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Teaching Real Property Law as Real Estate Lawyering

Roger Bernhardt

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Teaching Real Property Law as Real Estate Lawyering

Roger Bernhardt*

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INTRODUCTION

This Article describes an alternative way of teaching the Property course so as to have students appreciate that the rules covered there are relevant to the everyday practice of law. It concentrates on the use lawyers make of those rules, rather than treating the rules as ends in themselves.

What I do here is approach the rules covered in Property from the position of attorneys who have to deal with them in the ordinary course of their practice—not at a jurisprudential or appellate level, but at the earlier, simpler stages of questioning clients, drafting documents, negotiating with others, preparing for litigation, and when necessary, litigating.

The traditional case method does little to make a student appreciate what most class discussion has to do with actually being a lawyer. Rule learning appears to many students to be something to do in order to graduate law school but not very relevant to the activities of lawyering which they hope to engage in after graduating.

Most teaching innovations that go beyond the pure case method do so in a litigation context. But everyday real estate practice does not consist primarily of litigation. Clients with real estate matters more often consult their attorneys in order to make transactions terminate favorably rather than because transactions have already terminated unfavorably; they are clients who have not yet acted, or prepared their offers, or commenced their negotiating, and who have generally not yet started feeling antagonistic to the other side. Litigators and judges are stuck with facts that have already occurred, but transactional practice contains the extra dimension of creating the facts: telling clients what they can and cannot do or that their desires can be achieved if they go at it one way rather than another, inserting or deleting clauses in documents to avoid adverse consequences, or striking or not demanding clauses that merely duplicate what the legal system already provides. These creative possibilities are denied to those who merely litigate.¹

Realistic coverage of the rules of Property need not be limited to hypotheticals involving disputes over facts that already exist and documents that have already been executed. Co-ownership issues can be

1. A litigation approach also presents a narrow and unflattering picture of real estate practice. Real estate lawyers are dealmakers as much as they are fighters; clients retain them on the assumption that the transaction will more likely go through and on better terms because of their involvement. Teaching the rules of Property as if they were intended only for trial and appellate use conceals this positive aspect of lawyering. See Gerald Korngold, *Legal Education for Non-Litigators: The Role of the Law Schools and the Practicing Bar*, 30 N.Y.L. SCH. L. REV. 621 (1985).

raised in terms of advising two clients how to take title to land they are acquiring rather than in terms of resolving a disagreement as to the consequences of a deed they already have. Landlord-tenant coverage can revolve around consideration of what provisions to include (or omit) in a lease rather than as argument over the effect of the provisions in an already executed lease. Conveyancing is clearly better suited for asking what provisions to put in a listing, offer, deed, or escrow instruction than in analyzing the provisions of an executed agreement in order to determine whether to sue or not. Land use can be made significantly more realistic and believable to inexperienced students by having them consider what regulations they might wish to enact rather than considering the effect of those already in force. Adverse possession is less subject to such a planning approach, but even it has many aspects in which legal creativity about making use of the rules can play an important pedagogic role.²

The teaching proposals presented in this Article are procedural and not substantive. I do not seek to revise the corpus of the Property course³ or to offer new insights into the cases, rules, or policies cov-

2. There is no reason why we professors cannot teach law in a planning climate, even if that was not how we used our legal talents while we were engaged in practice prior to teaching. It has never been assumed that we must have practiced what we preach. For the query, "What sort of dispute would involve the legal issues I want to cover in class today?" merely substitute "transaction" or "negotiation" or "deal" for "dispute."

Because we are cloistered in our academies, our knowledge of what occurs in nonlitigation practice may be significantly behind the times. But such deficiencies are not likely to have any significance in dealing with the subject matter of first-year Property.

3. In preparing this Article, I examined all of the casebooks to make sure that the classes I describe here do fit the mainstream course. Occasionally, there will be footnote references to casebook coverage of the topic being discussed.

The casebooks I reviewed are CURTIS J. BERGER, *LAND OWNERSHIP AND USE* (3d ed. 1983 & 1989 Supp.); OLIN L. BROWDER, JR., ET AL., *BASIC PROPERTY LAW* (5th ed. 1989); JON W. BRUCE & JAMES W. ELY, JR., *CASES AND MATERIALS ON MODERN PROPERTY LAW* (3d ed. 1994); A. JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY* (3d ed. 1984 & 1989 Supp.); RICHARD H. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* (1988); JOHN E. CRIBBET ET AL., *CASES AND MATERIALS ON PROPERTY* (6th ed. 1990); CHARLES DONAHUE, JR., ET AL., *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* (3d ed. 1993); JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* (3d ed. 1993); PAUL GOLDSTEIN, *REAL PROPERTY* (1984); CHARLES M. HAAR & LANCE LIEBMAN, *PROPERTY AND LAW* (2d ed. 1985); SANDRA H. JOHNSON ET AL., *PROPERTY LAW* (1992); SHELDON F. KURTZ & HERBERT HOVENKAMP, *CASES AND MATERIALS ON AMERICAN PROPERTY LAW* (2d ed. 1993); JOSEPH

ered there; the teachers' manuals and law review articles already do that. I address myself instead to the more mundane attempt to introduce Property concepts to students in more pragmatic ways.⁴ Professors may continue to address their favorite themes just as before, with only the background context for the class discussion of these themes being altered.⁵

Readers may note the absence of any systematic lawyering style in what follows. The teaching techniques appear almost random because the approach taken in each class is driven by the subject matter rather than by the technique; the course taught is Property rather than Legal Process. For instance, although it might be desirable to begin with the drafting of simple documents rather than with litigation, if the first topic covered is adverse possession, most scenarios would have to be wildly unrealistic to support drafting or planning questions.⁶ The ap-

W. SINGER, *PROPERTY LAW—RULES, POLICIES AND PRACTICES* (1993); EDWIN H. RABIN & ROBERTA R. KWALL, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* (3d ed. 1992). In some cases, new editions appeared as I was writing without my text being revised accordingly. With apologies to the very deserving but alphabetically-disadvantaged collaborators, I use only the name of the first author of each book in many of the subsequent references.

The Seventh Edition of Cribbet arrived as this Article was going to press, and there was not time to revise most references to reflect changes appearing in this latest version.

4. I have also looked at the teachers' manuals (except for Haar which does not have one). Although filled with rich discussion of cases and issues, none of them concentrate on the style of questioning. The typical questions propounded by the manuals are: "What is property?" "What were the facts of the case?" "What did the court actually hold?" "Why did the court . . . ?" "Would the case have been decided the same way if . . . ?" "What alternatives were open to the court?" "Do you agree?" That type of interrogation is not likely to give students the impression that the professor expects students to look at cases the same way as practicing attorneys do. Only Donahue proposed an imaginative scenario—a simulated fox hunt—as a way of starting the course.

Rabin's book is unique, selecting cases for inclusion based upon questions posed by the book. The techniques described in this Article really require one of the more traditional books, whose cases are intended as background for the class discussion determined by the teacher (with some problems added as incidental accompaniment). For users of Rabin's book, the questions contained in this Article are probably helpful only as minor gap fillers.

5. Contrary to what the title of this Article implies, the entire Property course is not covered here. Servitudes (easements and covenants) and incidental rights in land (airspace, nuisance, trespass, water, and support) are not included here, because I have never been able to develop teaching techniques that I regard as especially effective. Estates in land is dealt with transactionally only for waste and partition, with its major classification and rule components covered by streamlined lecture (which is added as an Appendix for any utility it may have to readers).

6. It is not very likely that anyone will ever walk into an attorney's office and say, "I want to be a squatter; tell me what to do." But even litigation topics can be

proach taken for each topic has been developed by trial and error rather than through *a priori* thinking.

There are also no large, complex questions, such as the problem method of teaching tends to emphasize.⁷ What is presented here is more atomistic. Each rule or doctrine has a set of questions best suited to get to the practical application and understanding of just that rule or doctrine. Since the next rule to be covered might require switching sides, changing facts, or moving to a different setting, too much flexibility is lost if all issues on the day's agenda are integrated into one single, overarching problem.⁸

Most of this Article consists of the actual questions put to the students. I think that it will be more helpful to my fellow instructors, especially those new to the teaching of Property, for this Article to provide the literal text of questions one might ask in class, rather than with a conceptual but elusive theory that forces the reader to figure out how best to implement it.⁹ I have put all questions to be addressed to the class in italics in order to clearly separate them from the pedagogical commentary accompanying them.

The questions put forth are generally addressed to those students who are asked to be lawyers for the day, "Laura" and "Larry" in this Article.¹⁰ Other students are designated as the principles for the trans-

approached from a planning perspective; instead of asking, for instance, *What if the possessor said she knew she did not own the land?*, you can ask, *Would it be worthwhile looking for someone to testify that the possessor said she knew she did not own the land?*

7. My colleague, Myron Moskowitz, describes it thusly, "The problem involves several issues cutting across several cases and statutes. It is meant to resemble a complex situation that a lawyer might face in practice." Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 250 (1992).

Moskowitz's article also furnishes enough of a review of the literature on this topic as to embolden me to merely refer readers to it rather than to offer further citations in a belated attempt at academic respectability.

8. For this reason I am reluctant to characterize this technique as one of "simulation" in light of the fact that the practitioners of that pedagogic skill all seem to have in mind large and complicated role-playing situations. See Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469 (1995).

9. Far too often, elegant and intriguing theories of teaching are presented to us at Association of American Law Schools meetings without any guidance as to *how* we listeners are actually supposed to carry them out in class.

10. Although these two names are used throughout this Article, they are but shorthand for the different students called upon in each class to play those roles. Three or four students may at any given time be acting as attorney for the client, notwith-

action and topic under examination.¹¹ By keeping their identities constant for the duration of the topic,¹² one less variable is introduced, situations are humanized,¹³ and there is less of a need for cumbersome labels in the discussion. It is easier and more realistic to say in class, *What about Sid?* than to say *What about Finder #2?*¹⁴ But this feature is hardly essential if your style is otherwise.

I. POSSESSION

A. *Possessors' Rights*

Most of the casebooks begin with cases on capturing, finding, stealing, conquering, or creating property, usually personal property. These cases may be more useful for illustrating the significance of possession in our legal system than for providing a comprehensive review of the law of personal property,¹⁵ or even the law of wild animals.¹⁶ My goal in the first class is, substantively, to have students appreciate that a possessor of property has some "rights" to it, even though he or she does not own it, and procedurally, to see how that principle has an effect on real world disputes. I begin with a situation involving competing claimants to an asset that someone else owns.¹⁷ The claims should be different from those covered in the cases assigned, and the issue should be close enough to generate disagreement among the students when they first consider it. First finder v. second finder or first thief v. second thief best fits these conditions.¹⁸ I begin by telling a little story

standing that they are all referred to here as Laura or Larry.

11. In the text, I have chosen names that readily fit the roles played, e.g., Fern, the first finder, and Sid, the second finder. Sometimes I am lucky enough in class to have students whose names help.

12. E.g., in all the classes discussing finders, Fern and Sid are the parties.

13. It may be easy for a student to announce that a finder or a seller will lose because of a rule. It becomes emotionally harder, however, to tell a real person who has just found that she must suffer because of that same rule. Replacing abstract categories with real persons adds a little more realism to lawyers' treatment of rules.

14. On the other hand, students can and do forget who is who, making it wise to regularly combine names and designations (e.g., *What about Sid, the second finder?*).

15. Bruce makes personal property a second chapter, after Landlord-Tenant. Chused, Goldstein, and Rabin do not appear to include this topic at all.

16. According to the topic headings, this is what is intended in Casner and Haar.

17. For these purposes, the capture cases, whether of animals or inanimate resources, are inappropriate because students too easily intuit the idea of letting a person acquire title to the asset by capturing it and therefore are hardly stimulated to think much about that.

18. *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722), for instance, is a First Finder v. Second Thief situation and very unlikely to generate any disagreement. *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892), is a good First Thief v. Second Thief case, but appears only in Browder.

around that scenario, ending with the two parties both claiming the asset.

I was downtown last week when this guy came along and offered to sell me a bike. While I was looking at it, someone else came by and asked the bike seller how he had gotten the bike. When the seller answered that he had found it, the interlocutor said "I knew it; that's the bike I lost last month. Give it back to me!" The seller then said, "But how do I know that you didn't steal it yourself?" His adversary was taken aback by this question, but quickly recovered her wits and replied, "What's that got to do with it?" The police then came by and everybody scattered, so that I never found out whether that fact was significant or not.

