Reviewing Student Questions from Last Session
Positive theory of property rights (Demsetz):

- Property rights have both harmful and beneficial effects
- “Internalizing the externalities” – Using the effects of property rights (through “positive will”) to your advantage to reduce the external costs, thus (internally) benefitting yourself/the parties

Question: Why is it called “positive will”?

- Positive economics v. normative economics
- Positive economics quantifies economic phenomena as they are; Normative economics discusses what ought to be
- A positive will is an existing volition, as it is
- Prof. Garcia studied Economics at Yale, so she’s an excellent econ expert to refer econ/theory questions to ☺
“Owner 1 owned a lot on a hilltop. Owner 2 owned the neighboring lot in the valley below. In the spring, the water from the melting snow on Owner 1’s lot flowed downhill where Owner 2 captured it and used it to water his crops. Recently, Owner 1 dug a trench on his land to capture the water from the melting snow to use to water his own crops. Owner 2 must now purchase an alternate source of water for his crops because the water no longer flows to his land. The lots are located in a **reasonable use jurisdiction**. May Owner 2 recover the cost of the alternate water source from Owner 1?

Question: Is the melting snow diffuse surface water?

- Yes – It’s surface water that’s not in a defined channel.
- Diffuse surface water can be owned w/o regulation of its use
- Even in a reasonable use jurisdiction, Owner 2 would not be able to recover the cost of the alternate water source from Owner 1 because it’s diffuse surface water.
Review: Ways to Acquire Property

- First Possession
- Discovery
- Creation
- Principle of Accession
- Fixtures
- Adverse Possession
Exceptions to the Right to Exclude

1. Necessity
2. Custom
3. Public Accommodations Laws
4. Public Policy
5. Antidiscrimination Laws
1. Necessity

*Ploof v. Putnam (Vt. 1908)* (Necessity caused by the storm justified Ploof’s need to dock his boat at Putnam’s dock. Thus, Putnam is liable for damages and injuries suffered by Ploof as a result of Putnam’s untying Ploof’s boat. Necessity caused by an “act of God” or other disaster resulting in an inability to control movements justifies entries upon land and interferences with personal property that would otherwise have been trespasses.)

2. Custom

*McConico v. Singleton (S.C. App. 1818)* (It was custom to hunt on unenclosed and uncultivated land. Even though a landowner asked the hunter not to hunt on his land, the hunter was justified in hunting there because the land was in the forest, which is customarily a common resource.)
Exceptions to the Right to Exclude

- 3. Public Accommodations Laws
  - Civil Rights Act of 1964 – Title II (All people are entitled to equal and full enjoyment of places of public accommodation – hotels, restaurants, entertainment)

- 4. Public Policy
  - *State v. Shack* (N.J. 1971)

- 5. Antidiscrimination Laws
Right to Exclude: State v. Shack (N.J. 1971)

- **Facts:** Two men (one an attorney) other (worker for a nonprofit) entered private land in order to aid the migrant farmworkers. The owner of the property asked the 2 men to leave, but they refused. The men were charged with trespass.

- **Cause of Action:** Criminal trespass action – *Definition:* Intentional intrusion on property possessed by another that isn't privileged.

- **Issue:** Does trespass on real property include the right to bar access to governmental services available to migrant workers?

- **Holding:** No. Ownership of property does NOT include the right to bar access to government services available to migrant workers.

- **Court:** Shack intentionally intruded on property owned by someone else (thus, it meets the literal state law test for trespass) BUT there are federal statutory & constitutional arguments that protect humans.
  - From a **policy perspective,** the state should not discourage or prevent migrant workers from receiving health or legal services, in their own living space, especially as provided in federal legislation.
  - From a **theory perspective** property (ownership) does not include the right to harm others; property rights serve human values, including human dignity.
Antidiscrimination Laws

- **Statutes:**
  - Title II of the Civil Rights Act of 1964 (restrictions on the right to exclude – cannot exclude based the protected classes of race, gender, national origin, familial status, disability)
    - *Bostock (2020)* – In employment context (Title VII) Gender discrimination includes discrimination based on sexual orientation or transgender status. This likely has implications on the right to exclude → may transfer to Title II in future case law
  - Fair Housing Act (Title VIII of the Civil Rights Act of 1968)
    - Cannot refuse to sell or rent based on race, color, religion, sex, familial status, national origin, or handicap.
    - Cannot discriminate w/housing advertising.
    - *Exemptions:* Single-family housing sold w/o use of a broker if the owner owns 3 or less properties; dwellings w/4 or less units if owner lives in one of them; religious organizations can give preference to members of their religion
Antidiscrimination Laws

