

- I. Course introduction
 - a. Arguments on property
 - i. Rights arguments
 - 1. Right to security of the plaintiff
 - 2. Right to freedom of action of the defendant (damnum absque injuria – damages without legal redress)
 - ii. Morality arguments
 - 1. individualism v. altruism
 - a. plaintiff – altruism – the golden rule
 - b. defendant – individualism – self-reliance
 - 2. fault v. compensation
 - a. plaintiff – compensation – as between two innocents, whoever caused the damage should pay
 - b. defendant – no liability without fault
 - iii. reasonable expectation
 - 1. foreseeability
 - a. plaintiff – foresee consequences to others of their conduct
 - b. defendant – foresee development of neighboring land
 - 2. reliance on reasonable expectation
 - a. plaintiff – reasonably expect accommodation
 - b. defendant – reasonably expect development
 - iv. distribution
 - 1. plaintiffs – developers pay for loss to others
 - 2. defendants – developers should invest to protect their own property rather than externalizing costs
 - v. social utility arguments
 - 1. behavior modification/investment in safety
 - 2. investment arguments
 - a. plaintiffs – secure investments
 - b. defendants – competitiveness
 - 3. cost internalization arguments
 - a. plaintiffs – cost internalization
 - b. defendants – deregulation of economic activity
 - 4. transaction cost/efficiency arguments
 - a. plaintiff – most valued user
 - b. defendant – deference to free market
 - vi. judicial role arguments
 - 1. precedent arguments
 - a. broad v. narrow holding
 - b. distinguish/reconcile conflicting cases
 - c. enforce/overrule precedents
 - 2. institutional role arguments
 - a. common law: judicial restraint v. activism
 - b. statutory interpretation: broad v. narrow

- 3. institutional competence
 - a. deference to legislature
 - b. judicial responsibility
- vii. administrability
 - 1. predictability v. flexibility
 - 2. uniformity
 - 3. relationship between form and judicial role
 - 4. relationship between form and substance
- viii. Joseph William Singer, “the legal rights debate in analytical jurisprudence from bentham to hohfeld”
 - 1. correlatives:

Plaintiff right	Defendant privilege	Plaintiff power	Defendant immunity
Defendant duty	Plaintiff no right	Defendant liability	Plaintiff disability

b. Pierson v. Post

- i. Post hunted a fox, was about to get it, Pierson knew and got the fox
- ii. Trial court found for Post. For animals, occupancy only determines property.
- iii. What determines occupancy? Depriving animals of their natural liberty = possession
- iv. People would sue each other *a lot* if pursuit made possession; reversed judgment for Post
- v. Livingston’s dissent: if the beast be followed by large hounds, he belongs to the hunter, not the chance occupant. If he be chased by beagles, he belongs to the occupant (good hunting is to be valued).
- vi. *No one owns wild animals in their natural habitats. Under the common law capture rule, property rights in such animals are acquired only through physical possession. The first person to kill or capture a wild animal acquires title to it. Post got the fox because he had been the first to actually capture or kill it, even though he was rude. In general, ownership ends when the animal escapes. However, if the animal is tamed to come back, ownership resumes.*
- vii. *Today the capture rule is condemned by legal scholars for the same reason that it used to be supported: it encourages the destruction of wild animals.*
- viii. *English law held that the owner of the land was in constructive possession of the wild animals on the land. American law rejects that; you don’t own the animals on your land, but you can stop hunters from trespassing, so you have exclusive ability to capture (and therefore own).*

c. Karl Llewellyn, “the common law: deciding appeals”
Canons of Construction

Thrust	But	Parry
The statute cannot go beyond its text		To effect its purpose the statute may be implemented beyond its text
Statutes in derogation of the common law will not be extended by construction		Such acts will be liberally construed if their nature is remedial.
Read statutes in light of the common law		Contradictions solved dialogically
Titles do not convey meaning		But they can serve as a guide
If the language is plain, then implement it		Unless it is absurd
Take words at face value if they are not technical		Words may be indistinct or have double meaning
Every word has effect		Unless spurious
Exceptions not made cannot be read in		The words are just the “bark” – the bite should be the spirit of the law
Expression of one thing excludes another		Different examples draw different readings

- d. *The term “property” is difficult to define. The ordinary person defines property as things that are owned by people. However, the law defines property as rights among people that concern things*
- i. *Real property are rights in land and anything attached to land*
 - ii. *Personal property are rights to things other than land*
 1. *chattels: tangible, visible personal property such as jewelry, livestock, cars, and books*
 2. *intangible personal property (stocks, bonds, patents, debts, and other contract rights)*
- e. *Theories of property and the law:*
- i. *Legal positivism: property rights arise only through government*
 - ii. *Natural law theory: rights arise in nature as a matter of fundamental justice, independent of government*
- f. *Scope of property rights: limited, not absolute –*
- g. *Can be described as a ‘bundle of rights’*
- i. *Right to exclude*
 - ii. *Right to use and possess*
- h. *What is the justification for private property?*
- i. *First occupancy reflects the familiar concept of first-in-time: the first person to take occupancy or possession of something owns it*
 - ii. *Labor-desert theory says people are entitled to property that is produced by their labor*
 - iii. *Traditional utilitarian theory says that property exists to maximize the utility of citizens; therefore property rights are allocated and defined to promote the general welfare.*
 - iv. *Law and economics utility theory: human happiness can be measured in dollars; private property exists to maximize the overall wealth of society*

- v. *Liberty or civil republican theory: the ownership of private property is necessary to democratic self-governance*
- vi. *Personhood theory: private property is essential to the full development of the individual; some things matter so much to psychological development that it justifies property rights over them.*

II. Trespass and Public rights

Many rights go with property – one is the right to exclude, but it is not absolute. The more an owner has opened her property to the public, the more likely it is that courts will find public rights to access.

- a. *The right to exclude – as the Supreme Court has explained, the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”*
- b. *At common law, any intentional and unprivileged entry onto land owned or occupied by another constituted a trespass. The element of intent has a special meaning in trespass law. A trespasser is strictly liable; good faith and fault are irrelevant. The doctrine only requires that the defendant intend to enter land as a matter of her free choice, not that she had an intent to trespass. The modern law of trespass largely follows the common law approach.*
- c. Non-owners can:
 - i. Enter property to save a life
 - ii. Have rights to inhabit (tenant laws)
 - iii. Have rights to property open to the public (shopping centers, movie theaters, restaurants)
- d. State v. Shack
 - i. Defendants entered Tedesco’s property to help migrant workers and were arrested for trespass
 - ii. “under our state law the ownership of real property does not include the right to bar access to governmental services”
 - iii. title to real property cannot include dominion over the people who are allowed on it (the migrant workers)
 - iv. maxim of the common law that one should use property so as not to injure the rights of others
 - v. questions are not only of the relationship between property owner and other people who want to come on the property but also of the relationship between property owners/users/people who want to come on the property. Representatives of government agencies can enter the property.
 - vi. Reversed, acquitted.
- e. Desnick v. ABC
 - i. Primetime lied to Desnick about the nature of an expose being done on them. Desnick argues that undercover patients broke the agreement.

