells another property
2. Serious injury would result if enforcement is refused

* **Marketable Title – Concept that goes with Purchase contract, disappears after The Closing**
  + In every sale of real property, seller expressly or impliedly promises that she will deliver marketable title (merchantable title) unless the contract says otherwise (default standard)
    - Title must be “reasonably free from doubt as to its validity”
      * **Standard: A reasonable and prudent purchase would pay fair market value for the property**
        + Buyer normally does not expect to purchase title clouded by mortgage, mechanic’s lien, easement or other defect
      * Title does not need to be perfect
      * If before closing, buyer finds out that there is an easement, buyer has a claim against seller for breach of implied promise – marketable title
    - Marketable title concerns title to the property, not the physical condition of the property; one can hold perfect title to land that is valueless
    - Municipal restrictions or ordinances, existing at the time of the execution of the contract, are not encumbrances or burdens on title
      * However, a violation of these restrictions makes title unmarketable (*Lohmeyer v. Bower*)
  + **Buyer is not required to produce a marketable title until the closing**
  + Almost any private encumbrance causes title to be unmarketable
    - Title is **unmarketable** if:
      * Seller’s property interest is less than the one she purports to sell
      * Seller’s title is subject to an encumbrance
      * There is reasonable doubt about either (1) or (2)
  + Split Jurisdictions on buyer’s knowledge:
    - If a property is burdened by a visible encumbrance or the buyer knows about an encumbrance, it is presumed that he impliedly agreed to accept title burdened by that encumbrance and took this into account when negotiating the purchase price
    - However in other jurisdictions title is unmarketable if any encumbrance exists, whether buyer knows or not
* **Insurable Title**: title insurance company insures a title at normal rates
  + An insurable title standard may provide less protection because they may ignore minor title defects
* **Record Title**: title that appears in the public records
  + Also provides less protection because it does not protect against title defects not reflected in the public record such as adverse possession

**[Duty to Disclose]**

In most jurisdictions, the seller is obligated to disclose defects he knows about that (1) materially affect the value of the property and (2) are not known to or readily discoverable by a buyer.

* Under the traditional doctrine of *caveat emptor*, the seller was liable **only if** he (1) affirmative misrepresented the condition of the property, (2) actively concealed defects, or (3) owed a fiduciary duty to buyer.
* Statutes in many jurisdictions today require the seller of residential property to provide a written disclosure statement to the buyer
  + Problems with building code or zoning violations, structural defects and drainage issues must typically be disclosed
  + However, many states specify conditions that the seller does not have to disclose
    - Conditions that may have a psychological impact on buyers, such as a murder on site or that the seller has HIV/AIDS
  + In *Stambovsky v. Ackley*, court held that where a condition created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser, nondisclosure constitutes a basis for rescission as a matter of equity
  + **Modern Law:** Seller has duty to disclose defects that materially affect value of property and not readily discoverable by buyer (CA: “Affect Value or Desirability”)
    - **The test is whether the value of the house would go up or down; seller should not make the call, disclose so you don’t get sued**
* However, a prospective **buyer** has no duty to disclose facts that may materially alter the value of the property (*Zaschak v. Traverse* Mich.)

**[The Closing]**

The closing is the point where the purchase contract is performed. In many states, the closing is supervised by an escrow agent (neutral third party who receives the documents needed to consummate the transaction).