Case law:

- *Plessy v. Ferguson* (1896) (upholding “separate but equal” facilities) was overruled by *Brown v. Board of Education* (1954) (dismantling “separate but equal” rule)

- *Shelley v. Kraemer* (1948) (Courts cannot enforce racially restrictive covenants b/c this state action violates the 14th Amendment by denying equal protection)

- *Fair Housing Council v. Roommate.com* (9th Cir. 2012) (The Fair Housing Act does not apply to the selection of roommates. In enacting the FHA, Congress intended to address discriminatory practices by landlords, and not arrangements between people who share a living space.)
Other Powers of The Sovereign Owner

- Overarching concept: Property as a sovereignty over designated things; as the power to act as the “gatekeeper” of a thing
  - Licenses
  - Bailments
  - Power to Abandon
  - Power to Destroy
Licenses

- License: The power to give permission to someone else to gain access to property/asset
  - A license is a waiver of the owner’s right to exclude

- Wood v. Leadbitter (U.K. 1845) – Caveat: This is a really old case
  - Plaintiff (Wood) sued, claiming assault and false imprisonment. He had bought tickets to attend horse races on the property of Lord Eglinton, but Eglinton chose to remove him. The Lord’s servant forcibly removed the plaintiff.

- Holding: A license to enter land is revocable because mere licenses do not transfer a property right, and only authorize a licensee to enter land lawfully. Grants, on the other hand, are irrevocable, because they authorize an individual to carry property away from the land.
  - BUT - A license tied to a grant, like a hunting license (allowing the hunter to carry away their game), is irrevocable
ProCD v. Zeidenberg (7th Cir. 1996): ProCD sold a phone directory database called SelectPhone – had a shrinkwrap license which limited the use of non-commercial uses, but was printed on the inside of the packaging and on a pop-up screen where the product is run, not on the outside of the packaging. Zeidenberg (defendant) purchased the product under a non-commercial license but ignored the license agreement and started a company in violation of the license. ProCD brought suit.

Holding: Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (e.g., unconscionable). Nothing in the U.C.C. prevents the rule from working when the license is on the inside of the packaging, rather than the outside.

ProCD invited acceptance of its license by placing the products for sale. Because Zeidenberg read the license agreement and continued to use the product, he accepted the offer, forming a binding contract. The decision (originally in favor of Zeidenberg) is reversed and remanded.
Bailments

- **Bailment**: The power to transfer temporary custody of property to someone else

- **Allen v. Hyatt Regency-Nashville Hotel** (Tenn. 1984): When a customer using a parking garage reasonably expects that the garage will keep the car safe, a bailment relationship is implied between the parking garage and the customer. Because Hyatt could not return the car to the owner, a presumption of negligence was established.

- **Cowen v. Pressprich** (N.Y. 1922): Suit for conversion b/c of wrongful delivery of a bond. If an involuntary/constructive/quasi bailee exercises “dominion over the thing so bailed,” they have an absolute duty to return goods delivered by, meaning that violation of the duty cannot be excused by any showing of care or good faith.
Abandonment and Destruction

- Abandonment: Throwing away or relinquishing all claim to title/ownership
- Destruction: Demolishing, burning, or otherwise eliminating most or all of something’s value

*Pocono Springs Civic Association, Inc. v. MacKenzie* (Penn. 1995): After an unsuccessful sale of their vacant lot on the Pocono Springs Development, the MacKenzies claimed that they no longer owed fees to the Pocono Springs Civics Association because they abandoned their real property.

- Holding: Even though they were no longer paying property taxes, and they signed a notarized statement which was mailed to “all interested parties,” stating their desire to abandon the lot, the Pennsylvania Superior Court held that they did not abandon their property because they still held a valid deed (in fee simple), and perfect title cannot be abandoned under Pennsylvania law.
  - Imperfect title due to a lien, defect or AP could lead to abandonment under Pennsylvania law
Eyerman v. Mercantile Trust Co. (Mo. App. 1975): Though a landowner is generally free to do what they please with their land while they’re alive, if their will directs a destruction which is against public policy, it can be voided by a court.