That is only the first version of the facts. Before letting the students actually work on the problem, real people have to replace the abstract ones earlier mentioned. Legal problems are best appreciated at a concrete and human level. In class, disputes will be resolved; documents negotiated and drawn; and advice given to real, living persons so that the students do not dehumanize the rules into disembodied legal abstractions. So the second version is: *Suppose that it was this student—what is your name? Fern?*¹⁹ *Suppose it was Fern who first had the bike, and that she had gotten it by stealing (or finding) it. And then she lost it (or had it stolen from her), and it came into Sid's (another student at the opposite end of the classroom) hands. If Fern and Sid somehow found out about each other, who gets the bike? Fern, do you think that Sid ought to have to give the bike back to you? If Fern does not say yes, she obviously needs an attorney. Does anybody think that Fern should be entitled to get the bike back from Sid? Laura, you do? OK, tell Fern why Sid should have to give the bike back to her.*²⁰ *The same questions go to Sid, or to his lawyer, Larry, if Sid is too unselfish to assert himself.*²¹

19. For the rest of this topic I will use Fern (the first possessor) and Sid (the second possessor) as my subjects.

20. This can be put more elegantly by asking whether Fern has a "right" to get the bike back or whether Sid instead has a "privilege" to keep it, in Hohlfeldian terminology.

Later, having the attorney tell her client what she can or cannot do will become the dominant mode of class discussion, as we move from litigation to transactions. At this stage, however, this advice to the client is just a starting point for making a student "talk like a lawyer."

21. Both parties should get several lawyers along the way as you broaden the discussion base or move past unhelpful speakers.

Since Sid presently has the bike, Fern or her lawyer should try to persuade him to give it back. Sid's lawyer, Larry, however, should not be persuaded,²² and so I suggest a democratic resolution. *How many in the class think Sid should be able to keep the bike? How many think he should have to give it back to Fern?* Two features usually emerge from the voting: first, the students are divided, and second, many did not vote. The nonvoters can be put to productive use: *How many of you didn't vote because you were unsure of the outcome? OK, you six undecideds are the jury; you are the ones the lawyers will have to persuade.*²³ *Laura, will you argue to the jury why Sid should have to give the bike back to your client?*²⁴

Students clearly enjoy playing courtroom lawyer and may even discover how hard it is to persuade third persons who have the power to decide issues. It is not the same as making the teacher happy by coming up with an answer to which the reply from the podium is "right." It makes for a less certain world than that for which college courses prepared them; instead of objective (or at least authoritative) right and wrong, there is the disquieting task of persuading nonexperts of the validity of doubtful propositions in the face of adversaries who are attempting to accomplish the opposite result.

The discussion that follows, in the format of arguments to a jury, is where you²⁵ cover the substantive points on the issue of possession that you deem worthwhile.²⁶ When a student makes a point you want

22. You might ask: *Should Sid's lawyer permit himself to be persuaded?* Of course, if there was a rule Larry did not know about, he should, on learning it, promptly correct his advice to his client. But in our current situation, in which there is as yet no controlling rule, Larry is ethically obliged to remain loyal to Sid. *Sid, how would you feel if Larry changes his mind and sides with Fern? Should lawyers only take cases they believe in?* Usually you can intimidate Larry into sticking with his client; if not, it is easy enough to appoint another student to pick up where Larry dropped out.

23. Obviously, one needs to blithely ignore the distinction between issues of law and fact at this stage of the course.

24. A convenient byproduct of using a jury is that it reduces your obligation to spend time refuting silly arguments sometimes made by the student lawyers. Instead of responding to them, you need merely ask the jury: *Is anyone persuaded by that?* Then move on, with a shrug of the shoulders, to another point.

Persuading others—judge, jury, or opposing counsel—is not the best way to discuss issues, but for this first class when not everything may have been read or understood, it fits.

25. The more formal approach of referring to readers of this Article as "one" or "the professor" too often gets in the way of readable sentence writing. Frequently, I will address "you," dear reader, as such—hoping that you forgive my informality.

26. As stated at the outset, this Article does not cover substance. Most of the teachers' manuals contain excellent ideas that can be easily translated from the case commentary form in which they were written into the format propounded here.

discussed, attorneys for the other side should be required to respond to it then and there; the next speaker cannot ignore the last good point because she wanted to make some new and different one.²⁷ You may need to assist the original proponent of a position into converting it from the inchoate or crude version he put forth into the more sophisticated version you want to see discussed in class.²⁸

It is also your job to keep the debate honest and coherent. Students cannot rewrite the facts just to fit their arguments, nor merely assume the very conclusions they are proving.²⁹ Nor can any student get too officious by dogmatically relying on one of the cases in the book.³⁰

If too many students have not yet had the opportunity to read the cases, or if the assigned book lacks appropriate cases on the question, you can invent precedents: any related rule that commands unanimous assent should serve as an authoritative precedent.³¹ *If the case were Owner v. Thief, how many would vote for the thief? Then we have one precedent that both sides can use in our case. Are there others? What about Owner v. Finder? What about Finder #1 v. Thief #2?* The class regularly votes for the plaintiff in all of those situations³² and the student attorneys have three precedents that they can be made to argue to

27. You may have to promise to come back to her point later on, and you can control the order of ideas by timing just when you will honor that promise and return to that point.

28. It is not hard to put your ideas into students' mouths. Statements like *Stu, are you saying that . . . ?* or *Stella has just said . . . ; how do you answer that?* will almost always be endorsed rather than disavowed by their putative originators.

29. For example, *The bike should go to Sid (or Fern) because it belongs to him, or because he has a "right" to it* (which will be true only if the jury says so).

30. The students are allowed to argue law to the jury on this first class day in order to keep the discussion going, notwithstanding the procedural impropriety of doing so. (Later, that law/fact confusion can be mentioned to them.) But one should not let a student simply cite a case to the jury and then sit down—she should be made to argue and justify the result in the case she cites. Before she can use it, she must show the rest of us that it is the same kind of case as ours, i.e., that the parties there are in the same positions. Since this is never so (because the hypothetical has been constructed to be different), the student must argue by analogy and persuade the jury to follow the analogy. E.g., *Since X v. Y was a case of Finder #1 beating Thief #2, how does that prove that Thief #1 should beat Thief #2?* So put, both sides can be forced to deal with the case cited.

31. This also keeps the unprepared students involved.

32. Other variations are less likely to achieve universal agreement and are not worthy of class time since that may only confuse discussion of the issue at hand. One variable is enough at this stage.

the jury. Both sides should take account of these precedents in their arguments.³³

In addition to arguments from authority, you can easily coax the students into making policy arguments by reading underlying policies into their statements. For example, *Laura, are you saying that if Fern loses this case, then no one will ever . . . again? That would be significant. Larry, can you refute that?* Public, nonparty considerations can be introduced, if the parties have not raised it themselves, by asking, *Should the rest of us care about this fight? Will our lives as finders, losers, or taxpayers who have to pay for judges to decide cases be better off with one rule rather than the other?* and, *Should that be a consideration in deciding as between Fern and Sid?*

As class nears its end, the jurors should deliberate in public (this will reveal which arguments most affected them) and vote. You may prefer to save your remarks on the outcome until the next class.

The following class can relate the assigned cases to the previous discussion. If the jury voted in favor of the first possessor, then the common law principle that first in time is first in right, or that possession is nine points, is morally justified and the law has a rational basis.³⁴ But even if the jury voted the other way,³⁵ the difference is not critical. The important point of the previous class was that rival claims to an asset were ranked and that one of the claimants prevailed, even though neither party was the owner; i.e., one may have lawful claims to an asset without owning it. The existence of a ranking system and the protection of possessory claims is more significant than the question of whether it is the “first” or the “better” possessor who prevails in the lawsuit.³⁶

If the assigned cases mention other types of claims, they can now be added by lecture, by straightforward questions to the class, or by another similar conflict, depending on how much time is available.³⁷ There is

33. The party who likes one of these outcomes should be made to read it as stating a broad principle that fits our case; the other side should read it so narrowly as to have it not fit, or—even better—reinterpret it in a way that makes it support the opposite result in our case.

34. This rule also lets you make the point that even thieves can win lawsuits, if their claims are better than those of their rivals. Our disapproval of theft may entitle us to send the thief to jail for what she has done, but it does not mean that outsiders have better claims to her stolen assets than she does. Common law rules try to come up with the best solution to the particular problem at hand, even though the outcome may not further other, more global, moral concerns.

35. This is often the outcome if the hypothetical involves Thief #1 v. Finder #2.

36. Helmholtz and Holmes, included in most of the casebooks, seem to say this.

37. For example, for landowner claims, *Suppose Fern found a ring under the sofa while visiting at Sid's house? Suppose this occurred in an apartment Sid was rent-*

also the question of what constitutes possession, when that is the basis of the claim.³⁸ You can readily move from the question of previously owned assets to those which were formerly unowned, such as foxes, whales, and natural gas, asking whether they should be subject to similar or different rules.³⁹

B. Bailments⁴⁰

Whoever prevailed in the previous class (say, Fern) is now better entitled to possess the asset than her adversary. *Laura, what if I, the owner of the bike, appear and want my bike back? How will you advise Fern in that case?* Because it is rare for a student to disbelieve her professor, Laura will respond that Fern must return the bike to me.⁴¹ *Thank you for the bike, but what if I was lying? What are you going*

ing and Sid's landlord claimed the ring? Suppose Sid was merely subletting the apartment for the summer? Suppose he was just housesitting for the weekend? Suppose Sid was selling books on the premises, and Fern was there purchasing a book when she found the ring? Suppose she found the ring tucked behind a book on a high shelf (i.e., hidden rather than mislaid)?

Other claims may raise different issues—such as when an employee finds goods on the employer's premises or when the finder gives the goods to someone else for inspection or holding—that may be better resolved by agency or contract law than by possession principles. As such, those questions may be premature for first-year, first-week law students.

38. This will come up again, and more significantly, when real property is taken up. For personal property, you can ask *Suppose Fern and Sid were walking together. Fern said, "Look at that bike." Then Sid picked it up. Who possessed it first? Suppose Sid shoved Fern aside as she was going to pick it up? Suppose Fern was standing on a \$10 bill without knowing it, and Sid saw it under her foot and took it?*

39. This includes the question of whether privatizing ownership of these natural resources would accentuate their demise or prolong their existence on earth. *Would every capitalistically-minded owner automatically kill her whale immediately?*

40. Most casebooks give only a passing nod to this topic, making it more sensible to use it to illustrate other aspects of possession rather than to try for a thorough account of the law of bailments. Average casebook coverage was 10 to 15 pages, although Dukeminier and Johnson both reduced it to 2 to 3 pages and—at least according to their tables of contents and indices—Chused, Goldstein, Haar, Rabin, and Singer did not cover it at all.

41. Laura's advice to Fern to relinquish the bike is also the occasion for the observation or lecture that lawyers do not always fight with their adversaries. When an attorney knows that the rules put her client in the wrong, the best thing the attorney can do for her is tell her to abandon her position. Theoretically, the only time lawsuits should arise is when two attorneys really disagree as to the outcome of a particular dispute.

to do when the true owner shows up? Will Fern be liable to him for losing his bike?⁴² Did she owe him a duty to be careful (i.e., to not lose) the bike? Was Fern free to throw the bike in the trash after she found it? Should she be treated like a bailee?⁴³ Tell Fern what her obligations are regarding assets that she may possess but does not own.⁴⁴

This last question is important because it transforms the role of the student attorney from one of arguing with an adversary or judge over some event that has already occurred into one of advising a client as to how to behave in the future in order to keep out of trouble. Knowing what the rules are is no less important to the attorney acting as advisor, because the advice should be right rather than wrong,⁴⁵ especially since real estate attorneys spend more time advising clients what to do or not to do than fighting over what their clients actually did or did not do.

In class, the questions that will be asked of the attorney must come from you rather than the student client because you are the one with the necessary knowledge to know which questions to ask. You must take on the role of client or speak on her behalf, determine the order of questions and the adequacy of responses, reject the answers that avoid the issue or change the facts, and prod the other students to refute or challenge incorrect or provocative answers.⁴⁶

Here is an easy place to begin. *Larry, the advice Laura gave to Fern makes me concerned. Students are always coming to my office to ask*

42. Or you can ask another student, *Has Laura committed malpractice by telling Fern to give the bike to a stranger?*

43. Only Casner includes a case on this issue: *Cowen v. Pressprich*, 192 N.Y.S. 242 (App. Term), *rev'd*, 194 N.Y.S. 926 (App. Div. 1922).

44. The cases holding owners of animals (chicken-killing foxes, grass-trampling cattle, and polluting pigeons) liable for the harm their animals do to other land or persons can be used to raise the same problems, although some stretching is needed.

45. For instance, if a finder does have a duty of care, it would be bad advice (even malpractice) to tell her that she need not be careful; conversely, if she does not have such a duty, it is still malpractice (although less harmful) to impose on her the unnecessary burden of care.