- ii. Primetime asked to film surgery/interview; were granted on the condition that the documentary was nice and didn't focus on Desnick
 - iii. "to enter upon another's land without consent is a trespass. The force of this rule has been diluted by concepts of privilege and implied consent. But there is no journalist privilege to trespass"
 - iv. But the law allows consent produced by fraud. Nothing in this case indicates the tort of trespass.
- f. A trespass is an *unprivileged intentional intrusion* on property possessed by another. The intent requirement is met if the defendant engaged in a *voluntary act*, such as walking on to the property. Didn't have to intend to violate legal rights. The *intrusion* occurs at the moment the nonowner enters the property.
 - i. A trespass is privileged if:
 1. consent of the owner (the person is then a licensee with corresponding property interest)
 2. the entry is justified by the necessity to prevent a more serious harm
 3. the entry is otherwise encouraged by public policy
- g. Civil litigants can get:
 - i. Nominal damages
 - ii. Compensatory damages
 - iii. Punitive damages
 - iv. Injunction ordering cessation of wrongful behavior
 - v. Declaratory judgment stating legal rights against someone.
- h. Criminal trespass is usually initiated by governments.
- i. Food Lion v. ABC
 - i. 5.5 million in punitive damages at trial, 4th circuit threw it out; no punitive damages for trespass generally
- j. Encroachments
 - i. *An encroachment is a permanent or continuing trespass caused by the construction of a building or other improvement that partially extends onto another's land. The common law treated the encroachment like any other trespass; the successful plaintiff was allowed to choose either damages or an injunction forcing removal of the encroachment. But where the encroachment results from a good faith mistake and the injury to the plaintiff is relatively minor, most modern courts will refuse an injunction and only award damages.*
 - ii. *Most states provide relief to the good faith improver – one who improves land owned by another the mistaken but good faith belief that he owns it. For example, many states allow the good faith improver to either*
 1. *remove the improvements or*
 2. *receive compensation equal to the amount by which the improvements increase the market value of the land.*

3. “the improving trespasser” mistakenly invests a lot of money in building on another’s property.
4. Construction of encroaching structure, owner wants to destroy, builder wants to keep through forced purchase.
5. Relative hardship doctrine = if encroachment is innocent, harm minimal, interference small, and removal cost substantial, no injunction to remove. If removal cost cheap or damage substantial, removal may be ordered
6. If encroachment is non-innocent, removal ordered.
7. When removal isn’t ordered, plaintiff is relegated to compensation for loss of property rights.
8. Unjust enrichment v. forced sale: what if the whole structure is on the wrong property? Is the owner unjustly enriched by getting to keep it? Does it force sale?
9. Somerville v. Jacobs Supreme Court of West Virginia
 - a. Plaintiff owners of lots 44, 45, 46 mistakenly built on the property of defendant owners of lot 47. Soon after the building was complete, defendants figured out it was on their property.
 - b. Can a court reward an improver for improvements he placed on land not owned by him but that he believed he owned?
 - c. Plaintiffs are entitled to relief which they seek; defendants claim ownership of the building through annexation. The plaintiff concedes this point, and just wants money for it.
 - d. If the defendants keep the building and don’t pay the money, they are unjustly enriched for 8.5 times the value of the unimproved lot. Forced sale for the value of the lot is fair.
 - e. Improver with:
 - i. Reasonable mistake of fact
 - ii. Good faith who
 - iii. Erects a structure entirely on the land of another
 - f. Caplan’s dissent: self-proclaimed alarmist against the majority – what of the property owner’s right?
 - g. *From the notes: how could such a big mistake happen? Why wouldn’t a landowner notice?*
- k. How we agree to a boundary
 - i. Oral agreement okay if:
 1. both parties are uncertain where the real boundaries are or there is a genuine dispute
 2. parties can prove the agreement
 3. parties act on the agreement
 - ii. courts may also recognize long-term acquiescence to a boundary

- iii. by estoppel where “one owner erroneously represents to the other that the boundary between them is on a certain line and builds relying on that”

III. Discrimination

- a. Uston v. Resorts International Hotel
 - i. Resorts stopped Uston from playing blackjack because he counted cards.
 - ii. Uston did not threaten the security of any casino occupant; therefore, he has a reasonable right to access.
 - iii. When property owners open their premises to the general public in pursuit of their own property interests, they have a duty to be non-discriminatory and cannot exclude arbitrarily.
- b. “Spirit-murdering the messenger: the discourse of finger-pointing as the law’s response to racism” Patricia J. Williams
 - i. buzzers open locked door to store for desirable customers; undesirability is linked to race. She was excluded when store was clearly open; humiliated and angry
- c. Three normal justifications of obligations on inn-keepers and common carriers:
 - i. More likely to be monopolies so denial is tantamount to denial of travel/accommodation
 - ii. Provide necessities that put the denied person at risk (say, of theft), to be denied
 - iii. Innkeepers hold themselves out as ready for the public, creating that perception.
- d. Brooks v. Chicago Downs
 - i. Can exclude people who “look like mobsters” so long as it is not on the basis of race, color, creed, or sex
 - ii. Can you exclude homeless people? Kick out congregated teenagers?
- e. 1964 Civil Rights Act, Title II
 - i. “Full access” without “discrimination or segregation on the ground of race, color, religion, or national origin” for lodging, restaurants, and places of entertainment, excluding private establishments
 - ii. note: no federal law prohibits sex discrimination in public accommodations.
 - iii. This section does not allow for damages, only injunctive relief
- f. Civil Rights Act of 1866
 - i. All persons have right to make and enforce contracts, to sue, to testify, to own property, and to inherit.
 - ii. Interpretation was originally very limited, but has been revived broadly after the passage of the 1964 civil rights act in order to compensate for its weaknesses (like retail stores questions)
- g. How to interpret the meaning of statutes:
 - i. Specific language
 - ii. Guidance from the legislative history

- iii. Determine the intent of the legislature
 - iv. Canons of statutory intervention and interpretation
 - h. New Jersey law against discrimination: race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital states, familial states, military service. (Broader list of protected groups and of public places than the federal law)
 - i. Dale v. Boy Scouts of America
 - i. Dale was an eagle scout who became an assistant leader and was then thrown out of the organization for being publicly gay
 - ii. New Jersey Supreme Court says that the Boy Scouts are a place of public accommodation (membership is public) and they are in violation of the NJ Law against discrimination
 - iii. US Supreme Court says forcing Boy Scouts to admit gays counters their message, violating their first amendment rights
 - j. The ADA (1990)
 - i. Disability is a physical or mental impairment that substantially limits one or more of the major life activities of an individual
 - ii. *Broad* list of public accommodations: inns, restaurants, bars, motion pictures, entertainment, lecture hall, stores, laundries, services, public transportation, museum, library, park, center for the indigent, gym . . .
 - iii. The standard is “readily achievable” – easily accomplishable and able to be carried out without much difficulty or expense
 - iv. Discrimination means the denial of participation, participation in unequal benefit, separate benefit, or denial of association. Must make affirmative adjustments to prevent discrimination (including engaging in new construction)
 - v. ADA does not include those who use illegal drugs, homosexuals, or bisexuals
- IV. Free Speech, Constitutional Limits
- a. *The first amendment protects the right of freedom of speech from government action, not private action. Accordingly, the constitution does not require a private landowner to open his land to demonstrators or to others who wish to exercise the right of free speech, even if the land is a shopping center or is otherwise generally open to the public. However, some states have interpreted their state constitutions to provide that shopping center owners cannot bar free speech activities.*
 - b. Lloyd Corp v. Tanner
 - i. Lloyd owns the mall, Tanner distributed handbills in privately owned courtyards in it
 - ii. Tanner was protesting the Vietnam war
 - iii. Guards kicked them out and suggested they use adjacent public streets and sidewalks.
 - iv. Tanner left, then sued, seeking declaratory and injunctive relief