Upon a person’s death, it may be proper for a court to intervene in the handling of the property. Here, destroying Johnston’s house for seemingly no reason (other than because it was in her will) is against public policy b/c it’s in historic district and it would add little value to the beneficiaries.

The destruction would decrease the value to her beneficiaries and would decrease the property values in the neighborhood, without providing any benefit to anyone.

Thus, the judgment (in favor of the executor of the will) was reversed and remanded.
Divisions by Time; Present Possessory Interests;

- Present Possessory Interests
  - Fee Simple
    - Absolute,
    - Determinable,
    - Subject to Condition Subsequent,
    - or Subject to Executory Limitation
  - Life Estate
  - Fee Tail
  - Term of Years

- We will cover present and future interests more in-depth next time (Deserves more time than what we have today)
## Future Interests

<table>
<thead>
<tr>
<th>Possessory Estate</th>
<th>Future Interest</th>
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<tbody>
<tr>
<td><strong>Nature</strong></td>
<td><strong>Added Limitation</strong></td>
</tr>
<tr>
<td>Fee Simple</td>
<td>Next estate in grantor</td>
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<tr>
<td>Fee Tail</td>
<td>Will end naturally</td>
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<tr>
<td>Life Estate</td>
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<tr>
<td>Term of Years</td>
<td>Condition Subsequent</td>
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<tr>
<td><strong>Next Estate in 2\textsuperscript{nd} grantee</strong></td>
<td>In grantee</td>
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<tr>
<td>Will end naturally</td>
<td>Remainder (contingent or vested)</td>
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<td>Determinable</td>
<td>Executory interest (shifting or springing)</td>
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City council for the city of Dublinshire are concerned about the number of vacant lots weeding over at the edge of town. They vote unanimously in favor of a new program that would assign those lots to local farmers for use as they see fit. This program is best explained as:

- (A) Internalizing externalities
- (B) Adverse possession
- (C) Offering incentives
- (D) None of the above
- (E) All of the above
The city council wants to incentivize the clean-up and ongoing maintenance of otherwise vacant land by granting property rights in that land to persons, in this case farmers, who might be incentivized to take care of it, so (C) is the correct answer. Because the farmers are neither not effecting nor experiencing the effect of the actions of a third party, there are no externalities here to internalize, so (A) is wrong. Nothing in the fact pattern suggests adverse possession, so (B) is wrong.

More explanation: As discussed in class, “externalities” are actions felt by a different party from that which caused them. For example, A and B live on adjoining plots of land alongside a lake. A pollutes the lake. B experiences an externality, because B is affected by the pollution (can’t swim, can’t fish, etc.) that it did not cause.

In Q2, the farmers are not the cause of the lots weeding over. That is, they are not causing any negative externalities that they now need to “internalize” by being assigned land to take care of. This makes incentivization the *best answer (which should always be the goal in multiple choice).
Risa breaks into her neighbor’s house to put out a kitchen fire that she noticed from her window. If Risa is not found to owe her neighbor for damages to their door and personal belongings that were trampled during the incident, which of the following must be true?

(A) She could’ve entered via a window instead of breaking the door
(B) The jurisdiction recognizes necessity as an exception to the right to exclude
(C) The jurisdiction recognizes necessity as a right
(D) – (A) & (B)
(E) – (B) & (C)
Midterm Review

- Where necessity is viewed as a right (as opposed to a privilege), damages may not be owed. The fact that Risa ended up not owing suggests she must have both been excused and that she had a right to do what she did. (A) is wrong because the availability of another option is generally irrelevant to whether one acted in necessity.

- Answer (E) [B&C] is correct
Which of the following is the best exemplar of Lockean labor theory?

- (A) Johnson v. M’Intosh
- (B) Midler v. Ford
- (C) Berg v. Wiley
- (D) International News Service v. Associated Press
- (E) Pocono Springs v. MacKenzie
The court in *International News* was willing to require IN to recreate available news, however tedious and inefficient doing so may be, in order to “earn” a property right in the news they deliver and would not let them profit from the work that AP put in. In other words, IN didn’t have enough sweat on their brow, while AP did. This makes (D) the correct answer.