46. Student lawyers are frequently going to ask you, as client, questions about your situation. This is usually just an attempt to avoid having to think about and resolve the question you have put the them, since a properly put question from you should already contain all of the facts necessary to generate an answer (unless your goal is to cover the question of what additional information is necessary). Their initial evasiveness is perfectly understandable and can often be put to good use by you. For instance, if Laura responded to one of my questions about the bike by asking me, *Was the bike new or used?* I would respond, *Does that matter? Is there one rule for new bikes and another rule for used bikes? If not, why do you need to know, Laura?* (And if it turns out that the student did have an interesting theory behind her question, you may profit from it.)

if they can leave their books there for a while. When I permit this, does that make me responsible if someone steals them? From here, planning is the inevitable next step. If I don't want to have to be responsible (meaning careful), is there a way out of that (other than by refusing to let the books be left there)?⁴⁷ The next time a student asks if he can leave his books in my office for a while, can I say "yes" only if he agrees that I have no duty of care towards them?⁴⁸ Or, if a duty of care is imposed on me only because I am deemed a possessor of the books, Can I tell the student (or post a sign) that I provide only space in the office and that no bailment of books is involved? Will that make me a nonpossessor? Should I tell him to lock the bookbag and not give me a key?⁴⁹

What occurred in this exchange is an example of a recurrent theme of the course. Class time is not spent on discovering what the rule is—it is assumed the students learned that from their reading. Instead, discussion focuses on how the rule operates to guide behavior, by asking what it permits and prohibits, and by exploring how a desired goal can be obtained by maneuvering around the rule.⁵⁰ Deeper questions of the wisdom, fairness, or efficiency of a rule come up in this background context of an attorney advising a client how to behave.

47. Students are sometimes shocked that anyone would not want to be careful, and often prefer to admonish me to be so, rather than to cooperate in exonerating me from this burden. In addition to observing that having no responsibilities is always selfishly better than having some, there is the equally important point that a duty of care means finding out afterwards whether a jury thinks the conduct was above or below some standard. Most clients prefer certainty or safe harbors from their lawyers to post facto judgments from jurors.

48. This question should be asked only if the reading materials cover exculpatory clauses in bailment agreements.

49. These questions are designed to play off the parking lot cases found in many casebooks. For example, Berger includes *McGlynn v. Newark Parking Auth.*, 432 A.2d 99 (N.J. 1981); and Browder includes *Wall v. Airport Parking Co.*, 244 N.E.2d 190 (Ill. 1969). Most of the real world answers to such questions come from contract, tort, or statutory sources rather than from simple bailment law, making the discussion oversimplified if bailment law alone is discussed.

50. For example, *If a possessor has a duty of care, can one avoid that duty by attempting to become a nonpossessor instead?*

In the real world, these kinds of suggestions would come from the attorney rather than the client. In the classroom, a major reason for the professor to be the client is to generate these questions for the student attorney to work on.

C. Possessing Land

The transition from personalty to realty comes through asking whether the rules about possessors that have been covered apply to land as well.⁵¹ Because land is immovable, it is not found or stolen in the same way as personalty. Rather, it is possible for one person to possess land that someone else owns, as in landlord/tenant situations, or even to possess it without the consent of the owner, as when A misreads the property description in her deed and moves onto B's land instead.

Suppose the house Fern is residing in turns out not to be hers, legally, because there was a defect in the will giving it to her. If she found Sid in the house when she got home yesterday, can she do anything about it? Laura, tell Fern what her rights are. The lesson of the previous classes should now be converted into advice to a prior possessor of land.

Insofar as this topic will ultimately lead to adverse possession, the distinction between ejectment and trespass should be introduced. *Laura, before you sue on behalf of Fern don't you think you ought to find out what she wants?*⁵² *Fern, would you rather get some money from Sid or do you want to get the property back from him?*⁵³ *OK, Laura, will you draft a complaint in ejectment for Fern?*

Drafting a complaint is easily manageable, even for first-year students, if technical pleading rules are disregarded. Laura's complaint needs to contain only three statements: (1) an allegation about Fern's rights, (2) an allegation about Sid's wrongs, and (3) a prayer for relief.

Getting students to properly frame the first allegation is the hardest. The natural temptation is to allege that Fern is the owner of the property. Yet, those are not the facts of the case; Fern does not have a valid deed. Laura could easily allege that Fern owns the land, but she would not be able to prove it at the trial. Laura's reaction to this realization may be a loss of faith in Fern's case, since students easily ignore rules

51. This question is easy to handle if the casebook includes an ejectment or trespass claim based on prior possession alone, such as *Tapscott v. Cobbs*, 52 Va. (11 Gratt) 172 (1854), which is included in Casner, Donahue, Haar, Kurtz, and Singer, or *Holden v. Lynn*, 120 P.2d 246 (Okla. 1911), which is included in Goldstein.

It is only a question of making the students realize that the posture of the parties in such an action is the same i.e., Possessor #1 v. Possessor #2. Without such a case to assist the class, it may be easier just to just assume that realty and personalty are treated by the same rules.

52. Getting Fern's attorney to ask what the client wants, rather than deciding it for her, is always difficult. I usually have to give a little talk about how attorneys are supposed to help clients make their own decisions instead of deciding that for them.

53. Having left the choice to Fern, it is nevertheless pedagogically important that she choose possession over damages, so you may have to persuade her to do so.

that they just learned when they do not think that the learning has anything to do with lawyering. *But Laura, as we said yesterday, what it means to say that a prior possessor has a better right than a subsequent possessor is that she can sue to get possession back, as Fern wants to do today. That rule is not something that lawyers memorize and then forget; it is something they use in all aspects of their practice. It is knowing that rule that lets you decide to take Fern's case in the first place,⁵⁴ to plead a proper complaint in the second place, and then to introduce the right evidence at trial in the third place. If the rule were the other way, you would kick Fern out of your office and limit your practice to representing owners.*

With the realization that prior possession is sufficient, Laura need only allege that Fern was in possession of the property before Sid. The second allegation will have to be that Sid is currently in possession ("wrongfully," if Laura wants) of the property, since the prayer is going to seek his removal from possession, and it is hard to dispossess anyone not in possession. The prayer is therefore self-evident.

Now it is time for Sid's response. *Larry, how are you going to reply to Fern's complaint?*⁵⁵ Affirmative defenses and cross complaints should be ruled out, so that the choice comes down to answering (denying) or demurring (moving to dismiss).⁵⁶ *Can Sid demur? On what ground?* Larry may realize on his own that prior possession is a sufficient allegation, or he may have missed the connection to his own strategy and will propose to demur on the ground that Fern did not allege that she owned the property. If he does so, you can take arguments on the demurrer until sooner or later someone realizes that the same rule of law also disposes of the demurrer.⁵⁷

The appropriate response is for Sid to answer the complaint and deny Fern's allegations, or at least the first one. Because there is now an issue of fact, a trial is appropriate, and Fern has the burden of proving her contention that she was a prior possessor. Laura should

54. Perhaps the lawyer will even take the case on a contingent fee.

55. This question should be asked only after finding out whether Sid wants to resist (which, for class purposes, he must do).

56. A short explanation regarding the difference between saying "no" and "so what" in response to a complaint is required.

57. Again, this lets you point out how useful knowledge of the rules of law are to a lawyer's practice. Larry wasted Sid's money by raising a demurrer that was certain to be overruled in light of a well-settled rule, which he knew but did not think to apply.

call her first witness, who is, inevitably, Fern. Her role on the witness stand must be played by you⁵⁸ who should testify to acts of occupation that are light and sporadic.⁵⁹ After being examined and cross-examined by Laura and Larry on these acts, the case is closed, some students are appointed as jurors, and both attorneys must argue the issue of whether Fern was a possessor. Laura should stress how much Fern did do and how her conduct amounts to possession, whereas Larry should concentrate on how much was not done. The nature of possession of land is the real subject matter of the class, but it is covered in the context of jury arguments rather than academic hypotheticals.

Both counsel must also submit a proposed instruction to the jury on this topic. Their rival versions will be argued before you (as judge now, rather than as witness). The format of the instruction, for both, should be: *In order to conclude that Fern was in prior possession of the property, you must find that . . .* This gives the attorneys an opportunity to apply any statements in the casebook on the nature of possession to the problem at hand. Finally, and to afford a common sense view of the situation, the jurors should deliberate aloud and render a special verdict on the question of whether Fern had possession of the property before Sid entered.⁶⁰

You can eliminate issues around Sid's possession by having him actually reside on the property, so that the sheriff will have to remove him in order to restore Fern to possession, or you can introduce other considerations by putting his own possession into question as well.⁶¹

58. On rare occasions Laura will have the presence of mind to want to discuss your testimony with her client before putting you on the stand. In that case, you should meet with her in her office (with the class listening, of course), but the substance of the testimony will be the same. If she fears that the testimony is not good enough, you will have to force her to take it to trial or look for another student who does find it sufficient.

59. For example, *I would go to the house every few days (after the old lady, who told me that I had inherited the house, died) to water the plants and collect the mail, up until the time I found Sid there; sometimes while I was there I would make myself a cup of tea before leaving.*

Here again, your attorney may slip into wanting to treat you as an owner rather than a possessor. Laura's opening question to you may well be, *Do you own (have a deed to) the property?*—notwithstanding all that has been said about the sufficiency of possession.

60. With luck, the case will be close enough to generate a split verdict on this point.

61. I cover the issue of a defendant's possession in order to give some justification to the adjectives later used in adverse possession cases (e.g., "open" and "notorious"). I believe they exist because a defendant guilty of ejection must also qualify as an effective prior possessor in order to prevail as an adverse possessor. This is raised by having Sid's possessory acts mirror Fern's, followed by the question of whether the same standards apply to him. *Should Sid have a defense to Fern's law-*

*D. Adverse Possession*⁶²

The transition to adverse possession begins with asking the jurors, *Did it matter how long Fern was in possession before Sid entered, so long as she was there first? On the other hand, does it matter how long Sid was there? Larry, could you make a better case for Sid if he had been in possession six*⁶³ *years before Fern sued him? Should ejectment actions be subject to statutes of limitations the same as all other causes of action? If the statute of limitations does apply and Sid has been there longer than the allowed time period, what does that mean? How do you assert the defense, and what do you want the judge to do about it? Larry may want to leap ahead and say that Sid has title by adverse possession, but the proper and narrow answer at this stage is merely that Fern can no longer have him ejected because the statute has run.*

*What if the true owner shows up after those six years—assume that's me,*⁶⁴ *can I eject Sid? Does the statute of limitations for ejectment actions also apply to owners (or should we owners be given forever to recover our land from ejectors)? The relation of adverse possession to the statute of limitations is best brought out through using Fern as the example, rather than Sid. Suppose Fern was there six years and the statute of limitations was only five; what is her status vis-à-vis everyone else at that point? Can any stranger to the title (e.g. Sid) dispossess her? Can I, after the statute has run? Who is more of*

suit if he can show that he was there only three times a week (or that his actions were "inappropriate")? Is there a difference between the kind of possession that a plaintiff in ejectment must show for herself and the kind of possession that she has to show concerning the defendant? Since there seems to be no reason why inappropriate acts should stop the clock, perhaps the reason that a possessor claiming the statute of limitations must show that the acts were appropriate because appropriateness applies to prior possession instead.

62. Adverse possession appears early in most of the casebooks as a part of the concept of possession. But Berger, Bruce, Cribbet, and Rabin tie it to conveyancing (Cribbet, making it a part of title assurance, includes it as the very last substantive theme in the book). Where so located, it is doubtful that the approach outlined here will fit.

63. This hypothetical rests on a statute of limitations of five years; use a longer period if your jurisdiction is different.

64. In adverse possession discussions, you should play the role of the client who owns the land rather than the one possessing it. Real adverse possessors are rarely aware of their status and do not consult attorneys for guidance on how to perfect their possessory claims. Absentee record owners, on the other hand, have good reasons to seek legal advice on an ongoing basis.

*an owner, Fern, who can kick everyone else off and cannot be kicked off herself, or me? If you wanted to buy the right to live in that house, how much would you pay for my record title? How much would you pay for Fern's possessory rights?*⁶⁵

Teaching adverse possession as a logical consequence of prior possession keeps students from being carried away by the name of the doctrine and thinking of adverse possessors as calculating land thieves.⁶⁶ It also avoids their being affronted by their first encounter with a legal doctrine which is not as pernicious as it sounds; Fern's victory is not legalized land theft. She did not set out to appropriate someone else's land; she came there through some kind of mistake and has now been there too long for society to want to let anyone undo it. If students appreciate that the claimants in adverse possession cases are usually innocent persons who got swindled when they purchased, who got mixed up when they moved onto and improved the wrong parcel, or who were confused when they put the fences on what they believed to be their boundary lines, the doctrine is far more palatable.⁶⁷

Although the rules are helpful to those who find themselves on another's land, do they accomplish that at the expense of unfairness to the owner? *Larry, I own some vacant land out of town. How can I keep from losing it by adverse possession?* The advice that I visit it

65. Students should be reminded that 99% of a possessor's rights arise when she first enters, before the statute of limitations even began; thus, she is immediately superior to all other nonowners and only the true owner could eject her. It is only the other 1% that arises later when the statute of limitations runs on the owner's right to eject. Adverse possession actions involve that 1%.

66. In fact, adverse possession is probably the most stupid form of theft possible, since the wrongful possessor will owe damages and lose all improvements made if the record owner files suit any time before the last minute.