- v. District court says that today's mall is yesterday's back yard; it is a public business district; therefore prohibition violated 1st amendment rights
- vi. Court of appeals claimed to be bound by the factual determination of the character of the center. *Marsh v. Alabama* was used as dubious precedent; the town was entirely corporately owned, which is very different.
- vii. 1st and 14th amendments are limits on *state* action, not private action; respondents contend that the shopping center was public and therefore state
- viii. The argument goes too far – Lloyd can kick them out. Reversed, 5-4.
- ix. Dissent (Marshall, Douglas, Brennan, Stewart) – when all of these interests are properly weighed, free speech should win.
- c. *New Jersey Coalition against the war in the Middle East v. JMA Realty*
 - i. Plaintiffs protested the Gulf War; went to the malls and asked for permission to leaflet
 - ii. Lots of description of the malls: 9 regional centers, two community centers
 - iii. Old style business district is dying; the mall is the replacement
 - iv. In *State v. Schmid*, New Jersey rules that sometimes 1st amendment rights trump property rights (Article 1, paragraph 6, NJ Constitution).
 - v. In New Jersey, there is a law on substantive free speech – defendants' rules prohibiting leafleting violate plaintiffs' non-1st amendment free speech rights. Elements of the Schmid test"
 - 1. normal use of private property
 - 2. extent and nature of public invite
 - 3. the purpose of expressional activity
 - vi. Here, invitation to the public: just come here (multitude of non-customers was invited)
 - vii. Message is "its your community" → total transformation of private property to the mirror image of a business district, and, beyond that, a community
 - viii. This sort of invitation is an implied invitation to leaflet
 - ix. Decide case not only on three-pronged Schmid test, but also on general balance of expressive and property rights
 - x. Weight of property owners' interest in limiting and controlling activity on property decreases with uses v. right to free speech is the "most substantial in our constitutional scheme"
 - xi. Can leaflet. Doesn't apply to: bullhorn, soapbox, parades, pickets, placards.
 - xii. This doesn't harm business interests
 - xiii. Dissent: majority isn't careful enough in the definition of public place and the broadness of the malls invite. The primary use of the mall is for shoppers

- d. Things to ponder:
 - i. Statutory v. constitutional law
 - ii. Federal v. state constitutional law
 - iii. Conflicting free speech claims
 - iv. Free speech v. property rights
 - v. Picketing?
- e. Mathews v. Bay Head Improvement Association
 - i. *Under the public trust doctrine, state governments typically control wet-sand beaches just below the mean tide line; accordingly, the public is free to use these beaches. Some jurisdictions allow the public to use dry sand beaches as well, even if they are privately owned – based on public trust doctrine, customary rights, or other theories.*
 - ii. If the public has a right to the beach (“public trust”), does it have the right to cross non-public land to get to the beach?
 - iii. Association owns most of the property that is blocking the beach
 - iv. Publics’ potential interests in privately owned dry-sand beaches:
 - 1. to cross
 - 2. to use for recreation
 - v. the public interest is not satisfied unless there is “reasonable access to the sea” – what that is depends on the circumstances
 - vi. “when an organization is quasi-public, its power its power to exclude must reasonably and lawfully be exercised in furtherance of the public welfare related to its public characteristics”
 - vii. If every beach was like Bay Head, no one would be able to get to the beach; therefore Bay Head’s membership must be open to the public
- f. Definitions:
 - i. Dedication – gift of real property from a private owner to the public at large
 - ii. Prescription – if the public has used land for a long time for a specific purpose, they may still get to (a permanent right to do something on another’s land = easement)
 - iii. Custom – longstanding, uninterrupted, peaceable use of beaches confers continuing rights

V. Nuisance

- a. Nontrespassory interference is when one’s own property use interferes with the property interests of another – *can be divided into two categories: private nuisance and public nuisance. Most of the law in the field deals with private nuisance. – The definition above is overbroad, because not all such invasions are private nuisances. The traditional distinction between nuisance and trespass hinges on the nature of the intrusion. If there is a physical entry onto the land of another, the case is evaluated as a potential trespass. However, in cases involving fumes, smoke, light, or other nontrespassory conduct are governed by nuisance principles.*

- b. Privileges to use one's property are limited by the legal rights of others – interest is not in exclusive possession but in quiet enjoyment
- c. Nuisance is cases that are offensive physically to the senses and which by such offensiveness make life unbearable
- d. *Elements of private nuisance*
 - i. *Intentional interference – a person's harmful conduct is deemed intentionally if either*
 - 1. *he acts for the purpose of causing the harm or*
 - 2. *he knows that the harm is resulting or substantially certain to result from his conduct*
 - ii. *Unreasonable interference – states vary widely on what constitutes unreasonable interference. Some equate unreasonableness with serious injury to the plaintiff; others use a multi-factor test including such items as the character of the neighborhood, the nature of the conduct, its proximity to the plaintiff's land, its frequency and duration, etc. Under the restatement (second) of torts approach, adopted in about one-third of the states, interference is unreasonable if the **gravity of the harm** outweighs the **utility of the defendant's conduct**.*
 - iii. *Substantial interference – slight inconveniences or petty annoyances do not give rise to nuisance liability. But if a normal person living in the community would regard the interference as strongly offensive or seriously annoying, then the level of interference is substantial*
 - iv. *Interference with the use and enjoyability of the land – nuisance liability arises only from interference with the interests of an owner, tenant, or other land occupant with the use or enjoyment of the land.*
- e. *Defenses for liability for private nuisance*
 - i. *At one time, many courts recognized a defense called **coming to nuisance**; plaintiff who moved into the area after the offending conduct began was not so entitled to recover. However, this is virtually obsolete now. Other defenses (laches, statute of limitations) might apply.*
- f. Public nuisance is an unreasonable interference with a right common to the general public – it used to be that only public figures could sue for public nuisance, but now any member of the public affected can
- g. Nuisance law provides for remedies for property use that:
 - i. Cause substantial harm
 - ii. Unreasonably interfere with the enjoyment of neighboring property
- h. Courts decide in four ways (absent a zoning law that makes it easy)
 - i. Defendants' privilege (freedom to act despite harm)(damnum absque injuria – damages without legal redress)
 - ii. Plaintiffs' security (strict liability or absolute right to be free from harm)(defendant cannot do it without plaintiff's permission)
 - iii. Reasonableness test – reasonableness in the context of the case

- iv. Prior use – prior appropriation grants right to harm to person who first established use; prescription gives longstanding use the right to continue.
- i. Relief:
 - i. Dismissal
 - ii. Damages: cost of restoration or diminution of market value
 - iii. Injunction: order to do or not to do certain acts
 - iv. Conditional injunction: force defendant to stop if plaintiff pays him
- j. Defining nuisance: Fountainbleau hotel corp v. 4525 inc
 - i. TRO restrains defendant Fountainbleau hotel from 14 floor addition that would block the sunbathing area in plaintiff eden roc hotel
 - ii. Sic utere tuo ut alienum non laedas – one must use his property so as not to injure the lawful rights of another
 - iii. There is no legal right to the free flow of light and air
- k. Prah v. Marietti Wisconsin Supreme Court
 - i. Plaintiff owner of house with solar panels. Defendant built to block light. Plaintiff warned of potential damages – defendant built anyway.
 - ii. In the 19th century, courts didn't enforce sunlight rights because:
 - 1. property owners' rights must be absolute
 - 2. sunlight was only pretty
 - 3. interest in unrestricted development
 - iii. now, we:
 - 1. regulate welfare more
 - 2. have new significance for sunlight as energy
 - 3. want to hinder development
 - iv. what is nuisance today would have been tolerated in former times
 - v. dissent: majority failed to convince me that the absolute standards are actually obsolete; policy decisions are best left to the legislator, and solar panels are hypersensitive use
- l. Defining unreasonable land use: Page County appliance center, inc. v. Honeywell, Inc
 - i. Plaintiffs page sued defendants ITT and Honeywell because defendant's computer sent out radiation that interfered with the tv signal in their shop
 - ii. Defendants appeal from entered judgment on jury verdict awarding plaintiffs punitive and compensatory damages
 - iii. Building radiation-free computers could have been built but were financially infeasible.
 - iv. Suit asked for injunction from central travel (computer owner), money from other defendants
 - v. A fair test of whether the operation of lawful trade or industry constitutes a nuisance is the reasonableness of conducting it in the manner, at the place, and under the circumstances shown by the evidence