- *Johnson* involved superior and inferior titles;
- *Midler* involved rights of publicity,
- *Berg* involved self-help,
- and *Pocono Springs* involved abandonment.

To the extent Locke comes into play in any of those cases, the connection is more attenuated, preventing any of them from being the BEST exemplar.
True or False: The decision is *Ghen v. Rich* is consistent with the Coase Theorem.

(A) True

(B) False
Coase Theorem: Under ideal economic conditions with low/no transaction costs, where there’s a conflict of property rights, the parties can negotiate terms of an agreement to get the most efficient outcome.

The Coase Theorem is focused on getting property to its highest and best use by trusting the (artificial, no transaction costs) market to shake out. In *Ghen*, the court effectively holds that granting of a property right in a whale to the owner of the harpoon that sinks it is as good an initial property entitlement program as any, especially since it comports with local norms and customs. Ultimately, if a passerby wants the whale more than the person who harpooned it, they can negotiate with the owner. This comports, making (A) the correct answer.
In the wake of the global pandemic, the Boons fell behind in payments on the mobile home that they use to operate their food truck business. If the lender is allowed to repossess the mobile home, it might be best explained by:

- (A) Dwellings as personhood property
- (B) They did so without inciting violence
- (C) The sales contract allowed for it
- (D) They are in a “posting” jurisdiction
- (E) None of the above
As a general matter, property law enforcement aims to protect people not things. For this reason, possession of vehicles is generally allowed so long as no threat of violence exists. In this case, the facts suggest the Boons are using the mobile home not as a dwelling, but as a vehicle. Given that, and the fact that it says the lender was allowed to repossess it (where dwellings are not typically repossessed), we can assume this was not being used as a dwelling, making (A) the wrong answer and (B) the correct answer.

If the Boons were living in the mobile home, a sales contract running contrary to public policy would likely not be enforced, making (C) the wrong answer.

“Posting” has to do with hunting, not at issue here, making (D) the wrong answer.
Which of these statements are true?

(A) Some property is non-transferable

(B) Debt is a form of property

(C) The state can be a property owner

(D) None of the above

(E) All of the above
Some property, like a law license, cannot be alienated, so (A) is true.

Undesirable things, like student loans, can still be property, so (B) is true.

States can, and often do, own public lands, like state parks, so (C) is true.

This makes (E) the correct answer.
Which of the following is a public good?

(A) A house
(B) A community lake
(C) Your law license
(D) Your blood cells
(E) A song
A public good is one that is both **non-excludable** and **non-rivalrous**. Once a consumer has purchased, say, a CD or an MP3, they cannot be prevented from listening to that music (non-excludable). In addition, one person’s enjoyment of the music does not impact my ability to enjoy the music (nonrivalrous), so (E) is the correct answer. None of the other options meet these two requirements.
True or False: Property theory should always aim to incentivize use over non-use.

(A) True

(B) False
While it’s true that “highest and best use” is often synonymous with use, this isn’t always the case (e.g., nuclear weapons), making (B) the correct choice.
Home buyers in the county of Waterloo are required to concede mineral rights to the county. Which of the following is true?

(A) Homes in Waterloo are semi-commons
(B) Waterloo does not recognize the ad coelum doctrine
(C) Home buyers in Waterloo are entitled to an absolute right to exclude
(D) All of the above
(E) None of the above
The ad coelum doctrine entitles a property owner to everything below and above their property (with some jurisdictions who ascribe to the doctrine limiting the reach to that which the property owner is using). In order to require exclusion of the rights in sub-surface minerals, Waterloo must be a jurisdiction that rejects the doctrine, making (B) the right answer.

Because the rights are conceded to the county and not to, say, everyone else in the neighborhood, the scenario described is not a semi-commons, making (A) the wrong answer.

The exception of mineral rights from Waterloo homeowners’ deeds functions as an exception to their right to exclude, making (C) incorrect.
In a “posting” jurisdiction, which of the following are acceptable form(s) of self-help for a landowner who doesn’t want hunting on their land?

(A) Fencing their land
(B) Training a team of attack dogs
(C) Shooting at hunters
(D) All of the above
(E) None of the above
Self-help should **never** harm people, or create a risk of harm/violence to people, making (A) the correct answer.
True or False: The reasonable use of water is an appropriate question for the jury.