67. A good case to avoid, if you take this approach, is *Van Valkenburgh v. Lutz*, 106 N.E.2d 28 (N.Y. 1952), in *Dukeminier*, which is so doubtful that it creates a very misleading impression of what property law is all about. A recent article called it "[p]robably the most notorious and complex of adverse possession cases" in light of "the absurdity it injects into the law of adverse possession." Lila Perelson, Note, *New York Adverse Possession Law as a Conspiracy of Forgetting: Van Valkenburgh v. Lutz and the Examination of Intent*, 14 CARDOZO L. REV. 1089, 1089 (1993).

In most of the reported cases, adverse possessors were also the legal owners of the properties they occupied, but their attorneys decided it was safer to show that they met the elements of adverse possession than to prove that their paper titles complied with all of the complicated formalities of record title. Adverse possession lets land marketing be based on a "what you see is what you get" system whenever someone has occupied the property for five or ten years. Buyers need not be overly concerned about fuzzy links in long chains of title nor require surveys when they purchase, because a long-standing house proves its own boundaries. I think that is pretty useful, socially.

every few years can lead to a discussion of open and notorious by my protesting, *But traveling there is expensive; shouldn't I be entitled to not have to worry until I actually hear that someone is occupying my property?* Whether it is better to require actual notice to the owner rather than openness and notoriety by the possessor is raised by, *Laura, if actual notice were required, would you have advised Fern to notify me (given that Fern, like most nonowning possessors, was not aware that she was on property that did not belong to her)?*⁶⁸

The structure of an adverse possession action is raised by asking my attorney, *If I didn't look at the property for six years and Fern says she was there all that time, what will happen? If I bring an ejectment action against her, what will I say in my complaint?*⁶⁹ *How will she answer it?*⁷⁰ At the trial, the burden of proof is reversed, with the defendant possessor seeking to establish her wrongful possession for over the statutory period and the plaintiff owner trying to refute it.⁷¹

Laura, how do you want the jury to be instructed on behalf of Fern in such a case? Her instruction should ask the jury to merely determine

68. Alternatively, you could ask the class whom they would notify if it turned out that the deeds or leases to their own residences were defective. In this regard, *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969), which is included in Browder and Kurtz; *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980), which is included in Berger, Browder, Cribbet and Dukeminier; or *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991) in Kurtz, are unwise cases to use. *Mannillo's* requirement of actual notice for small urban encroachments tends to make students take the exception more seriously than the rule. The opinion makes the outcome seem appealing by looking at the situations with hindsight and admonishing contractors to be careful, but how comfortable does it make ordinary persons feel when purchasing existing houses standing at the lot line? No longer can they count on the running of any clock for comfort against the risk that it encroaches if it is located in a New Jersey town. Surveys should be necessary in each turnover of title there. Similarly, how comfortable can an ordinary buyer of a painting be under *O'Keefe* with the risk of discovering 30 years later that the painting belongs to someone else?

69. The important distinction between my complaint and the one Fern previously filed against Sid is that I can allege that I own the property, which she could not do.

70. Unlike Sid, Fern will admit her own possession but add the affirmative defense that she has been in possession for over six years, an allegation I will have to deny if I am to prevail.

71. If it is clear that Fern is a successful adverse possessor, someone may ask whether I would be better off not suing her because I will lose. I explain that under those circumstances, Fern may sue me to quiet title, alleging that I would lose if I were to sue her in ejectment. The issues are the same regardless of who files the action.

whether I could have brought ejectment against Fern more than five years ago. *Larry, can we impose a more restrictive standard in our proposed instruction?* Larry should want the jury to have to find that Fern was open, notorious, continuous, hostile, exclusive, uninterrupted, etc., for that time, using all of the judicial adjectives found in adverse possession cases.⁷² The question of which standard is the correct one leads to the classic question of whether adverse possession is merely the negative effect of the running of the statute of limitations or the positive act of transferring title from one person to another.⁷³

Each of the elements of adverse possession can then be explored through a series of questions about Fern's conduct posed by an owner looking for evidence to refute her claim of adverse possession:

- **Continuous.** *I heard that Fern was frequently out of town on weekends; does that mean that her possession has not been continuous? What kind of evidence would I need to prove noncontinuity?*⁷⁴
- **Exclusive.** *I know someone who was often invited over to visit Fern on the property; will showing that someone else was there prove that Fern was not in exclusive possession? What kind of testimony would I need to establish nonexclusivity?*
- **Hostile.** *Suppose I testify that Fern was pleasant to me and even invited me into the house for tea; will that show she was not hostile? What do I have to testify that she said, to me or to someone else, in order to prove nonhostility?*

Other requirements can be considered through questions from an owner who wants to stop the running of the clock (without having to hire an attorney), e.g.:

- **Adverse.** *What if I just tell Fern that it's all right for her to stay? Does it matter whether she responds with "Thanks" or "No thanks?"*⁷⁵
- **Uninterrupted.** *Can I sneak on the property at night for a few minutes and thereby interrupt Fern's possession? How much more would I have to do?*

Other questions can come from an owner already resigned to losing:

- **Actual.** *Fern has been on my property for over six years and it is*

72. In the alternative, Larry should want the jury to find that the special statutory requirements in jurisdictions like New York and California, which call for cultivation or improvement in the absence of color of title, have been met.

73. I suggest to the students that courts may want the more demanding standard because they do not want to award the 1% to someone who did not also qualify for the 99%. The adjectives are a way of deciding the 99% question. For example, if Fern would not have prevailed as a prior possessor against Sid during the past six years, then she should not prevail as an adverse possessor against me now.

74. Tacking can be included as a subtheme here.

75. Permissive possession and the role of ouster should also be discussed here.

too late to do anything about it. But she has only actually been on a small corner of the property, so do I have to worry about losing more than that corner? Does it matter that she talks about having a deed to the entire parcel? How can that deed increase her rights, since it is obviously an invalid deed?

The discussion of adverse possession should close with a review of what it means to be a successful or failed adverse possessor. *Laura, if Fern does prove that she satisfied all of the elements of adverse possession, what will she get? Will the court give her a deed to the property? Since she now has all of the rights of a real owner, is there some way you can make the records reflect that? What about the mortgage that the bank had on the property; does she owe that?*

E. Innocent Improvers and Fixtures

The topics of innocent improvers and fixtures can be raised by considering the effect of an unsuccessful adverse possession. *Larry, what will happen if Fern fails to satisfy all of the elements of adverse possession? Can I have her ejected and also recover damages for her past wrongful possession? What happens to the house she built on the land while she was there?*

The doctrine of fixtures can then be explained, pointing out that the lumber Fern purchased changed from personal to real property when the house was built. Thus, title to it passed to the owner of the land where it was affixed.

An unsuccessful adverse possessor is often merely an innocent improver of another's property. If there are casebook materials on this topic (or a good faith improver statute in your jurisdiction), it can be raised by asking, *Laura, tell Fern what she can do, if anything, about the house she has built on Bernhardt's land.*⁷⁶

76. Fixtures and innocent improvers have no settled location in the casebooks. Only Dukeminier, Goldstein, and Kurtz cover it as part of adverse possession. Singer puts it just before adverse possession. Bruce covers fixtures and Cribbet covers innocent improvers as part of their sections on personal property which is substantially separated from their coverage of adverse possession at the end of their books. Both Casner and Rabin have entire chapters on fixtures, part of landlord/tenant and conveyancing, respectively. Donahue has a fixture clause and note in his form contract of sale. I could not find references in the indexes of Berger, Browder, Chused, Haar or Johnson using fixtures, good faith improvers, innocent improvers, landlord/tenant, trade fixtures, or trespassers as reference words. This topic is indexed under "accessions" in Cribbet!

F. *Agreed Boundaries*⁷⁷

In boundary dispute cases, the neighbor claiming a strip on the other side of the legal line is likely to plead both adverse possession and agreed boundaries theories as alternative bases of relief. Based on this pragmatic similarity, the two doctrines are easily taught together.

If the house I just purchased runs all the way up to what I think is the lot line, I don't need to worry, so long as it has been there long enough.⁷⁸ But what if the house is set back, and I want to build an addition and be sure that I am not trespassing on my neighbor's property? In response to the answer that I should have a survey made, But a survey is expensive. Can't I just ask my neighbor, Nate, where the line is?

Then, using an aisle in the classroom as the strip that will come into dispute, *What if Nate (who lives left of the aisle) tells me that the boundary line is here (on the left side of the aisle), I then build up to that line, and later it turns out that the true line was on the other (right) side of the aisle (so that my improvement is encroaching, because the strip belongs to Nate rather than to me)?* This is not an agreed boundary situation, since there is neither a dispute nor uncertainty; however, a convenient way to lead up to that doctrine is to weed away the situations that do not involve it. If I am allowed to keep my encroaching structure under these circumstances, it is because Nate should be estopped from denying the line is where he earlier told me it was, knowing that I would rely on his statement.

What if, instead, Nate and I agree to use the left side of the aisle as our boundary because that is where we both think that the legal line really is? This too is not an agreed boundary case. We were neither disagreeing nor uncertain; we were quite certain, but wrong. In light of the mutual mistake, it is unlikely that any court would enforce any agreement arising from it.

What if, instead, Nate and I both know that the right side of the aisle is the true boundary, but it is more convenient for us to use the

77. Browder, Cribbet, and Kurtz cover agreed boundaries as an aspect of deed descriptions in conveyancing; Rabin also has it there (along with adverse possession). The drawback of teaching agreed boundaries as part of conveyancing is that the parties there are grantor and grantee, whereas the fights resolved by the agreed boundaries rules involve neighbors, who are at best only coincidentally grantor and grantee (and where that feature is significant, some doctrine other than agreed boundaries will resolve the issue, e.g., estoppel or mutual mistake).

Only Berger and Browder have cases on agreed boundaries; the others cover it with a note or problem or not at all, so far as I could tell from their indices.

78. This would be true except perhaps in New Jersey, under the rule of *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969). See *supra* note 68.

left side; and we orally agree to change it; will that work? This is still not an agreed boundary situation, but merely the conveyancing question of whether a strip of land can be conveyed from one party to another without a deed. When both parties know their true line and want to change it, they should go to an attorney and have a deed drafted conveying the strip from one to the other.

But suppose neither of us knows where the true line is, although we can say that we want to have it on the left. Under those circumstances, Laura, could you draft a deed? Of course she cannot, since a deed can be written only if the true line is known. We would have to first hire a surveyor to tell us where the real line is and then hire an attorney to change it, if it is not where we want it to be. Under those circumstances the legal system permits our oral agreement to be effective. *Likewise if Nate thinks the line is on the right and I think it is on the left, and we agree to resolve matters by putting it in the middle or along one of the sides.*

Since the doctrine needs to be invoked only when the legal line is somewhere else, it is always the case that the agreed line is "mistaken." Students frequently confuse that factor with the earlier statement that an agreed boundary cannot be based on mistake, unless the professor clears up the confusion.⁷⁹

II. CONCURRENT OWNERSHIP

Nowhere is the case method more at variance with real-world law practice than in the area of co-ownership. From reading the decisions in the casebooks, one would conclude that lawyering in this field consists of arguing cases whose outcomes depend on whether some home-made document created, for example, a joint tenancy or a tenancy in common. But outside of the casebooks, such constructional issues occur perhaps only 1% of the time;⁸⁰ it is not what real estate lawyers spend their time doing. Attorneys do regularly encounter co-ownership problems, but not in contexts likely to work their way into appellate opinions. Whenever two people purchase real estate together, their attorney is (or should be) assisting them in making their choice by

79. There is certainly more to agreed boundaries than what has been said here, but I have no special techniques for covering the other elements and aspects of the doctrine.

80. Whether an asset is or is not community property in a divorce proceeding is such an issue, but rarely requires construction of a will or deed.

advising them as to the consequences of the options. It is not only a common role, it is also one that clients can appreciate and an attorney can feel good about playing.

That role can easily be replicated in the classroom, by making their student attorney answer all of the questions two persons intending to purchase property would ask.⁸¹ As one of the two buyers, I could, put all of the necessary questions to the attorney myself without a companion, but it is more realistic (and entertaining) for both acquirers to see an attorney together, manifesting enough different circumstances and interests to generate different concerns and favor different outcomes. Beforehand, I have arranged with one of the students in the class ("Fiona") to play the role of my fiancée, with her own agenda of questions (written by me) to put to our attorney.⁸² Then in class, I announce our engagement, add that I have offered to buy us a house, and ask Fiona if she is ready to start looking for one, to which her (scripted) response is that we should see an attorney first.⁸³

A. *The Choices*

Fiona's first question to our attorney is, *How should we take title?* The pedagogical goal is to get a list of possible ways to hold property that can thereafter be compared, and the ideal lawyer's response would be, "You can do it several ways; let me tell you about all of them." That is not likely to occur in class. The student lawyer will probably blurt out, "You should take title in joint tenancy." Anticipating this, you might warn your fiancée to reply, *But I thought it was your job to help us make our own decision, not to make a decision for us. Can't you just give us a list of choices and explain their consequences to us?*

As the options are mentioned, a list will be kept on the blackboard. It will of course contain tenancy in common and joint tenancy, but class discussion is more coherent if the list begins with separately held title, to serve as a basis for comparisons and analogies. So (early in the conversation) I ask, *Would it be possible for us to put the house in my name, even though we are married?* Fiona, who knows this is coming, follows up by asking, *Could we put the house in my name instead? Even though he is the one paying for it?* My question raises the issue of the relationship between separate property ownership and the mar-

81. Johnson approaches the matter in this fashion. Casner begins with a brief note dealing with planning factors, and Haar, by virtue of including this topic as an aspect of purchasing, inevitably invites such treatment. However, most casebooks and teacher's manuals treat characterization as an after-the-fact issue: the deal has already been done, the question now is, What does it mean?