- vi. The existence of nuisance is not affected by the intent not to injure.
- vii. Priority of occupation and location matters
- viii. Is the appliance center hypersensitive use? No, everyone had a TV. Still defendants were entitled to have the jury consider whether the plaintiffs had hypersensitive use.
- ix. Reversed and remanded for a new trial for the defendants
- x. Action for nuisance need not be predicated on negligence; nuisance is a condition, not an act or failure to act.
- xi. From the notes:
 - 1. *rights approach* – because of the type or amount of harm is one that owners should not have to bear for the good of society without compensation
 - 2. *social utility approach* - compare costs and benefits of providing a remedy
 - 3. an activity that is not customary is likely to be deemed unreasonable
 - 4. consider:
 - a. extent of harm
 - b. character of harm
 - c. social value of use or enjoyment invaded
 - d. suitability of particular use to locality
 - e. burden on harmer of avoiding harm
 - 5. on the fairness side, consider
 - a. character of the harm
 - b. distributive justice
 - c. fault
 - 6. on the social welfare side, consider:
 - a. costs and benefits
 - b. incentives
 - c. lowest cost avoider
 - 7. rules
 - a. property rules – fix an absolute entitlement either to engage in conduct or to be secured from the harm
 - b. liability rules – prohibit each party from interfering with the interest of others unless the party is willing to pay damages determined by a court of law
 - c. inalienability rules –assign entitlements and prohibit these entitlements from being sold or exchanged
 - 8. requiring damages but not awarding an injunction is a judgment that the nuisance is efficient – that the benefit outweighs the costs, but the costs are unfairly distributed
 - 9. current law:
 - a. plaintiff gets an injunction when defendant’s conduct is unreasonable and causes substantial harm to the plaintiff

- b. plaintiff gets damages no injunction if defendant's conduct is reasonable (it causes more social good than harm) to the plaintiffs is so substantial that it is an unfair burden to the plaintiffs
 - c. plaintiff is entitled to no remedy if:
 - i. harm to the plaintiff is not substantial
 - ii. defendant's conduct causes more social good than harm and it is not unfair to impose the costs of the defendant's activity on the plaintiff *or*
 - iii. the imposition of damages would put defendant out of business and avoiding this result is more important than preventing harm to plaintiff
 - d. plaintiff is entitled to purchased injunction if:
 - i. defendant's conduct causes more harm than good but it is fair to impose on the plaintiff (coming to nuisance)
- m. Coase: the problem of social cost to stop A from harming B must often harm A; which has more social value to us, A or B? Is it the magnitude of the harms, as Coase suggests, or their character? Or both?
 - i. General rule =that property owners should internalize the costs they generate; Coase disagrees
 - ii. Costs are reciprocal – consider them as joint costs that each conflicting activity imposes on another
 - iii. Coase theorem, part 1. *If there are no transaction costs, it does not matter which legal rule is chosen because any legal rule will produce an efficient outcome*
 - iv. Efficiency is achieved by giving the entitlement to the party who values it most, the value measured by willingness and ability to pay
 - v. What if there were transaction costs? Coase Theorem, part II: *in the presence of transaction costs, the choice of entitlements by the courts may have an effect on efficiency*
 - vi. Two types of transaction costs:
 - 1. bargaining – incurred in finding and negotiating with others
 - 2. information costs - incurred in finding information
 - vii. lowest cost avoider – when the court lacks perfect knowledge concerning the wants of the parties, place burden on party with best access to best information
 - viii. critiques of transaction cost analysis:
 - 1. efficiency is a function of the initial distribution of wealth – measuring social utility by reference to willingness and ability to pay gives greater impact to the wealthy's interest

2. transaction cost analysis depends on the unwarranted assumption that it is possible to general an answer to the question of who values it more
- ix. why might people attach different values to what they are willing to pay to be free of the harm and what would they be willing to be paid to incur it?
- x. Because of the difference between offer and asking prices, it is possible to describe at least five ways to measure efficiency:
 1. fair market value
 2. auction
 3. status quo
 4. redistribution
 5. reverse auction
 6. social values
- xi. other difficulties
 1. externalities
 2. difficulty of making a voluntary exchange
 3. efficiency has a conservative bias
 4. commodification
- n. The right to use: water rights
 - i. Armstrong v. Francis Corp
 1. defendant owned land with a small stream for natural drainage, which it destroyed when building and put in modern drainage for 100+ homes.
 2. result for them was dryer terrain more suitable for housing
 3. Francis' improvement changed the "little stream" on plaintiff Armstrong and defendant klemp's land to a massive, smelly river with no fish that is speedy and causes erosion
 4. and defendant francis isn't done building
 5. the trial court decided that plaintiff Armstrong and defendant klemp were entitled to relief in the form of piping their part of the stream too
 6. Did the plaintiff suffer non-actionable consequence from something that the defendant had the right to do?
 7. this appears to be a tort, but has only been classified as one by two states
 8. "Common enemy" rule: surface waters → the common enemy; emphasizes the right to get rid of surface waters as one will **OR** "Civil law" rule: possessor has that right but also a duty to other affected landowners
 9. Result actually comes from a reasonable use doctrine – virtue of flexibility and capacity to serve the common good
 10. Judgment affirmed
 - ii. Rights: freedom of action v. security
 1. justice in social relationships

2. rights as freedom of action
3. rights as security
4. value judgment
- iii. Social utility: competition v. secure investment
 1. promoting the general welfare by enacting certain incentives
 2. promoting competition by shielding from liability
 3. protecting the security of an investment because no one will invest without security
 4. balancing interests (figuring out how to balance costs so that everyone will still do what they “ought”)
- iv. Formal realizability: rigid rules v. flexible standards
 1. predictability v. justice in an individual case
 2. rules (good for predictable, bad because circumstances don’t matter)
 3. standards (good for circumstances, bad for predictability)
 4. choice between rules and standards is influenced by desired social effects
- o. Support easements
 - i. Landowners own both surface and subsurface unless they sold subsurface mineral rights
 - ii. One landowner may effect the stability of another’s land
 - iii. Noone v. Price
 1. plaintiff Noone bought land four years after defendant Price
 2. four years after plaintiff moved in, foundation was giving way
 3. defendant’s house had a wall in disrepair that caused it; defendant didn’t repair it
 4. plaintiff paid \$6000 to fix the house and then sued for \$50000 for failure to provide lateral support
 5. withdrawal of lateral support = subject to strict liability
 6. did withdrawal of lateral support happen here?
 - a. Usually about land in its natural state, not land where there is a building. Still, building or structure on it that was supported but isn’t because of some alteration is covered.
 7. Court erred in summary judgment for the defendant because plaintiff should have been allowed to prove that their land in its natural state supports a house and it’s the wall’s fault
 8. If the land would not have subsided without the weight of the house, the plaintiff cannot recover . . . if it would have, plaintiff can make case – courts distinguish the lateral support of land and the lateral support of buildings. Still, recognize compensation for both harm to the land and the

building on it if the harm to the building resulted from the removal of lateral support to the land.