(A) True
(B) False
Because reasonable use is determined on a jurisdiction-by-jurisdiction basis, and is tied to local norms and customs, (A) is the correct answer.
Which of the following is an example of the public trust doctrine?

(A) A state recognizes a homeowner’s right to enforce a restrictive covenant

(B) A state refuses to honor the grant of a waterway to a private company

(C) A state prohibits the sale of human eggs

(D) All of the above

(E) None of the above
The public trust doctrine recognizes that there are some things that are just too public to be slotted into private ownership. **(B) is a good example of this.**

**(A) deals with a restrictive covenant that is between two private parties, making it the wrong answer.**

**(C) deals with a particularly private restriction, making it also the wrong answer.**
If Beyonce grants Blackacre to Jay-Z for life, then to Prof. García, what kind of interest does Prof. García have?

(A) A life estate
(B) A remainder in fee simple
(C) A life estate per autre vie
(D) A fee simple subject to a condition subsequent
(E) A fee tail
Here, Jay-Z has a life estate (a present possessory estate). The only corresponding future interest among these choices is the remainder in fee simple, making (B) the correct answer.
True or False: A license requires consideration.

(A) True
(B) False

A license does not require consideration, so (B) is the correct answer.
Which of the following is an example of a non-freehold estate?

- (A) The apartment you rent
- (B) The condo you own
- (C) The vacation home you rent out
- (D) All of the above
- (E) None of the above
A freehold estate is property that you own, whereas a non-freehold estate is property that you lease. Because both (B) and (C) indicate ownership, the correct answer is (A).
For each of Winterfell, King’s Landing, and South of the Wall, please identify the relevant issues, state the applicable rules, engage in an analysis that includes claims and counterclaims, as well as possible defenses, and offer a reasoned conclusion.

Winterfell
Sansa Stark inherited Winterfell from her father, Ned, upon his beheading twenty years ago. When her friend, Petyr Baelish, tells her he’s looking for a place to rouse and train an army in order to conquer the Seven Kingdoms, she offers him the use of Winterfell. Petyr arrives at Winterfell to discover Daenerys Targaryen already there. When confronted, Daenerys tells Petyr that she first broke into the north tower on a particularly brutal winter day over twenty years ago. By the time the weather cleared, she had decided that she quite liked it at Winterfell, and so she stuck around, planting crops in the northern field, and raising a herd of cattle in the western field. She refuses when Petyr tells her, on Sansa’s account, to leave. Fed up with both of them, Petyr drains the wine cellar, gathers his rag tag band of soldiers and tells them they will march at dawn.
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Back at King’s Landing, Varys hires Podrick to deliver a secret handwritten message to Tyrion Lannister, who is locked in a cell beneath the castle. Varys tells Podrick that he must deliver the message before sunset. On his way to the castle, Podrick is distracted by a lively joust between a man the size of a mountain, and a man dressed as a snake. By the time he remembers his mission, the sun is setting, so he turns and sprints to the castle gates. As he approaches, he sees a figure standing near the entrance, and presses the message into the figure’s outstretched palm just in time. Unfortunately, the figure is Cersei, who reads all about Varys’ and Tyrion’s plot to overthrow her.
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Meanwhile, just south of the wall, Samwell Tarly comes upon a tent and campground that Mance Rayder and the free folk have left behind on their march North. He moves his stuff in, and a week later sells the tent and grounds to a limping Sandor Clegane in exchange for a horse. Back at the Night’s Watch, it is discovered that a single lock of Jon Snow’s hair defends against the zombie-like creatures known as White Walkers. The maester who discovered this power claims the right to sell the hair, while Jon Snow insists that he alone has the right to sell (or not) his own hair.
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Question 2: Ever since the Wildings won the 1000-year-battle for control of the Seven Kingdoms, there has been a problem with wooly mammoths trampling homes (and people) all willy nilly. Being Wildings, they currently have no laws regulating the mammoths. A town hall meeting is called to consider what to do.

Drawing upon the various theoretical approaches that we have studied, please draft a brief memo to the King of the Wildings, Mance Rayder, with possible options for preventing wooly mammoth tramplings, and the pros and cons of each.
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Questions?
Lingering Questions...? Reach out!

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