82. Her ghostwritten questions are shown in the same italics as mine.

83. Another student, of course, ostensibly chosen by Fiona, will play this role.

riage state.⁸⁴ Her question introduces the distinction between the form of title and the source of funds behind its acquisition.⁸⁵ Our attorney should be able to give us affirmative answers to all of these questions, and the first two entries on the blackboard list become: (1) my property and (2) her property. Because it will make matters easier later, regardless of the order in which our attorney gives them to us, the next two entries should be: (3) tenancy in common, and (4) joint tenancy. All of these categories are listed without any significant discussion of their characteristics at this time.

Tenancy by the entireties or community property or both should next be added. As these are mentioned, I ask, *Since we haven't yet gotten married, can we take title that way if we buy the house before the wedding? Should I have asked that question about the earlier options?* As we discuss the special marital nature of these two estates, one of us asks, *What about the Jones couple who are gay; can people of the same sex own a house as tenants by the entireties or community property?*⁸⁶

This is the basic list, but other categories can be added. Modern forms of community association are introduced by saying, *My friends own a condominium; what's that?*⁸⁷ The condominium and the time share are good ways to show how modern real estate packaging takes advantage of pre-existing legal categories.⁸⁸ A similar question about

84. Some of my California students think that everything a married person owns becomes community property solely by virtue of the marriage, and many more believe that everything acquired by a person while married is community property, even though separate funds were used to pay for it.

85. Students need to be reminded that gifts can be made between concurrent owners as well as to third persons (I can buy Fiona a house as a gift, or I can gift her half a house instead).

86. This topic is richly treated in Kurtz and generally ignored in the other books, although both Donahue and Singer include it as a landlord/tenant issue.

87. Contemporary forms of community ownership receive quite disparate treatment in the casebooks. Many (Bruce, Cribbet, Donahue, Johnson, Singer) include it as part of concurrent ownership. It is alternatively located in estates (Berger), covenants (Browder, Dukeminier), land use (Casner, Haar), or as a free-standing topic (Goldstein, Kurtz). Chused spreads it among concurrent ownership, landlord/tenant, sales, covenants, and housing quality. Rabin appears not to cover it at all. Coverage ranged from a few pages of text to inclusion of several cases.

88. Students may be confused by the idea that two persons can hold a condominium unit as joint tenants while also being tenants in common of the shared hallways with the other unit owners. You will have to step out of your role as client to explain this to them.

cooperative apartments also introduces the corporation as another form of shared ownership, although rarely appropriate for a couple's internal choice. The corporate form leads to the partnership form of concurrent ownership, a common device for groups of real estate investors to employ. That can lead to the sort of domestic partnership implied in *Marvin v. Marvin*.⁸⁹

B. Considerations

1. Death Consequences

So far, the concurrent estates have merely been listed without any comparative analysis. The differences between them and the reasons for selecting one over the others are now brought out.

Fiona asks,⁹⁰ *If we're married and title to the house is in his name, what will happen to the house when he dies?* The question is incomplete, so I add, *What if my will said that everything I owned went to my son, Sonny?* and Fiona then continues, *What if he dies without a will?*⁹¹ Beginning with nonconcurrent, noncommunity property invites a review of common law dower (or curtesy),⁹² testacy and intestate succession, heirship, statutory forced shares, and probate homesteads. The same answers also apply to the option of title being held in my fiancée's name rather than mine.

This background makes Fiona's next question, *What if we hold title as tenants in common and he dies first?* easy for the class to understand, because that form treats half the house as my separate property and the other half as her separate property for death purposes. The same question for joint tenancy (and tenancy by the entirety) introduces the concept of survivorship, especially when I raise the prospect of devising my interest to my son.⁹³ Community property naturally fol-

89. 557 P.2d 106 (Cal. 1976). Donahue, Dukeminier, Haar, and Kurtz include *Marvin* or a *Marvin*-type case. Covering it at this point permits comparison with standard business partnership rules, but it can be raised at any time by asking your attorney, *Suppose we postpone getting married and buying our own house until later and she just moves into my house with me; will that have any effect on ownership of the house?*

90. I have my student spouse ask these questions because I am older than she and therefore most likely to die first.

91. Death consequences of separate property in nonmarriage cases take only a one sentence comment by the professor.

92. Since I am a husband, curtesy is mentioned under the second option (title in my wife's name).

93. Survivorship should be then elaborated upon by asking, *What if we make my son a joint tenant along with the two of us; what would happen when I die?*

lows from this because of its similarity to joint tenancy in intestate situations and to tenancy in common in testate situations.

Death consequences can be concluded by Fiona asking, *Our broker told us that taking title as joint tenants would avoid probate fees; is that right?* This can be followed with a discussion (or lecture) on the differing capital gains tax consequences of these estates.⁹⁴

2. Marital Dissolution

A less complicated consideration is what effect a divorce would have on ownership interests in the property. One or both of us ask, *What will happen if we get divorced and the property is held . . . ?*⁹⁵ Exploration of the various options will bring out the distinctions between separate property and community or marital property. Property that is in only one of our names should be unaffected by a divorce.⁹⁶ Community property and tenancy by the entireties, on the other hand, are clearly affected by divorce, and we can consider whether their division should be equal or based on fault or contribution. Students tend to also put tenancy in common and joint tenancy into the same hopper and to divide them up in the marital dissolution action, which gives you the opportunity to explain the differences between concurrent and community property and between ending a marital relationship and ending a property relationship.

3. Liability for Debts

Another consideration that separates the different forms of ownership is the liability of the property for the debts of either spouse. These issues are considered by questions from one of us based upon concerns about the other's spendthrift nature.⁹⁷ *Will her creditors be able to*

94. Section 1014(b)(1) and (6) of the Internal Revenue Code can be included in the materials to introduce the students to the notion of stepped-up basis. It is also a manageable and useful introduction to tax law (which will come up again in conveying).

95. For increased drama, one of the spouses can visit another attorney separately and pose these questions as if the other party were not present.

96. The only instance in which it may be affected is if the property is treated as community or marital property notwithstanding the legal form of title. At this stage the various presumptions of community property can be introduced to show that title may not really be the way it appears in the records. That point can also be made later when class gets to the drafting issues.

97. Either I worry about her jeweler and furrier, or else she frets over my gam-

*reach the house if it is in my name? If it is in her name? In . . . ?*⁹⁸ These situations often puzzle students. For them to appreciate the outcome in tenancy in common situations, you may have to explain execution sales and make them realize that the execution purchaser will become a co-owner with the remaining (nondebtor) spouse, notwithstanding the absence of any marital dissolution.⁹⁹ The outcome for joint tenancy is more complicated for them. First, it introduces the concept of severance, when the execution purchaser becomes a tenant in common rather than joint tenant with the remaining co-owner.¹⁰⁰ Second, by postponing execution on the judgment until after one of the joint tenants has died, you can illustrate the risky nature of the creditor's position in such a case.¹⁰¹ The same discussion can then be had with regard to tenancy by the entirety¹⁰² and community property. Finally, the distinction between general and secured creditors is introduced, *What if her creditor asks me to co-sign a mortgage on the house to cover her debt? What if I do? What if I refuse?*¹⁰³

4. Inter Vivos Transfers

The last consideration is the effectiveness of a unilateral conveyance by either spouse. The dramatic impact is greatest when it is raised as a surreptitious consideration by one party alone. At the conclusion of the joint interview with our common attorney, Fiona chooses joint tenan-

bling and car racing expenses.

98. Or *What if she (or he) files bankruptcy?*—a question covered in several books, including Chused, Donahue, and Johnson.

99. If your student attorney is good enough, you can ask, *If her creditor gets a judgment against her and she doesn't pay it, can the creditor then go after the (tenancy in common) house? How much of it can he reach? How will he get it? If he has an execution sale of her interest in the house, and X buys it, what is my relationship to X?*

100. The same questions as in the previous footnote are appropriate, except that the answer to the final question should mention the lack of unity of time or title between the execution purchaser and the remaining (former) joint tenant.

101. This issue can also be approached from the perspective of a potential merchant contemplating extending credit to a spouse on the basis of a financial statement that shows that all assets are held in joint tenancy. *Mark, if Fiona wants you to give her credit and tells you that she owns a house in joint tenancy, should you do it?*

102. *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977), one of the most commonly included cases in the books, extensively reviews creditor questions in a tenancy by the entirety jurisdiction. It can also be used as a springboard for the other situations.

103. In California, for instance, neither party can mortgage community property without the signature of the other, CAL. FAMILY CODE § 1102 (West 1994), but, perversely, community property is liable for the debts of either spouse. *Id.* § 910. So the unsecured jeweler can reach my interest in the community house, but the secured jeweler cannot!

cy,¹⁰⁴ and I visit another attorney privately¹⁰⁵ to find out how much that form of title interferes with my ability to convey my interest to my son. *If title were in my name, could I convey the property to Sonny without her consent? Would I need her signature on the deed? Would I have to tell her? What if title were in her name? What if we held title as tenants in common?* Joint tenancy introduces significant tension into the conversation. *If we were joint tenants, could I still execute a deed of my share to Sonny without telling Fiona? Would Sonny have to record the deed?*¹⁰⁶ *You mean Fiona will only learn of this at my funeral? What would be the state of title after my death?* The dangers of joint tenancy can be made even more dramatic by continuing, *But if Fiona dies first, won't this device defeat my right of survivorship? But didn't you say that I didn't have to tell Fiona about the deed to Sonny? So if she dies before me, couldn't Sonny and I just tear up that deed and forget about it?*¹⁰⁷ The natural instinct of the students to criticize your behavior should be deflected into a discussion of how attorneys can prevent this from happening to their clients—both actor and recipient.¹⁰⁸ Community property and tenancy by the entireties, the final two options, gain significantly in attractiveness as students appreciate the value of a two-signature requirement in conveyancing.

C. Drafting

Drafting considerations in practice are the reverse of those in litigation. Instead of asking what kind of estate a certain set of words has created, as casebook opinions do, the student lawyer must determine what words to use in order to create the particular estate selected by the clients. *What should the deed say if I want to be sure that title is in my name alone even though I am married?* raises the question of how to rebut any presumption of community property. *What should it say in order to create a joint tenancy?* permits consideration about the

104. This is what the students always recommend to her, after title in one name alone is ruled out.

105. Obviously, everyone in class is listening in on this consultation.

106. Students probably will not know, without your telling them, that the deed needs only to be executed and delivered to be effective.

107. I often see the knuckles of some students whiten as they worry about whether this has happened to them.

108. This should involve asking whether clients appreciate that this is how joint tenants stand and whether there are ways for an attorney to create or guarantee a truly indestructible joint tenancy for them.

role of clauses reciting “and not as tenants in common” or “together with right of survivorship.”¹⁰⁹ The unities of time and title are introduced by my asking, *How can I convert the house that I currently own into joint tenancy with Fiona?* The residual nature of tenancy in common is raised by asking, *Can the deed just say to A and B, without adding “as tenants in common”?* To raise community property issues, *The deed the seller proposes to give to us says “A and B (or A and B, husband and wife)”; is that good enough, or does it also have to say “as community property?”*¹¹⁰ Another variable is introduced by asking, *What should the deed say if we want to be 60/40 tenants in common? Can we be 60/40 joint tenants?*

The final questions are, *What if we aren't that certain of how we want to hold title? Can we change our minds later? If we take title in joint tenancy now, can we convert it to community property later? How would we do that?*

D. Money Issues

1. Title

What has been done so far may seem complicated to the students, but the rules are coherent and easy to outline.¹¹¹ The clarity of the pigeonholes blurs, however, when money considerations are factored in to the analysis. Fiona asks, *Will the house really be mine if we take title in my name, but the entire price came from his separate bank account?*¹¹² The class should appreciate the possibilities that I have made a gift of my funds to her, or that there is a resulting trust on the house because of the use of my funds. My converse question, *If title goes in my name and I pay the entire price from my separate funds, will she be able to contend that she has some interest in the house just*

109. If the student attorney does not include them, you ask whether the omission was malpractice; if she does include them, you ask whether she is charging by the word and including a lot of unnecessary verbiage.

110. In California, there is the added twist that, for purposes of marital dissolution, joint tenancy and tenancy in common are presumed to be community property to give the divorce court jurisdiction over the property. This presents a special problem for the drafter who is asked to create a true joint tenancy or tenancy in common for a married couple.