9. negligence if and only if
 - a. did something correctly supposing harm
 - b. failed to provide against the risk of harm when did something
- iv. An easement is a limited right to do something on or control the use of someone else's property. An affirmative easement is the use of someone else's property; a negative easement is preventing certain uses by others of their own property
- v. Massachusetts general laws – a building commissioner administers building code. State building code is the intent for public safety, health, and welfare.
- p. Subjacent support
 - i. Friendswood development v. Smith – SW industry
 1. defendant withdrew water under his own land – is he responsible for subsidence on others'?
 2. defendant friendswood knew of the subsidence risk
 3. underground water needs to be governed by the reasonable use standard, plaintiffs contend
 4. court listed only waste of malice as unreasonableness
 5. no malice, unreasonableness, or waste here → selling water for industrial purposes; therefore not liable
 6. Dissent: case not about the ownership of water; plaintiff this time doesn't give a damn about the water, only his house. There is no start decisis when noone cares about the water.
 7. Standards of care: strict liability, reasonableness, foreseeability
 - ii. Karl Llewelyn, "the Bramble Bush"
 1. precedent = officially doing over again the solution which has been worked out
 2. ratio decendi- rule of the case
 - iii. David Shapiro, "Courts, legislators, and paternalism"
 1. courts have very little control over their agenda while legislators can control their agenda and priorities
 2. courts are limited in investigating peripheral issues, and are limited both by the prevailing doctrine and by the scope of judicial power
 3. those constraints are statutes, doctrine, and precedent
 4. courts have a more difficult time experimenting than do legislatures
 5. judges should not decide cases on their own values
 - iv. Joseph Singer, "catcher in the rye jurisprudence"
 1. judges make the law. Yet many of them are afraid to admit it

2. two types of judges: activist and passivist
 - a. passivist position hides the reality of judicial lawmaking and contradicts principles of common law
 - b. two contradictory foundations meant to be chosen among: precedent and rights
- VI. Law and economics – a school of thought among legal academics and some judges that applies economic analysis to the study of the law
- a. Economic analysis of the law = fancy cost-benefit analysis
 - b. Transactions include:
 - i. An initial distribution of property
 - ii. An offer price by nonowner
 - iii. An asking price by owner
 - c. Definitions of efficiency
 - i. Pareto superiority – someone gains by the change and no one is injured or made worse by it
 - ii. Pareto optimality – a situation is pareto optimal if no further exchanges can be made that are pareto superior
 - iii. Wealth maximization – a change in allocation of resources or a change from one legal rule to another is wealth maximizing if the benefits outweigh the costs
 - d. Externalities – costs imposed on third parties by legal factors that are not taken into account in the actors own revenue-cost determination
 - e. The goal of efficiency is to increase social wealth by choosing legal rules that give economic actors incentives to engage in activities which benefit society
 - f. Efficient legal remedy causes big corporations to internalize external costs
- VII. The estate system
- a. *In law, a person does not “own” land, rather, she owns certain legally enforceable rights to the land, either in the form of an estate or future interests*
 - b. *A present estate is a legal interest that entitles its owner to immediate possession of real or personal property. A future interest is a legal interest that does not currently entitle its owner to immediate possession, but that may become a present estate in the future*
 - c. *Property law in feudal England*
 - i. *English property law system can be traced to the Norman Conquest of 1066. When William the Conqueror became the King of England, he redistributed land to his supporters in order to protect his reign from foreign and domestic opposition*
 - ii. *Over time, the system imposed by King William resulted in two types of landholding: free tenures (held by the noble and upper classes) and unfree tenures (held by peasants). The free tenures were by far the more important categories and formed the foundation for the modern system of land ownership. One who held land from the King in free tenure owed both service and*

incidents in return. The required service might be to provide a specified number of knights on demand, to make an annual payment, or to perform another action. The incidents were specific rights; for example the incident of wardship allowed the king to take possession of the land after the holder's death until the orphaned son reached the age of 21.

- iii. Subinfeudiation – each person or tenant holding from the king could create subtenures with others through subinfeudation. Thus, one parcel of land could be subject to many different tenures.*
- iv. As feudalism declined, the system of free tenures gradually evolved into private ownership of land, in the form of three key estates: the life estate, fee tail, and fee simple.*

d. American property law

- i. Was long dominated by a Byzantine system of estates and future interests; precise, elaborate, and sometimes arbitrary rules were created to classify estates and future interests. The system is of decreasing relevance today; still, want to understand its basic structure*
- ii. Estates and future interests exist in two documents: deeds and wills.*

iii. Classifications:

1. freehold/non-freehold

a. freehold (“owning”)

- i. fee simple – freehold estate whose duration is potentially infinite*
- ii. life estate – freehold estate designated by the lives of one or more specified persons, ie, grant to A for the duration of A's life.*
- iii. fee tail – a largely-obsolete freehold estate where duration is measured by the lives of lineal descendants of a designated person*

b. non-freehold (“leasing”)

- i. term of years tenancy*
- ii. periodic tenancy*
- iii. tenancy at will*

2. absolute/defeasible

- a. most estates are absolute, meaning that their duration is only terminated by the category in which their estate belongs.*

b. Defeasible ones:

- i. Fee simple determinable automatically expires at a certain time, giving the holder immediate right to possession*
- ii. Fee simple subject to conditions subsequent does not automatically expire when the condition occurs; rather, the future interest*

holder must take affirmative action to end the estate

- iii. *Fee simple subject to an executory limitation expires when a stated event occurs, but gives the right of possession to a transferee*
- iv. *No absolute restraints on alienation in any of these, but little ones that are reasonable are okay.*
- v. *Not allowed to waste land – affirmatively or permissively*

VIII. *Concurrent ownership*

- a. *A present estate in real or personal property can be simultaneously owned by two or more persons, each holding the right to concurrent possession. Such an estate is called a concurrent estate.*
- b. *Types of concurrent estates:*
 - i. *Tenancy in common: each co-owner holds an undivided fractional share of the entire parcel of the land, and each is entitled to simultaneous possession and enjoyment of the whole parcel. Today any devise to two or more unmarried persons is presumed to create a tenancy in common. A tenancy in common interest is freely transferable during the holder's lifetime and at death.*
 - 1. *each cotenant has an equal right to possession and enjoyment of the whole land, regardless of his share of the fractional interests. Thus, under the majority view, even a cotenant in exclusive possession of the property, absent an ouster.*
 - 2. *However, each cotenant is entitled to a pro rata share of:*
 - a. *Rent paid by third persons*
 - b. *Profits from the land.*
 - ii. *Joint tenancy: differs from tenancy in common in that a joint tenant has the right of survivorship. If O conveys land to "A and B, as joint tenants, with right of survivorship" and A dies first, B gets a fee simple to the whole land. Joint tenancies are inalienable. The joint tenants have four unities:*
 - 1. *acquire at the same time*
 - 2. *acquire title by the same deed or will*
 - 3. *interest must be identical in size*
 - 4. *each must have an equal right to possession.*
 - iii. *Tenancy by the entirety (now abolished in many states) can only be created by a husband and wife – "to A and B, as tenants in the entirety" It requires the same four unities as joint tenancy, plus being married. It can be terminated, only by divorce, death of one spouse, or mutual agreement of the spouses. This estate is controversial because in some states creditors of one spouse cannot levy on property held by tenancy in the entirety.*

- c. *Any common or joint tenant may end cotenancy by suing for partition; the court will grant partition automatically without a need to show cause. The court will either grant partition in kind (physical division of the land) or partition in sale (division of the proceeds from the judicial sale of the land). A cotenant can always end or sever the joint tenancy merely by conveying her interest to another person. If A and B are joint tenants, and B conveys her interest to C, then A and C now have a tenancy in common, because the unities of time and title are missing.*

IX. Future interests

Complex rules govern the classification and enforcement of future interests. These rules rise out of the social and economic conditions prevailing after the decline of feudalism in England.