* **At a typical closing:**
  + Buyer pays purchase price to the seller
  + Buyer executes mortgage and promissory note to the lender
  + Lender advances loan funds
  + Seller transfers title to the buyer by delivering a deed
* **The Deed**
  + Effectively only when delivered and accepted (acceptance is presumed even if grantee is unaware of the gift)
    - Delivery is a matter of intention
      * Uniform Simplification of Land Transfers Act: delivery is “an act manifesting an intent to make a present transfer of real estate”
      * R.2d Property: Delivery is accomplished when the donor manifests that the document is to be legally operative while the donor is alive
    - In general, grantor must manifest intention to **immediately** transfer title (interest not possession) to the grantee
      * In *Rosengrant v. Rosengrant*, court held that deed was invalid when:
        + Grantor reserved a right of retrieval
        + Attaches condition that deed is operative only after the death of grantors
        + Grantor continues to use property as if no transfer had occurred
    - Many states have rebuttable presumptions that the manual transfer or the recording of a deed presumes the deed delivered
  + Statute of Frauds: The deed must be in writing, contain the essential terms (identity of the grantor and grantee, description of property, words showing intent to convey title), and be signed by the grantor
  + **Death Escrow**
    - In a normal escrow, grantor deposits the deed with a neutral third party who is instructed to deliver the deed at the end of closing
    - If the grantor asks to have the deed delivered only after the grantor dies, **most jurisdictions would find an effective delivery only if the grantor is unable to retrieve the deed**
  + **Beneficiary Deed**: Owner may designate the beneficiaries she wants to receive the property after her death, to be revocable by the grantor during her lifetime
    - Owner causes interest to be automatically conveyed to the listed beneficiaries upon death
    - Property is not considered a part of the estate and therefore does not have to go through probate
  + **Revocable Deed**: Even if grantor expressly provides that he can revoke the grant at any time, many jurisdictions will still hold this as a valid transfer
    - Some courts hold that revocable deed does not satisfy the delivery requirement
    - Others hold that the deed is valid but the power to revoke is void

**[The Mortgage]**

When the buyer needs to borrow money, the lender will deposit the loan proceeds into an escrow, and at the closing it will receive a promissory note and mortgage signed by the buyer.

* **Promissory note:** contract where borrower promises to repay the loan on certain terms and conditions
* **Mortgage:** Secures the loan in case buyer (mortgagor) cannot pay back gives the lender (mortgagee) the right to sell the property and use the sales proceeds to pay off the loan (foreclosure)
  + Judicial Foreclosure: mortgagee will file a complaint, prove his case, and receive a judgment authorizing the foreclosure on the property
  + Non-judicial Foreclosure: If the mortgage expressly provides for a “power of sale,” mortgagee forecloses on the property himself, conducting a sale without any judicial involvement
    - Notify the mortgagor that the loan is in default
      * A few jurisdictions require higher duty on the mortgagee, requiring it to use reasonable efforts to attract bidders and obtain a fair price
    - Allow him to pay the debt
    - If the loan is not repaid within a set time (usually 90-120 days) mortgagee is entitled to hold a foreclosure sale
      * **Reinstatement:** In most states, mortgagor can quickly pay any missed payments and avoid foreclosure
  + **Foreclosure:**
    - Advance notice must be given to the mortgagor, junior lien holders and the public
    - Usually conducted at a public location
    - Mortgagee bids the amount of the remaining loan balance (credit bid)
    - Other bides are required to bid with cash
    - If sale price is more than the loan balance, surplus is distributed first to junior lien holders and then the mortgagor
  + **Statutory Right of Redemption:**
    - In some states, mortgagor may redeem the property from the successful bidder within a set period of time
    - Mortgagor must pay the sale price plus interest and costs
* **Deficiency Judgment:** Mortgagee may sue Mortgagor for the difference between the foreclosure sale price and what remains unpaid
* **Title v. Lien Theory**:
  + **Title Theory (minority)** – Mortgagor only has possession and conveys the title to the mortgagee until the loan is repaid
  + **Lien Theory (majority)** – Mortgagee conveys only a security interest – which gives mortgagee the right to foreclose on the property – and retains both possession and title in the property

**Alternatives to Mortgage:**

* **Deed of Trust**
  + Involves three parties:
    - Borrower (trustor) gives a deed of trust to a third party (trustee) for the benefit of the lander (beneficiary)
    - If trustor defaults, trustee will sell the property through foreclosure and give the proceeds to the beneficiary to repay the loan
* **Installment Land Contract** 
  + **Buyer promises to pay the purchase price in installments over a period of time**
  + **Buyer allowed to take possession but seller retains title until all payments are made**

**[Title Assurance]**

The sale of property is actually a sale of title. Three methods of title assurance are widely used in the United States:

* **Title Covenants:** 
  + Grantor promises in the deed that he has good title to convey
  + At common law, the promises made in the contract ended at closing unless they were restated in the deed
    - Doctrine of merger provided that once the grantee accepted the deed all prior promises were extinguished (contract merged into the deed)
    - **Title Covenants replace the guarantee from Marketable Title**
  + Grantees started demanding assurances of title in the deed
    - **General warranty deed:** grantor warrants title against all defects, whether they arose before or after he obtained title
    - **Special warranty deed**: grantor warrants title against all defects that arose after he obtained title
    - **Quitclaim deed:** grantor makes no warranties about title, so the grantee receives only what the grantor has, if anything
  + The General and Special warranty deed contain specific title covenants. **Breach gives a right to money damages (contractual covenants).** Six standard covenants are:
    - **Present Covenants: Breached, if at all, at the moment of delivery** – buyer must sue within the statute of limitations period after purchase (marketable title protects against defects discovered before closing; this protects against defects after closing)
      * **Covenant of Seisin (pronounced Season)**: promise that grantor owns the estate he purports to convey
      * **Covenant of right to convey**: promise that grantor has the right to convey title
      * **Covenant against encumbrances**: a promises that there are no encumbrances on the title other than those expressly listed in the deed
    - **Future Covenants: Breached, if at all, after the closing** (most commonly breached when the grantee is actually or constructively evicted by a third party holding superior title)
      * **Covenant of warranty**: promise that grantor will defend the grantee against any claim of superior title
      * **Covenant of quiet enjoyment**: promise that grantee’s possession of the property will not be disturbed by anyone holding superior title
      * **Covenant of further assurances:** promise that the grantor will take all future steps reasonably necessary to cure title defects that existed at closing
* **Title Opinions:**
  + Based on search of public records: Attorney or other professional renders an opinion about the state of title after searching the public land records
  + **Recording System**
    - Anyone holding an estate or interest in land may record a deed or other instrument to give notice of his rights to the world
      * In general, a deed or other document affecting title must be **acknowledged** in order to qualify for recordation
        + Subsequent buyers are charged with notice of the record because they could have found it had they searched
        + **An unacknowledged deed recorded in public land records are not deemed recorded and does not provide constructive notice**
        + Grantor needs to certify to a notary public that the grantor’s signature on the document is genuine
        + Almost always, the grantor will sign in front of the notary
      * An unrecorded deed is valid, but does not protect the grantee from title claims made by third parties
      * Even if the deed is incorrectly indexed or lost by the indexing clerk, it still provides constructive notice
    - **Forged deed is void**
    - **Deed induced by fraud is voidable by grantor, but if grantee conveys title to BFP, subsequent purchase prevails**
  + **Searching Title**:
    - Land records typically filed at a county agency, often called the recorder’s office
    - Recorder’s office will use either:
      * **Grantor-Grantee Index:** organized by the names o the parties to the transaction
      * **Tract Index:** organized by the parcel involved
    - **STEPS:**
      1. Establish a chain of title for the parcel
         1. Look up seller’s name in the grantee index and find the name of the person he purchased from, where the deed can be found and when it was recorded

Repeat the process deed by deed with each grantee’s name until he reaches a sovereign or other ending point

* + - * 1. Then begin with the first grantor in the chain in the grantor index

Move forward in time, looking under each grantor’s name, deed by deed, to see if he conveyed an interest or granted easements or encumbrances to anyone who is not in the known chain of title

Typically the searcher examines all entries in the grantor index under each grantor’s name from (1) the date he received his interest until (2) the date the deed conveying his interest to a grantee was recorded