111. By way of review, you can help the class prepare a cross-indexed chart (by type of estate and type of effect) through asking, for example, *For a tenancy in common what are the death consequences? What are the marital dissolution consequences? Etc.*

112. A fraudulent conveyance issue can be added in by saying, *I want title to be in her name in order to keep my ex-wife or my creditors from ever getting their hands on it.*

because we were married at the time of acquisition? raises questions of tracing appropriate to community property, equitable distribution rules, or uniform marital property statutes.

Concurrent title situations are also fuzzy. *If we take title as tenants in common and I pay 90% of the price, do I own 90% or 50% of the house? If I own only 50% of the house, does she owe me any money back?* These questions force the class to appreciate that the overcontributing co-owner can be treated as having made an investment (i.e., owning 90%), a loan (owning 50% and being owed 40% of the price), or a gift (owning 50% and not being owed any part of the price).¹¹³ The question, *Will the same be true if we take as joint tenants?* asks whether the unity of interest requirement automatically overrules the investment alternative possibility. For the community property variation, Fiona asks, *What if my parents bought the house for us as a wedding present (with title in our names as community property) but later we get divorced?*¹¹⁴

Another dimension is added by dividing the price into a down payment and a mortgage. The down payment might be treated as a gift from one co-owner to the other, while at the same time mortgage payments might be called loans if both had signed the mortgage.¹¹⁵ In community property jurisdictions, where salaries are community income, use of one spouse's paycheck to make a mortgage payment on the other spouse's house may give the community an ownership (investment) interest in the property unless a gift (or loan) can be shown to have been intended. These are difficult and complicated issues, and students may become frustrated by numerous variables and a lack of bright line answers.

113. These options are more realistic if the students view the couple as two friends going into a real estate venture, rather than as spouses purchasing a house.

114. In California, for instance, by statute, a separate property contribution to a community asset is treated as an interest-free loan to the community, CAL. FAM. CODE § 2640, generating a novel answer to this question. See *In re Marriage of Lucas*, 614 P.2d 285 (Cal. 1980) in Donahue or Goldstein.

115. This is how the outcome in *Giles v. Sheridan*, 137 N.W.2d 828 (Neb. 1965), included in Donahue, appears to have been calculated. *Cummings v. Anderson*, 94 Wash. 2d 135 (Wash. 1980), in Kurtz, involves mortgage and tax payments made before, during and after marriage and separation.

2. Rent and Possession

Possession issues tie in neatly with money questions. Fiona asks, *Can he evict me or make me move down to the basement if we stop getting along?* I inquire, *If a new job forces me to move to New York and she stays behind in the house, can I make her help me out with my New York expenses by collecting some rent from her? What do I have to do to get some rental income from the property?*¹¹⁶ *Can I rent out my "half" to someone else? What if she won't sign the lease? What if she won't let my tenant in? What if she tries to rent out her half?*¹¹⁷ All of these questions explore and explicate the concept of unity of possession. The Statute of Anne is raised by my asking, *If she rents out the entire house while I am gone, can I claim any of what she receives?*

3. Expenses

The liability side of the equation is raised by Fiona. *If he leaves, what about the bills? Can I make him pay half the property taxes? Half the repair costs? Half the price of a hot tub I want to add?* I counter by asking, *Is it fair for her to live there rent free and make me pay half the bills at the same time? What if I would rather default on the mortgage because I think it is too large? What if I would prefer to lose the property at a tax sale rather than pay the property taxes? Can she impose personal liability on me for a bill the government cannot force me to pay? What if putting in a hot tub was a stupid idea as far as I'm concerned?* As to the hot tub, she responds, *But the hot tub generates an extra \$50 a month in rent. Do I have to share that with him if he didn't pay for it? If we sell the house for more because of the hot tub, who will get that excess?* These questions make the distinction between different kinds of expenditures (to preserve the title, necessary repairs, or elective improvements), different forms of liability (in personam or in rem), and different collection proceedings (contribution, accounting, or partition).

4. Income

Finally, and perhaps appropriate only in community property jurisdictions, is the treatment of income that is generated simultaneously from

116. *Should I try to get her angry enough to throw me out, so that I can claim an ouster?*

117. Also, as subsidiary questions: *What if I die while my tenant is there? Will his lease terminate on my death? Since it is a joint tenancy, how will Fiona's right of survivorship and my tenant's rights under the lease mesh? Is executing a lease a good way to sever our joint tenancy?*

a separate property source (a separate asset) and a community property source (efforts in managing the asset during the marriage). *I own and also manage an apartment building nearby. All of those rents are my separate income, aren't they?*¹¹⁸ The whole situation can be made hopelessly circular by having the received rents applied directly to the mortgage, which would make the ratio of community to separate change each year.

E. Settlement Agreements

By way of closing, *What if we don't really like all the consequences of any one choice of title? Can we make our own rules as to these matters?* The class can discuss what public policy issues are involved when unmarried persons (gay couples who cannot marry or straight couples who elect not to marry) attempt to create forms of property ownership equivalent to marital and community property regimes, or when married couples seek to change rules, perhaps solely in order to make it easier to get divorced later.

III. LANDLORD/TENANT

Landlord/tenant involves exciting opportunities for introducing new dimensions to lawyering roles. Transactions frequently involve drafting or reviewing lengthy legal documents, which requires that an attorney not only knows what the provisions mean, but also appreciates what underlying rules are being altered by them. Here, often for the first time, the students are forced to consider not only what the background rules are, but also, whether and how to modify them by contract. As an additional dimension, in the residential field, the rules have moved from the status of gapfilling, modifiable standards to welfarist policy edicts that the parties may not be free to alter by conventional drafting techniques. Students can consider what role an attorney may appropriately perform as "freedom of contract" gives way to "public policy."¹¹⁹

118. If this question is going to be raised, *Beam v. Bank of Am.*, 490 P.2d 257 (Cal. 1971), included in *Haar*, is a good case to assign. Fiona asks her attorney which formula profits her the most, and I ask my attorney how our accountant should testify regarding the value of my services at the building.

119. What is not covered here is the case of the government as landlord, which provides a very different role for an attorney to play.

At the same time, there is an enormous amount of substantive law and heavy organizational problems inevitably confronted by students when attempting to assimilate this knowledge. Distinctions abound¹²⁰ and much class effort needs to be spent reminding students which pigeonhole is being covered that day.¹²¹

A. *The Tenancies and Their Termination*

The conventional way of beginning landlord and tenant is to start with the distinction between the various types of tenancies, i.e., tenancy for a term, periodic tenancy, and tenancy at will. But since the distinctions are important only insofar as they matter; students are likely to more readily appreciate the differences between the tenancies if they are confronted with a situation in which the outcome differs according to the leasehold estate involved.

I present the following problem to my attorney:¹²² *I just received a letter from my tenant, Tina, saying that she has vacated her apartment (or store). Under our lease, she is supposed to pay me \$1000 a month rent for seven more years, and I can only get about \$700 a month¹²³ if I have to put it back on the market. Can she get away with not paying the promised rent? Furthermore, she has missed some back rent payments, which I also want to collect.*

A preliminary matter the class should appreciate is the essential connection between rent liability and the existence of a tenancy. In order for Tina to owe me rent, she must be my tenant; i.e., some form of tenancy must exist between us. If there is no landlord/tenant relationship, she might still have some liability for possessing my land, but then the amount sought is use value (\$700), rather than the rent reserved

120. The most common error I perceive in examination papers is the application of a correct rule to the wrong situation; the students have a much easier time memorizing the rules than remembering where they fit.

121. The diverse approaches of the casebooks illustrate the absence of any universal organizing principle for this field. About all that they can be said to share is a 150-300 page treatment of the topic. Although it generally appears relatively early in most casebooks, Donahue, Goldstein and Singer each put it towards the end, after conveyancing, servitudes, and land use, respectively. Both Bruce and Rabin, on the other hand, begin their books with this topic.

122. Throughout this topic, I take on the role of landlord as against a student or students identified as tenants ("Tina" in this part of the article). Students are clearly better able at identifying themselves as tenant's counsel, making it easier for them to challenge and attempt to thwart my ambitions. The questions put forth by the instructor could be phrased as tenant rather than landlord queries, but it is harder to generate opposition to problematic answers that way.

123. This is my way of indicating the fair rental value of the premises, making it \$300 less per month than the rent reserved.

(\$1000). Furthermore, now that Tina is no longer in possession, there is no basis for recovering future use value at all, making rent the only possible theory. To recover rent, I must be able to show that Tina was (and still is) my tenant.¹²⁴

Larry should want to see the lease to which I referred. I can either have a form ready for class distribution,¹²⁵ or I can tell him that it gives Tina possession of the premises for ten years at a rent of \$12,000 a year, payable at \$1000 a month on the first of each month. I add that she and I agreed on these terms three years ago, but that we never got around to signing the lease. Thus, there is an unsigned lease creating a term long enough to come within the statute of frauds. *Is it so important that it wasn't signed; if we had signed it, what would be my relationship with Tina? Since it isn't signed, does that mean that Tina isn't my tenant? What was she these past three years? Was she just a trespasser who I could have kicked out on a moment's notice? Can she demand back the extra \$300 she paid me each month for the last three years because she wasn't a tenant?*

Larry will ultimately figure out that Tina's consensual entry and regular payment of rent under an unsigned lease made her a periodic tenant,¹²⁶ and that she owed the stated rent under it. The question adds the point that periodic tenants owe rent the same as term tenants do: *She did miss one payment last year; can I sue her for that?*¹²⁷

And she missed a payment in the second year; can I get that? Was Tina still my tenant after the first year ended? This introduces the automatic renewal nature of periodic tenancies, which distinguishes them from term tenancies. Larry must explain to me that Tina owes rent for the second year, since she was a periodic tenant in her second year of possession because neither one of us took any steps to termi-

124. Some rhetorical questions to the student lawyer usually bring this out, e.g., *Suppose I found X living in one of my apartments without my permission. Apart from ejectment, can I recover \$1000 or \$700? If X refuses to pay and immediately leaves, can I recover damages for the future or only for the time X was there?* These questions should bring out the fact that trespassers and tenants are different.

125. If a form lease is used, it can also serve as a foundation for discussion in all later issues.

126. Under this scenario, Tina is a periodic tenant rather than a tenant for a term under a signed lease.

127. This query ignores any statute of limitations problems.

nate the tenancy after the first year.¹²⁸ The same is true for any unpaid back rent during the third year.

What about rent coming due after she sent the letter to me informing me of her departure? This introduces the question of how periodic tenancies are terminated and the requirement that the notice comply with certain formalities,¹²⁹ one of them being a requirement that the notice be given a certain time in advance, unlike the rule for tenancies at will.¹³⁰

*How much advance notice should Tina have given me? Or, When I want to terminate a periodic tenancy, how much advance notice do I have to give?*¹³¹ The answer to these questions requires a determination of the duration of the period involved. *Under the lease we didn't sign, did we create a tenancy from month-to-month (because of monthly payments) or from year to year (because of annual calculations)? Which position should I take? Tina, would you rather be a month-to-month or year-to-year tenant, now that you want out?*

The timing of the notice of termination can be raised through a series of questions to the tenant's lawyer: *Laura, if Tina is a month to month tenant and wants to quit as soon as possible, what should your notice to me say? If today is the tenth of the month (and the rent is payable on the first of the month), can the notice terminate the tenancy as of the first of next month? Can the notice terminate the tenancy as of the tenth of next month? Can the notice terminate the tenancy before the*

128. At this point, it is useful to introduce to the class the broad array of periodic tenancies so as to disabuse them of any assumption that the discussion relates only to long-term unsigned leases. *Why do you call Tina a periodic tenant when she never signed an agreement saying that a periodic tenancy was created? If this estate arises "by implication" out of some other factors (e.g., failure to sign a lease containing a valid termination date), when else might it be implied? What would we call Tina if she signed an agreement that stated a rent but not a termination date? What if she signed an agreement that contained a termination date, but that date came and went some time ago and she is still there paying rent? What if her agreement expressly stated that it was a tenancy from month to month? Are each of these forms of periodic tenancy the same or are there different rules for their termination?*

129. When instinctively protenant students want to dispense with these requirements, you can ask them whether they are currently more concerned with properly terminating their own tenancies or with keeping their landlords from doing so, especially around exam time.

130. This is an appropriate time to cover the estate at will, if it has any significance in your jurisdiction.

131. The question *Are the notice requirements the same on both sides?* will let the students consider the comparative needs for notice and the amount of time landlords may require to obtain replacement tenants versus the time tenants should have in order to locate and to move to new premises.

first of the following month? If the tenancy were determined to be year to year, how far in advance would your notice have to be?