- a. *A future interest is a non-possessory interest that will –or may – become a possessory estate in the future. For example, if O conveys land, “O to A for life,” O retains a future interest to retake possession when A dies. Future interests are most commonly encountered in family gifts; but also appear for charitable or economic reasons.*
- b. *5 types:*
 - i. *reversion (only in transferor)*
 - 1. *when an owner conveys a vested estate smaller than the estate he owns, he retains a reversion – for instance, if O holds a fee simple absolute, but conveys merely a life estate to A, O retains a reversion.*
 - 2. *freely transferable*
 - ii. *possibility of reverter (only in transferor)*
 - 1. *when a transferor creates a fee simple determinable, the future interest is retained as a possibility of reverter – for instance, if O conveys land “to A for so long as used as an orphanage,” O retains a possibility of reverter – O gets property back if it stops being used as an orphanage.*
 - 2. *freely transferable*
 - 3. *in some states, interests lapse in 20-30 years*
 - iii. *right of entry (only in transferor)*
 - 1. *when a transferor creates a fee simple subject to a condition subsequent – i.e., “O conveys to L, but if L fails to use the property as an orphanage, the O may enter and retake possession”*
 - 2. *freely transferable*
 - 3. *in some states, interest lapses in 20-30 years*
 - iv. *remainder (in transferee)*
 - 1. *A remainder is a future interest created in a transferee that is capable of becoming possessory upon the natural termination of a prior estate created by the same instrument. For example, if A conveys to be for life, then to C,” C’s interest is capable of becoming possessory when*

the prior estate (B's life estate) naturally terminates; C holds a remainder

2. *types of remainder*

a. *vested remainders – created in a living, ascertainable person and not subject to any condition except the natural termination of the prior estate*

i. *the indefeasibly vested remainder – certain to become possessory*

ii. *the vested remainder subject to divestment – certain to become possessory **unless** some specified event happens “A to be for life, then to C, but if C ever smokes a cigar, then to D” -*

iii. *the vested remainder subject to open – held by one or more ascertainable members of a class that may be enlarged by the future addition of presently unascertainable persons.*

b. *Contingent remainders, either:*

i. *Created in an unascertainable person or*

ii. *Subject to a condition precedent*

iii. *For example, A conveys to B for life then to C if C graduates from law school – C's remainder is contingent on satisfying a condition precedent before she is eligible to take possession*

3. *freely transferred in most states*

v. *executory interest (in transferee)*

1. *definition: a future interest created in a transferee that must “cut short” or “divest” another estate or interest in order to become a possessory estate. For example, if A conveys property “to B, but if C returns to France, to C,” B has a form of fee simple which may endure forever; in order to become possessory estate, C's interest must cut short B's fee simple.*

2. *types:*

a. *shifting executory interest (one that divest the transferee)*

b. *springing executory interest (one that divests the transferor)*

c. *can arise only through express language in a valid deed or will, not through implication.*

3. *freely transferred in most states*

c. *Limits*

i. *Contemporary relevance of future interests are declining*

ii. *The rule against perpetuities*

1. *the rule in context: the common law version of the rule is “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” – to comply with the rule, it must be logically provable that within a specified period a covered contingent interest with either vest (that is, change a vested interest into a current estate) or forever fail to vest (that is, never vest after the period ends, based **only** on the facts existing when the future interest becomes effective).*
2. *application of the rule: for example, assume O conveys “to A for life, then to the first child of A to reach age 30” – A is alive at the time the conveyance takes effect but to date A has no children. A potential unborn child receives a contingent remainder under this language, which is a type of interest subject to the Rule. It cannot be logically proven that this interest is valid. For instance, A might have a child, B, one year after the conveyance; suppose O and A then die. Twenty-nine years later, if B survives, her contingent remainder will “vest” by becoming a present estate. B’s interest is deemed invalid under the Rule – at the time of O’s conveyance – because such vesting would come too late (more than 21 years after O and A, the lives in being, died).*
3. *modern reforms: most states have modified the common law rule by:*
 - a. *adopting a “wait and see” approach (that is, waiting until the end of the relevant period to see if the interest in fact vested or failed forever to vest)*
 - b. *permitting reformation to validate the interest if consistent with the transferor’s intent.*

iii. *The doctrine of worthier title*

1. *traditionally, if an owner transferred real property to one party, and by the same instrument transferred the following remainder or executory interest to the owner’s heirs, then, under this doctrine, the owner received a reversion and the “heirs” received nothing. Today the doctrine is virtually obsolete in the United States.*

iv. *The rule in Shelley’s case*

1. *Under this rule, if a deed or will*
 - a. *Created a life estate or fee tail in real property in one person **and***
 - b. *Also created a remainder in fee simple in that person’s heirs **and***

- c. *The estate and remainder were legal or both equitable, then the future interest belonged to that person, not to the person's heirs*
 - d. *This rule has been abolished in all but two states*
 - v. *The destructability of contingent remainders*
 - 1. *At common law, a legal contingent remainder in real property was extinguished if it failed to vest when the preceding freehold estate ended. Today, almost all states have abandoned this doctrine.*
 - d. *Rights of someone with a future interest*
 - i. *Can bring suit if the possessor commits waste*
 - ii. *Can in some states share in eminent domain proceeds if the property is condemned. Common law tension between individual autonomy and social welfare*
- X. *Transfer of title without sale or inheritance*
 - a. *Adverse possession – often strikes law students as a form of theft, but the reasons underlying it help illuminate the policies that underpin American property law. English law first recognized adverse possession in 1275. In the United States, it served as a method to resolve widespread land title conflicts, especially in frontier areas where land was rarely surveyed and boundary lines were often unmarked. Adverse possession makes the possessor's right privileged and the true owner's right unprivileged, therefore the true owner would lose an ejectment suit and the adverse possessor would win a suit to quiet title.*
 - i. *Requirements of adverse possession*
 - 1. *Adverse possession is a blend of statutory and case law. All states recognize a statute of limitations for recovering possession of land from a wrongful occupant. In a majority of states, however, the other requirements stem from case law. In some states, statutes specify all of the acts necessary for adverse possession. A few states also require the adverse possessor to pay property taxes.*
 - 2. *Actual possession – the adverse possessor must take actual possession of the land. Under the majority view, this means that the claimant must physically use the particular parcel of land in the same manner that a reasonable owner would, given its nature, character, and location.*
 - 3. *Exclusive possession - the claimant must hold exclusive possession. His possession must not be shared with either the true owner or the general public, but must be as exclusive as would characterize an owner's normal use for such land. This means it didn't include the real owner.*
 - 4. *Open and notorious possession – the claimant's acts of possession must be open and notorious – so visible and obvious that a reasonable owner who inspects the land will receive notice of an adverse title claim. Putting in a fence*

is open and notorious. True owner has the responsibility of inspection.