* + - 1. **Marketable Title Acts:**
         1. Many states limit the search to 30-40 years hoping to increase the efficiency of the process
         2. Title defects that exist before the statutorily-determined **root of title** are extinguished
* **Recording Acts**:
  + **First In Time:** The person whose interest was created first prevails
    - If A conveys to B then to C, and both are unrecorded, A had nothing to convey to C… B wins
    - If A conveys to B and it is unrecorded, and A disputes the conveyance, B wins 🡪 as to the grantor, the conveyance already occurred and A retains nothing
  + **Exception to the Rule: Bona Fide Purchaser**
    - Donees are not BFPs
    - Recording Acts provide BFP with special protection which supersedes the first-in-time rule
      * **BFP who conducts a careful search of the public records and finds no title defects will be protected against existing unrecorded interests**
    - Promotes buyers to have confidence they will receive good title
    - Under the **shelter rule**, BFP may transfer his protection to a later grantee as well
  + **Priority between adverse claimants, established by recording act:**
    - **Race:** The purchase who records first has priority
      * Purely first come first serve
      * Only NC and LA still use this system
    - **Notice**: The subsequent BFP has priority
      * Subsequent purchaser prevails if he had no notice of a prior interest
        + **Actual notice:** knowledge of prior interest
        + **Record notice**: notice of any prior interests that would be discovered by a standard search of the public land records
        + **Inquiry notice:** notice of any prior interest that would have been obtained by investigating suspicious circumstances
      * About half of states use this
    - **Race**-**Notice**: Subsequent BFP who records first has priority
      * Protects the subsequent purchaser who both takes without notice and records first
      * Other half of states use this
  + **Defective Deeds:**
    - **A wild deed is a deed unable to be captured by the reasonable searcher. If a deed is not property recorded, it does not provide notice.**
    - **A deed recorded too late or too early does not provide notice either**
    - Some jurisdictions mandate a more extensive search, requiring title searcher to look under each grantor’s name from the time grantor received title until the present, and about half of the states require that the search includes all properties deeded out by a common grantor
* **Title Registration:**
  + The government assumes role of title assurer by maintaining an authoritative registry of title
  + Under this system, called the **Torrens System**, title is passed by registration in a government agency
    - The owner can only transfer interest only by registering title in the name of buyer
    - This was supposed to cure two major defects in the Recording System: (1) failure to conclusively establish title; and (2) BFPs with diligent searches may still lose title due to unrecorded interests outside of the recording acts
  + No longer used in the States
* **Title Insurance**:
  + A title insurance company issues a policy that insures the grantee’s title in addition to the protection provided in the title covenants of his deed
    - Title insurance covers certain off-record defects such as a forged deed in the chain of title, unlike title opinion
      * Title Insurance covers what happened in the past, unlike car insurance (covers accidents in the future)
    - Usually provided by state-regulated insurance companies which have substantial assets to cover losses
    - Title insurance company is contractually obligated to pay claims under the policy, while negligence must be proven to recover damages for a faulty title opinion
      * Title Insurance policies may also have a clause in the contract giving them the right to sue seller on behalf of buyer
  + **This is the main method of title protection in the United States**
    - Most insurance companies use standard forms prepared by the American Land Title Association (ATLA)
    - Two basic policies: owner’s policy and lender’s policy, which guarantees to the lender that the mortgage is a first-priority lien on the property
  + Coverage is pretty broad but limited by standard exclusions and property-specific exceptions
    - Exclusion: potential risk that the company is unwilling to cover in any policy, such as encumbrances created or agreed to by the insured party
    - Exception: problem that concerns the particular parcel, which the title company discovers by searching public land records, e.g. irremovable easement
      * A title insurance company will not insure against this known defect, so it will be excepted from coverage
      * Purpose of this insurance is to protect buyer from unknown risks, not title problems
  + Two duties for the insurance company:
    - **Duty to Defend**: pay attorney fees and costs necessary to protect the owner’s title as guaranteed by the policy, even when it is not completely clear that the potential defect is covered
    - **Duty to indemnify**: compensate the owner if a loss occurs

**NOT COVERED ON EXAM**

**Right to destroy**

**IP**

**Spite Fences**

**State v. Shack**

**White v. Samsung**

**Waste**

**Negative Easements**

**Rent Control**

**LL-T Security Deposit Issues**

**Estates in Land and Future Interests**

**Around 35 multiple choice**

**Probably 2 essay questions with sub-parts**