If Laura gets any of these "wrong," my lawyer will be asked about the consequences, e.g., *Larry, if Tina sent me a notice on the tenth saying that she was quitting on the first, did that terminate the tenancy on the first? Did it terminate on the tenth or on the first of the following month, if that isn't what it said?*¹³²

The continuation of rent liability after a defective notice of termination ties the entire topic together. *If Tina has not sent a proper notice of termination to me, what about next month's rent? What about next year's rent? What about rent in the eleventh year? (If the lease had been signed, would she owe rent in that eleventh year?)*¹³³

1. Other (Non)terminating Events

The underlying theme of the above discussion was that the chief distinction between the tenancies is how they terminate. A different, but related, point is the significance of other possible terminating circumstances, even though they do not serve to distinguish the tenancies from one another. I can introduce these by considering with my lawyer the assertion of various defenses to rent liability raised by the tenant, all based upon her contention that the tenancy has ended.

*Tina told me that she no longer owes rent because the store was damaged or destroyed by a fire; is that true?*¹³⁴ If the common law rule has been displaced by a policy permitting a tenant to leave when the premises are destroyed, the role of the background rule in negotiating can be introduced: *Laura, do you want a clause in the lease letting Tina quit if there is a fire? Are you willing to pay an extra \$25 a month rent if I agree to such a clause?* Students are more appreciative of the value of knowing the background rule (i.e., the law) when they discover that they have been offering to pay for a right their client al-

132. This question raises the issue of who generally profits from fussy formalities about termination.

133. One factor not yet discussed is Tina's departure.

134. Frustration is a related variant: *She said that she left because a city inspector told her that the zoning laws prohibit her from engaging in that kind of business on that block.* For both these issues, the distinction between periodic tenancy and tenancy for a term is not central, although a monthly tenant's ability to terminate on 30 days notice significantly reduces the impact of destruction of the premises on continued rent liability.

ready has.¹³⁵ A good lawyer is not one who simply makes demands for her client; it is one who knows what needs to be demanded and what does not. If the law already lets the tenant quit on destruction, she has no need for a clause to the same effect; indeed, it is the landlord's attorney who should recommend a clause going the other way (and perhaps offering a rent reduction in return).¹³⁶

B. Abandonment

The rules regarding abandonment naturally flow out of the discussion of termination, since they were largely implicit there all along. *If Tina did not terminate the tenancy by sending me a letter, did she terminate it by leaving the week (or month) after she sent the letter?* The negative answer means that abandonment does not terminate a leasehold and that an abandoning tenant continues to owe rent. My attorney has already effectively advised me that when a tenant abandons, a landlord can sue for the rent as it falls due, because that was merely another way of saying rent is due so long as the tenancy has not been terminated.

Exploration of the rent remedy follows: *If I sue Tina for the rent, must I file a new complaint each month? Can I let some months accumulate and then sue for all the back rent? Must I wait until rent is already past due, or can I sue for the future rent immediately under some kind of anticipatory breach theory?*¹³⁷ *Can I have a clause in my lease accelerating the rent?*¹³⁸

The other forms of relief are introduced by pointing out the drawbacks of the rent remedy. *But I don't want to leave the premises vacant and hope that Tina will stay around to be sued or remain solvent*

135. If the common law rule is still in force, it is too early to employ this negotiating issue; the point is most dramatically made when you have trapped the student lawyer into malpractice through advising the client to pay for rights she already has.

136. From here you can go into the question of what the provision might say, depending on who wants what. A lesser point that can be hinted at is that we may have to determine whether the background rule is only a gap filler that can be displaced by a contrary agreement, or whether it is a policy statement that the parties are not free to alter. But a full discussion of that point should wait until a true policy rule is on the table.

137. I limit these questions to rent, without mentioning alternative damage theories, since it is not yet time to introduce the question of mitigation. If there is a judicial or statutory measure of damages in the casebook or the jurisdiction, this is one place to cover it. Because lost profits intrinsically include mitigation—the landlord's award automatically subtracts recoverable rents from the rent reserved—this discussion can be postponed until after a duty to mitigate has been discussed.

138. As a way of introducing this topic, you can also ask: *Can I apply her security deposit to cover the unpaid back rent?*

enough to pay a judgment. Can I go into the place and rent it to someone else?¹³⁹ If the market has gone up so that I could collect \$1100 a month from a new tenant, can I tell Tina that her lease is over and that I am going to rent the premises to someone else?" Students will want to explain this common sense result as a form of contract termination or rescission, unless the casebook or you explain how the estate concept of property requires a reconveyance of the leasehold from tenant to landlord and how the fiction of surrender by operation of law satisfies that demand.

Reletting on the tenant's behalf follows from reducing the rent that can be obtained on a reletting. *If I get only \$700 a month from a new tenant, can I sue Tina for the \$300 difference? How can I say she owes that rent difference if we say her leasehold was surrendered to me? If Tina's leasehold is still in effect, how do I explain that I am renting it to a third party?*

1. The Duty to Mitigate

The dangers of the reletting remedy serve as an introduction to the question of mitigation. *Can I relet for Tina's account if my lease does not provide for it? Do I have to notify her first? Do I have to get her consent? Can I remodel for the new tenant? Can I give the new tenant a longer lease than Tina had? My attorney cannot categorically give me certain advice as to what I can and cannot do; so, If a court decides that I went too far in reletting and was not acting as Tina's agent, what will happen? If the judge says that my acts worked a surrender of her leasehold, what about her future rent liability? In light of that danger, why don't I skip trying to relet on her behalf and just allow the premises to stay vacant for the next seven years, suing her for the rent all that time or as long as she remains solvent? We are back at the rent remedy, but now approaching its availability to a landlord in a jurisdiction that imposes a duty to mitigate damages.*

139. There is also the threshold question of whether the tenant has truly abandoned or is merely absent and delinquent. That matter can be raised by asking, *What if Tina's rent check was lost in the mail and she had not abandoned but merely gone on vacation? Am I free to go into the place and remove the things she still has there or to change the locks?* To make the uncertainty more reasonable, Tina's termination letter can be replaced by a sudden disappearance (and removal of some belongings) after a missed rent payment.

I respond to my attorney's admonition that I am obliged to mitigate. *How much do I have to do to mitigate? Is it enough to put an advertisement in the Sunday paper? Can I rent it out only after I take care of the other vacancies in the building? Can I ask for the same rent that I am asking for in the other units? Can I impose the same restrictions—e.g., no commercial activity on the premises—that I imposed on Tina?*¹⁴⁰ *If I try to relet and fail, can I recover the costs incurred?*

In terms of sanctions, *If I do not relet Tina's premises, what will happen?*¹⁴¹ *Will I have to prove that I could not find a replacement or will she have to prove that I did not try hard enough? If the judge finds me at fault, will I lose the entire rent or just the amount I should have saved by mitigating?*¹⁴²

C. Transfer of the Leasehold

Assignment and sublease can be treated as an aspect of mitigation. While discussing what I must do to mitigate my loss, I tell my attorney, *I have been contacted by Trent, who told me that Tina told him to see me about taking over the premises now that they are empty; if I refuse to let him move in, will Tina be able to say that I did not properly mitigate my loss? When Larry tells me that I must accept Trent (unless I have legitimate objections to him), I counter, But my lease says Tina cannot assign without my assent, and doesn't the law say that I can unreasonably withhold that assent?* The tenant's right to assign and the

140. The casebooks rarely cover use restrictions, although Kurtz includes some problems on them, but such restrictions are certainly common enough in the real world. The topic can also be introduced in the context of being asked to consent to an assignment or sublease involving a different use of the premises.

The latest edition of Cribbet includes *Piggly Wiggly Southern v. Heard*, 405 S.E.2d 478 (Ga. 1991) on the question of whether a duty of continuous operation is implied against a tenant operating under a percentage lease. That topic would also go here.

141. Another aspect about this policy can be raised by asking, *Can I include a provision in the lease stating that I do not have to mitigate? Can there be a provision stating that one Sunday advertisement is sufficient? How about a clause to the effect that it is up to Tina to find a replacement?* The connection between this last question and the next topic of assignments is plain.

142. This leads naturally to an analysis of a damage remedy (rent reserved less rental value) as opposed to a rent remedy, since a mitigation component is inherent in the damage formula. Thus, in California for instance, where there is a statutory measure of damages following a tenant's abandonment, the landlord who is not officially forced to mitigate might as well do so since what could have been collected is subtracted from the rent reserved—whether the landlord actually relet the premises or not.

landlord's duty to mitigate become merely different perspectives on the same issue.¹⁴³

When there is no duty to mitigate, the right to assign becomes an issue in its own right. This issue can be raised through questions to the tenant's lawyer. *If we are in a state that does not make me mitigate I can let the premises remain vacant if Tina has to quit early Laura, in negotiating Tina's lease with me, do you want her to be able to transfer it to someone else if she has to leave? What do you want the lease to say on that issue? Would you recommend that Tina pay an extra \$25 a month to get that clause included in the lease? How much is it worth?* For Laura to suggest any price is bad lawyering on her part, since she should know that a leasehold is freely alienable unless the lease says otherwise. Just as was said before with a tenant's demand for a clause terminating the tenancy on destruction in a jurisdiction where that is already the rule,¹⁴⁴ a good lawyer appreciates what does not need to be demanded because she knows that the law already provides it to her client.

To deal with no-assignment clauses, the focus returns to the landlord, since he is the one who will suffer if the lease is silent on the issue of transfer. If the proposed clause was "badly" drafted—e.g., refers to assignments but not subleases, or vice versa¹⁴⁵—I ask, *If I demand that the clause go in the lease, Laura, would you advise Tina to accept?* After someone has pointed out to Laura that the clause does not prohibit subleases, I ask her, *How will you structure a transfer from Tina to Trent to make sure it is a sublease rather than an assignment? Is it enough to just label the document a sublease if Trent is getting the entire balance of the term? Is it enough to have him pay his rent directly to Tina or to make it a higher rent than she pays me or to have her reserve the right to evict him if he fails to pay her?*¹⁴⁶

143. The other side of this point can be raised by pointing out that, with regard to transfers, the tenant does not need to have a clause forcing reasonableness on the landlord when the landlord has a duty to mitigate. In that case, a sensible strategy for a tenant whose proposal to transfer has been turned down by her landlord would be to abandon and then propose the same transferee as a way of mitigating damages.

144. See discussion *supra* and text accompanying note 136.

145. If the student's clause is too well drafted, I may ignore it and propose my own ineffective clause to Larry: *What if we insert a clause saying "Tina may not assign without my written consent?"*

146. The question of whether Trent or Tina should prefer a sublease or an assignment should be raised only if covenants running with the land is discussed as a part of the landlord/tenant relationship. Even then, it comes up more realistically as a

A second line of discussion deals with my right to withhold assent to an assignment. *Does the clause we drafted force me to be reasonable? Do I have to accept Trent if I don't like his looks? Can I say that I will accept him only if I get a share of the higher rent he is paying Tina?* The landlord's right to be arbitrary, the enforceability of rent recapture demands, and the relationship to a duty to mitigate damages are raised by these questions.¹⁴⁷

The right to be arbitrary is also an appropriate place to introduce fair housing and tenant selection questions:¹⁴⁸ *Can I reject Trent because he is black? Gay? Jewish? Disabled? Poor? Accompanied by a minor child? Intending to live in sin with his girlfriend? What can happen to me if I turn Trent down for the wrong reason and he complains to the authorities?*¹⁴⁹ It is also a suitable place to cover use restrictions in the lease: *If Tina's lease limits her to (or prohibits her from) using the premises for a law office, can I insist that Trent be similarly limited? By the way, was I entitled to put that kind of limitation in Tina's lease?* The two topics tie together by asking *If Tina's lease prohibits children, can I reject Trent because he has a family? Can I evict*

decision for a landlord to make in deciding whether or not to approve a transfer. See *infra* note 147.

147. The running of covenants in leases can be raised in the context of the landlord deciding whether to give the required consent under a no-assignment clause: *If I do permit Tina to transfer to Trent, should I tell her that I want him as an assignee or as a subtenant? Which is better for me? If I let Trent sublease and no one pays the rent next month, can I sue him? If I can't sue him, can I evict him? If he takes by assignment and no one pays, can I sue Tina?* The converse aspects can be raised by saying to Trent's attorney, *If I don't care whether there is an assignment or a sublease, do you? Which arrangement should your client want if he is concerned whether I will honor my covenants in the lease (e.g., not to rent to a competitor)?* Asking Tina's attorney if Tina should care raises the point that an assignor remains responsible, even if the assignee assumed the lease obligations.

148. The tenant's right to share her apartment with a roommate can also be taken up here.

149. This is traditionally covered by having students prepare an action in favor of a rejected tenant against a discriminatory landlord. This is much less productive as a teaching technique because: (1) it does not bring the attorney into the picture until after the transaction is over, making the real estate lawyer a litigator rather than counselor; (2) it eliminates all the opportunities for reshaping the client's behavior into a pattern that attempts to both comply with the laws and satisfies his needs; (3) it eliminates all the hard ethical questions from the transaction—filing suit against a greedy landlord with God on your side is nowhere near as challenging as attempting to persuade a fee-paying client to alter his rental practices and still retain you as his attorney. Forcing the students to confront how they will deal with clients who ask them to do things they do not like may compel the professor to play the role of the unprincipled client, but serious coverage of professional responsibility may require that you make the podium more than just a pulpit from which to make easy exhortations for morality.