5. *Adverse or hostile possession under claim of right – in most states, the requirement of adverse or hostile possession under a claim of right is met if the claimant merely uses the land as a reasonable owner would – without permission from the true owner. In a minority of states, however, the claimant must believe in good faith that he owns the title to the land. A showing that the true owner has permitted use will dismiss the claim. Owners rarely either explicitly permits or explicitly denies – presumption is that possession of another’s property is non-permissive. 4 approaches to adverse possessor’s state of mind:*
 - a. *Objective test based on possession*
 - b. *Subjective test based on claim of right*
 - c. *Subjective test based on intentional dispossession (mistaken occupation won’t do here)*
 - d. *Subjective test based on good faith (intentional occupation won’t do here)*
 6. *Continuous possession – the claimant’s acts of possession must be as continuous as those of a reasonable owner, given the nature, location, and character of the land. However, successive periods of adverse possession by persons in privity can be combined to satisfy the statutory duration requirement; this process is known as **tacking**.*
 7. *For the statutory period – the period for adverse possession varies from state to state. Most states use periods of ten, fifteen, or twenty years.*
- ii. *Procedural aspects of adverse possession- successful adverse possession automatically extinguishes the former owner’s title and creates a new title in the adverse possessor by operation of law. As a practical matter, though, the successful adverse possessor needs to record a judgment or deed that confirms her ownership in order to convey the title easily.*
 - iii. *Special restrictions on adverse possession – the limitations period for adverse possession is extended or tolled when the owner is unable to protect his rights due to a disability such as infancy, mental illness, or sometimes imprisonment. Adverse possession is not available against land owned by the federal government or many state governments*
 - iv. *Policy rationales for adverse possessions – scholars have identified several alternative theories that help explain adverse possession. The most common view is that adverse possession is a specialized statute of limitations to recover possession of the land. Also “roots which we should not disturb” or “land piracy” - “providing a degree of ownership to possessors by eliminating a*

stale claim to land title” (decreasing administrative costs); “encouraging maximum utilization of the land” (saves rightful owners the cost of litigation); prevents valuable resources from being left alone too long – those who do not use their property risk losing it to adverse possessors.

1. Oliver Wendell Holmes justified by the roots argument
 2. Posner uses an economic argument – someone who no longer uses the property has a very marginal loss from losing it – the people who live on it would lose a lot. Adverse possessor values the land more than the neglecting owner – but the adverse possessor may have a lower offer price than asking price. For example, the adverse possessor won’t be willing to pay \$10000 for the land but may be willing to keep it rather than sell it to the true owner for more.
 3. Radin – fungible property (replacable with money) v. personal property (bound up in the personhood of the holder. Adverse possessor’s interest is initially fungible but becomes personal. True owner’s interest goes from personal to fungible to nothing.
 4. Adverse possessor may have reliance interests.
 5. Is it a problem rewarding the knowing trespasser/land pirate? Three arguments for “no” –
 - a. Purpose of doctrine encourages reliance on practicality – “good faith” is unpredictable
 - b. Failure of true owner to object may be seen as abandonment
 - c. Even if a land pirate is a thief, adverse possession encourages timely lawsuits
- v. *Brown v. Goble* Supreme court of West Virginia
1. plaintiffs sued to stop defendants use of a 2 foot wide tract of land on their property border. Defendants claimed adverse possession.
 2. defendants thought land was theirs until lawsuit and had used it that way
 3. plaintiffs knew that they owned the land then they bought the property in 1989 but waited five years to act on it
 4. trial court said that defendants did not prove adverse possession because they needed to do it by clear and convincing evidence
 - a. minority view: just a preponderance is fine
 - b. majority view: clear and convincing evidence (a higher standard) is better to protect property rights
 5. parts of adverse possession
 - a. adverse or hostile holding
 - b. actual possession

- c. open and notorious
 - d. continuous
 - e. under the claim of title
 - 6. here, owners back to 1937 thought they owned the two feet
 - 7. defendants brought evidence of all of the elements of adverse possession; circuit court either misunderstood or misapplied the defendant's theory
 - 8. reversed and remanded
- vi. Romero v. Garcia Supreme court of new mexico
 - 1. plaintiff Ida Romero sues defendants former inlaws to quiet title from more than ten years of adverse possession. Trial court for the plaintiff. Defendant appeals. Trial court affirmed.
 - 2. 1947 Romero and husband bought property (not legally), and lived on it from 1950-1962. Husband died, so she moved away.
 - 3. Defendants claim:
 - a. Void deed was inadequate color of title
 - b. Description was inadequate because it failed to specify where
 - 4. Verdict for the plaintiff was reasonable. Plaintiff paid taxes.
- vii. Nome 2000 v. Fagerstrom Supreme Court of Alaska
 - 1. 7.5 acres overlooking the Nome river owned by plaintiffs who in 1987 issued a motion to eject. Defendants counterclaimed adverse possession.
 - 2. Defendants were personally present 1944-1974 playing some; from 1974-1978 a couple of times a week – built on it in 1978.
 - 3. If defendants adversely possessed for ten years its theirs – question is whether 1977-8 constitutes adverse possession. 1978-1987 does.
 - 4. have to have used the land like a reasonable owner would. They did.
 - 5. hostility is determined by objective test: asks whether the possessor acted towards the land as if he owned it without permission of one with legal authority to give permission
 - 6. the northerly portion was adversely possessed; southerly portion seems just adversely used – remanded to trial court to decide extent of possession of southerly portion
 - 7. *from the notes: 556 adverse possession cases 1990-2000*

b. Easements

- i. If the scope of a possessor's actions are limited, not general, they may get a prescriptive easement not adverse possession
- ii. *An affirmative easement is a nonpossessory right to use land in the possession of another. For example, if A owns an easement that*

allows her to travel over land owned by B, A owns an affirmative easement.

iii. Easement terms

- 1. the land that is benefited by the easement is called the dominant tenement*
- 2. the land that is burdened by the easement is called the servient tenement*
- 3. an easement appurtenant benefits the easement holder in his capacity as the owner of the dominant tenement*
- 4. easement in gross benefits the holder in a personal sense, whether or not he owns particular land*

iv. Five categories of affirmative easement

- 1. express easements- an express easement is voluntarily created in a deed, will, or other written instrument. It may arise either by grant or by reservation. In order to create an express easement, the writing must identify the parties, manifest an intent to create an easement, describe the affected land, and be signed by the grantor.*
- 2. easements implied from prior existing use – three elements are required for an easement from prior existing use:*
 - a. severance of title to land held in common ownership*
 - b. an existing, apparent, and continuous use when the severance occurs*
 - c. reasonable necessity for the use at the time of the severance*
- 3. easements by necessity – two elements are generally required for an easement by necessity:*
 - a. severance of title to land held in common ownership*
 - b. strict necessity at the time of severance*
 - i. under the majority view, strict necessity exists when the parcel in question has no legal right of access to a public road*
 - ii. some courts only require reasonable necessity*
- 4. prescriptive easements – in order for a prescriptive easement to arise, the claimant's use must generally be*
 - a. open and notorious*
 - b. adverse and under the claim of right*
 - c. continuous and uninterrupted for the statutory period*
 - d. adverse possession principles are frequently used in interpreting these elements*
 - e. Community Feed Store v. Northeastern Culvert Corp Supreme Court of Vermont*
 - i. Plaintiff action for prescriptive easement – trial judge rejected and entered judgment*

- for defendant on counterclaim of ejectment. Plaintiff appeals. Reversed.
- ii. Plaintiff animal feed business adjacent to defendant business. Plaintiff's customers parked trucks on defendant's part of the lot. Defendant bought land in 1956, but it was not until 1984 that he found out he owned the parking-part
- iii. Plaintiffs errors: proved size of easement, and there was no permission.
- iv. Use here was open, notorious, and continuous – prescriptive easement.
- v. *From the notes: as with adverse possession, adverse use often must be proved by clear and convincing evidence; "claim of right" is regardless of the wishes of the owner.*
- vi. *Many jurisdictions require acquiescence (owners did not assert their right to exclude by bringing a trespass action) but non-permission*
- vii. *A majority of jurisdictions assume adversity of use, but some assume permission.*
- f. Older cases refused to grant the public easements by prescription, but there is a trend of modern cases to recognize that the public may acquire prescriptive easements *but* public use of private land is assumed permissive without evidence to the contrary.
- g. From the problems: should there be a good faith requirement? Should the adverse user lose when the problem is of his own negligence? Should there be compensation for a prescriptive easement if the adverse user is in bad faith?
- h. Trees are an exception to prescriptive easement – you can't have one to let your tree grow on your neighbor's property
- 5. *irrevocable licenses, or easements by estoppel*
 - a. *ordinarily, a license is revocable*
 - b. *A license that becomes irrevocable, however, when:*
 - i. *A license*
 - ii. *The licensee's expenditure of substantial money or labor in good faith reliance*
 - iii. *The licensor's knowledge or reasonable expectation that reliance will occur*
- v. *a negative easement entitles an owner to prevent another owner from doing a particular act on the second owner's land*
 - 1. *English law allowed four types:*

- a. Preventing blocking easements
 - b. Blocking air that flowed in a defined channel
 - c. Blocking water that flowed in a defined channel
 - d. Removing support for a building
 - 2. more recently,
 - a. solar easements
 - b. conservation easements
 - 3. a negative easement cannot be obtained by prescription
 - vi. *the scope of an easement may evolve over time as the manner, frequency, and intensity of use change. In general, the scope of an easement turns on the intent of the parties. The law usually presumes that an express or implied easement intended that the easement owner would be entitled to do anything necessary to the full enjoyment of the easement, absent evidence to the contrary.*
 - vii. *Transfer of easements*
 - 1. *Any transfer of title of the dominant tenement also automatically transfers the benefit of an appurtenant easement, absent an agreement to the contrary.*
 - 2. *The transfer of easements in gross is more complex*
 - a. *In some states, an easement in gross is transferable only if it is for commercial purposes*
 - b. *In other states, any easement in gross is transferable absent an agreement to the contrary.*
 - viii. *Termination of Easements – abandoned where the holder both*
 - 1. *stops using it for a long period*
 - 2. *takes other actions which clearly manifest intent to relinquish the easement*
 - 3. *by prescription*
 - ix. *A license creates informal permission to use land for a specific purpose (like a football game).*
 - x. *A **profit a prendre** is the right to enter the land of another and remove timber, minerals, gravel, game, or other physical substances.*
- c. *Real covenants*
- i. *A real covenant is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise and also their successors and (2) is enforceable in an action for damages. A real covenant may be either **affirmative** (a promise to perform an act) or **negative** (a promise not to perform an act).*
 - ii. *Law distinguishes between original parties and their successors*
 - iii. *Each real covenant has two “sides” – the burden (the promisor’s duty to perform the promise) and the benefit (the promisee’s right to enforce the promise)*
 - iv. *Requirements for the burden to run*

1. *In order for the successor to the original promissory to be obligated to perform the promise, the law traditionally requires that six elements must be met:*
 - a. *The promise must be in a writing that satisfies the statute of frauds*
 - b. *The original parties must intend to bind their successors*
 - c. *The burden of the covenant must “touch and concern” the land – in order to touch and concern the land, the covenant must relate to the direct use or enjoyment of the land. For example, a covenant that restricts the height of future buildings on a parcel meets this requirement. In contrast, a covenant that requires an act having no connection whatsoever to the particular parcel of land (ie, dancing a jig in the village square), does not touch and concern the land.*
 - d. *Horizontal privity must exist – the law traditionally requires that the original parties have a special relationship in order for the burden to run, called horizontal privity. In some states, horizontal privity exists between the promisor and the promisee who have mutual, simultaneous interests in the same land (landlord and tenant). Other states extend horizontal privity to the grantor-grantee relationship as well.*
 - e. *Vertical privity must exist – vertical privity exists only if the successor succeeds to the entire estate in land held by the original party.*
 - v. *Requirement to for the benefit to run is the same, but excludes horizontal privity.*
- d. *Equitable servitudes – promises concerning the use of land that:*
 - i. *Benefits and burdens the original parties to the promise and their successors*
 - ii. *Is enforceable by injunction*
 - iii. *Was born in the famous decision of Tulk v. Moxhay (1848), where England’s chancery court held that a promise to maintain a privately-owned park in an open state, uncovered by buildings, was enforceable in equity against a successor, even though the promise could not have been enforced as a real covenant.*
 - iv. *Requirements for burden to run with the land*
 1. *must be in writing that satisfies the statute of frauds or implied in common plan*
 2. *the original parties must intend to burden successors*
 3. *the promise must touch and concern the land*
 4. *the successor must have notice of the promise*

- v. *Requirements for benefit to run with the land*
 - 1. *in writing or implied in common plan*
 - 2. *original parties must intend to burden successors*
 - 3. *the promise must touch and concern the land*
- vi. *If a developer manifests a common plan or common scheme to impose uniform restrictions on a subdivision, most courts conclude that an equitable servitude will be implied in equity, even though the statute of frauds is not satisfied. The common plan is seen as an implied promise by the developer to impose the same restrictions on all of his retained lots.*
- vii. *Termination of an equitable servitude:*
 - 1. *changed conditions*
 - 2. *unconstitutional (Shelly v. Kramer – race restrictions)*
- e. *The third restatement of property of servitudes: simplifies this; a conveyance creates a servitude if:*
 - i. *The parties so intend*
 - ii. *It complies with the statute of frauds*
 - iii. *It is not:*
 - 1. *illegal*
 - 2. *unconstitutional*
 - 3. *violative of public policy*
 - iv. *A servitude is a legal device that creates a right or obligation that “runs with the land” even when the land changes hands*
 - v. *A license = not a servitude, because it is generally revocable. A permanent license, however, is a servitude called an easement.*
 - vi. *Four issues in the law of servitudes:*
 - 1. *what are the formal requirements to create an obligation that runs with the land? When are informally created ones enforceable?*
 - 2. *when meaning of a servitude is unclear, how should ambiguities be interpreted?*
 - 3. *what are the substantive requirements for the validity of servitudes?*
 - a. *When are servitudes immediately void as against public policy?*
 - b. *When can they not run with the land?*
 - 4. *How can servitudes be modified and terminated*
 - vii. *Four times you cannot revoke a license:*
 - 1. *when you sold something to someone and it is located on your property. This is a license coupled with interest*
 - 2. *licenses that are promises to allow access must be fulfilled, subject to contracts litigation*
 - 3. *easements by estoppel*
 - a. *courts may prevent an owner from revoking a license if the owner grants the licensee the right to*

invest in improvement or induces the licensee to act in reasonable reliance on the license.

b. This doctrine turns a revocable license into an irrevocable one.

4. constructive trusts

f. *Condominiums and other common interest communities*

i. *An increasing number of Americans live in a common interest community, where their properties are subject to comprehensive land use restrictions administered by private associations. Yet the benefits of such communal living are possible only by a surrender of individual freedom.*

ii. *In a condo, each owner*

1. *holds fee simple title to an individual unit*

2. *owns an undivided interest in the common areas of the development (building, recreational facilities, parking lot) as a tenant in common*

iii. *The planned unit development is a broad category that includes a variety of residential developments, ranging from a small cluster of tract houses to gated communities*

iv. *Role of declaration – a common interest community is usually created through a document called a declaration. It imposes binding restrictions – usually enforceable as real covenants or equitable servitudes – on all units of the project. These restrictions are known in many regions as covenants, conditions, and restrictions; others as just covenants.*

v. *Common interest community covenants are presumed to be valid. A growing minority of courts will invalidate such a covenant if it is arbitrary, violates a fundamental constitutional right, or violates public policy.*

vi. *Associations are held to the reasonable person standard.*