Tina if Trent and his children move in with her? Can I evict them if Trent marries her, moves in, and then they have a child?

Finally, there are the consequences of a wrongful assignment. *What if Tina transfers to Trent without getting my consent or despite my legitimate objections to him? Can I sue one of them for damages? How much will I get? Can I make Trent move out and force Tina to return? Can I terminate the lease? Can I raise the rent?*

D. Holdovers

Although the holdover tenant is the exact opposite of the tenant who abandoned early, the fact that the landlord has an election of remedies in both situations causes many students to confuse the two and to mis-apply rules from one case over to the other.¹⁵⁰

1. As Trespasser

The remedy of eviction is the simplest and most intuitive option. *Tina's lease ended last week, but when I went by the premises to clean it up, I found that she was still there. I want her gone. Can I call the police and have them make her leave? Can I go in and throw her out?*

This discussion begins with the civil and criminal consequences of self-help and forcible entry. *If I do break in, can Tina do anything besides call the police? Can she sue me for damages? How have I committed a trespass if it is my property and her lease has ended? If she wins, what will she get? Can she claim damages for mental distress as well as moving expenses?*

There are also other forms of conduct having the same effect to be explored: *What if I wait until she has gone out and then go in and change the locks? If the door is not locked, can I just push it open? Can I shut off the electricity? What if I just stop paying the electricity bill?*

The dangers of self-help are an obvious lead-in to the legal remedies available for removal of a wrongfully possessing tenant. *Larry, if I hire you to get Tina evicted, how are you going to do it? Are you going to bring one of those ejection actions covered in adverse possession that*

150. This is especially common when there is a factual overlap, as where the landlord elects to treat the holdover tenant as a new periodic tenant who then quits without properly terminating the new tenancy. (Such a situation is not the place to begin if the goal is to help the students keep the pigeonholes separate.)

takes several years? Is there anything faster? Summary dispossess proceedings then involve a review of the relevant materials in the casebook.

In determining whether such proceedings can be brought against Tina, the point should be made that most evictions are brought against nonpaying tenants who become holdovers after an appropriate notice was sent. *Must I send a notice to Tina demanding that she pay rent or quit, in light of the fact that her lease ended and I do not want to let her stay on—even if she is willing to pay rent? When is a notice to quit required, and when is not?*¹⁵¹ *Is that notice the same as the notice of termination of periodic tenancy we covered earlier?* These questions lead to an explanation of the initial difference between the rent defaulter and the holdover,¹⁵² as well as the differences between the kinds of notices. Once the students have mastered the role of notices in terminating tenancies, they should appreciate that any tenant still there, after the termination of her tenancy, is a holdover tenant—regardless of whether termination occurred naturally or because of a default.¹⁵³

Next, we focus on the summary dispossess action itself. *After you have sent the proper notice, what kind of lawsuit will you file? How will the lawsuit get the property back to me faster than an ejectment action would?* Discussing these questions should cover the nature of this special proceeding, the statutory techniques designed to expedite it, and tenant strategies for prolonging the litigation.

The question of monetary relief highlights the special status of the holdover tenant. *If I win, will I only get possession back or will Tina also owe me money? How much? Will I recover the unpaid rent for the time before the tenancy ended? Will I recover for her continued possession thereafter? How much will I get if I can show that I could have*

151. A further distinction can be made, if appropriate, between an alternative notice to pay rent or quit and an unconditional notice to quit following a noncurable breach.

152. If students are already familiar with the common law doctrine of independent covenants in leases, then some explanation is needed as to how a landlord is entitled to ignore his covenant of quiet enjoyment merely because the tenant has failed to honor her rent covenant (in the absence of a lease clause making the tenancy subject to a condition subsequent of rent default).

153. This is similar to the tenant who becomes a periodic tenant for any one of a number of reasons.

Here is where you can also introduce some bankruptcy law. Section 362(a)(3) automatically stays eviction proceedings if the tenant files in time, and § 365(a) lets her trustee thereafter assume or reject her unexpired lease. 11 U.S.C. §§ 362(a)(3), 365(a) (1988). A good introduction and background to this topic (and to “bankruptcy mills”) can be found in *In re Smith*, 105 B.R. 50 (C.D. Cal. 1989). In California, “unlawful detainer assistants” have gotten popular enough as to warrant special statutory regulation and passing mention in my class.

rented the premises for twice as much to someone else if she had quit when she was supposed to? Is it rent or damages I am getting? Once her tenancy expired¹⁵⁴ and Tina had not left, was she a tenant or a trespasser? Reversing the numbers raises troublesome variations on this issue. If I evict Tina for nonpayment but then cannot rent out the premises to someone else,¹⁵⁵ can I recover anything from her for the fact that her lease still had seven years to go? What if I heard her say that the rent was too high, and that she was intentionally going to stop paying in order to get herself evicted and thereby freed from having to pay?¹⁵⁶

2. As New Tenant

The other half of the holdover picture is introduced by expressing dissatisfaction with the eviction remedy and seeking other options. *If I don't know whether I can find another tenant who will pay as much rent,¹⁵⁷ are there any other remedies available to me? Can I make Tina stay until I find a new tenant? Can I do this even though my lease doesn't say so?*

The answer, that I do have such power, triggers questions about the nature of the new relationship between us: *It is now the tenth of the month; how long will she have to stay? Can I make her stay next month too? Suppose I want her out after that; could I do that? Or, What will she have to do to terminate this new tenancy? Can she move out at the end of this month? When can she move out? Does she have*

154. This expiration may occur by natural expiration of the lease term, proper notice in a periodic tenancy, or failure to comply with a three day notice after a default.

155. Or I can relet only at a lower rent.

156. There can also be questions as to the finality of the judgment, the tenant's right to seek relief from it, and how that affects the tenant's willingness to resist: *Suppose Tina withholds rent from me on the ground that . . . and I sue her and prevail, can she then offer to pay the withheld rent and keep from being evicted? Tina, if you get into a dispute with me over how much you are supposed to pay, how likely are you to refuse to pay the amount demanded if the consequence of a lawsuit could be not only a judgment that you owe the difference, but also that your tenancy is terminated?*

157. Or, *Because the premises weren't available when her old lease was supposed to end, I lost my intended new tenant and now I don't know if I can find another.*

to send me any notice first?¹⁵⁸ If she does just move out at the end of this month without giving proper notice, what can I do about it?

The nature of tenancy at sufferance is raised through questions about the tenant's liability for past wrongful possession. *If Tina is forced to stay, do I collect rent or damages for her possession? How can she owe rent for the past ten days since it is only today that I might decide to declare her a tenant rather than a trespasser? If I decide to have her evicted instead, would she owe ten days damages rather than ten days rent? Until I make up my mind on what to do, is she a tenant or a trespasser?*

There are many subsidiary issues that can be included as part of this decision-making. One is waiver: *If I cash the rent check that Tina sent me for this month, can I still elect to have her evicted? Can I elect to make her stay even though I did not cash (or she did not send) the check for this month's rent?* A second consideration is the freedom to change positions: *If I sent Tina a notice to quit¹⁵⁹ and she didn't do so, can I change my mind and decide to make her stay instead?* A third issue is the function of inconsistent terms in the original lease or in statements made by the landlord before or after the end of the term: *Can I do this even though the lease says that any holding over is at double rent for the time she holds over? If she advises me that she might not be able to move out on time at the end of the lease,¹⁶⁰ should I reply that holding over will be at double rent? If she is already holding over, can I tell her that the rent is doubled as of now? As of next month?*

3. The Effect on an Incoming Tenant

A landlord's duties to new tenants can be treated as one consideration in dealing with a potential holdover tenant. *How should my choice about Tina be affected by the fact that I signed a lease with a new tenant (Newt) to take effect the day her term ends? If I make Tina stay, or let her stay because she is offering more than the new rent I would collect from Newt, can he sue me?* Students may initially think the answer depends on whether the American or English rule applies, ignoring the fact that it is the landlord's act that has made the new tenant unable to enter. The scenario fits those rules when the

158. These questions are especially appropriate if the topic began with a periodic tenant's blundering attempts to terminate her tenancy.

159. Instead, either party could have previously sent a notice terminating a periodic tenancy.

160. This is where you can also cover the threshold question of whether a holdover has really occurred if the tenant has merely slept over one extra night or left a few suitcases on the premises.

question is revised to ask, *If I tell Tina that she cannot stay, but she is still there when Newt's lease takes effect, can he then sue me?*

This can also introduce the obligation of quiet enjoyment. *If Newt has moved in and Tina later returns and kicks him out, am I liable? What obligations do I have to protect my tenants from outsiders (and neighbors)?* Alternatively, it can lead to questions of any implied duty of continuous operation on the tenant by asking *If I go to all this work to get Newt into possession, can I be sure that he will have to stay the entire term and not quit early, even though he is willing to pay the rent? If his rent is calculated as a percentage of his gross sales? If he is the anchor tenant in my shopping center?*

E. Condition of the Premises

The issue of premises that are defective or in disrepair or out of compliance with the law (for which I shall frequently use the shorthand of "broken") depends upon more variables than students are usually able to hold in their minds at any one time, making good organization in coverage imperative. By way of introduction, I tell the class that an outcome may depend upon:

1. what is broken (e.g., a window, a light, or the building itself)
2. how it broke (conduct by the tenant, by the landlord, act of God or government, or just old age)
3. when it broke (before or after the tenant moved in)
4. what sort of premises are involved (commercial or residential)
5. whether the lease covers the problem (e.g., covenants to repair, to insure, or to comply with code requirements)
6. what remedy is sought (cost of repair, termination of tenancy, rent withholding or reduction, damages for personal injuries).¹⁶¹ This is the variable around which the classes are organized.

1. Repair Costs

The "cost" remedy (making the other party pay the repair bill) is the simplest one to begin with and introduces the question of basic duties as to repairs. *Tina just called me to say that her closet door¹⁶² is bro-*

161. Be prepared for the fact that, no matter how assiduously the students write all these variables down, most are forgotten the moment a concrete question is asked.

162. This example is indicative of a component whose disrepair does not render the

ken; she wants to know whether I am going to fix it or whether she should have it repaired and deduct the cost from the next rent check.¹⁶³ Can she do that, Larry? Larry's appropriate response—which may need to be prodded out of him—is to ask me about the variables just listed. In answer to such questions, I disclose that the premises are commercial, that the lease is silent as to repairs, and that I did not break the closet door. As to when it broke, *I don't know, but does it matter? Suppose it was broken before Tina moved in. Was I warranting the condition of the premises to her?*¹⁶⁴ *What if the door broke after she moved in?*

After forcing a grudging admission from my attorney that a landlord has no general common law liability for either pre-existing or subsequent disrepairs, the tenant's possible converse duty is explored. *If I do not have to fix the door, can I tell Tina that she has to repair it herself, and if she doesn't, I will send someone over to do that and add the cost to her rent?* Students often seem shocked at the notion that neither party may owe any duty to the other to pay for repairs in the absence of "special circumstances," such as changing some of the variables.¹⁶⁵

Permissive waste is introduced by changing the broken item from a closet door to a window or roof. *Does that mean that Tina does not have to take any steps to keep my floors and carpets from getting ruined when it starts to rain if all it takes is putting a board over a broken window*¹⁶⁶ *or a bucket under a leak?* The time variable can be explored as a subissue of permissive waste. *What if the roof leaked before Tina moved in, but she discovered it only when it started raining? Does she have to put a bucket under it in that case?*¹⁶⁷

premises untenantable or risk future waste.

163. It does not hurt to show how a tenant's deducting the repair bill from the rent is economically equivalent to sending the bill to the landlord for payment.

164. Since some of the old cases in the casebooks state that the landlord has no liability even when there is an affirmative concealment of a pre-existing defect, it may be necessary to mention the modern liability rules for fraud and to exclude that issue from further consideration for the time being by asserting that there was no active concealment. Such discussion should be brief because liability for nondisclosure is much better when raised as an aspect of personal injury damages.

165. For instance, if I broke the door, I might be liable to Tina the same as any third party tortfeasor would be (ignoring the tenant's limited interest in the damaged property). Conversely, if she broke the door, she would be liable to me under a theory of active waste.

166. Unlike the closet door, the window is a component whose continued disrepair can generate significant further damage (via rain coming in). Thus, failing to board up the window might be waste, whereas failing to repair the closet door would not be.

167. This can be treated as the baseline condition: neither party has a direct duty

From this duty-free starting point, one can ask how much freedom these parties have to create duties for one or the other. *Can I agree with Tina to make repairs in return for a higher rent? If I do, does that mean she does not have to board up a window in a rainstorm? Conversely, If Tina covenants to repair, will she have to fix the closet door if it was broken before she moved in? If the entire building is destroyed in an earthquake or hurricane, will she have to build a new one? Will she have to remove all of the asbestos in the walls if the local building department comes up with new rules requiring that?¹⁶⁸ Will she have to widen the bathroom doors for wheelchair access if the Americans With Disabilities Act¹⁶⁹ requires it? Does she have to make major structural changes? How should the clause read if I want to be sure she does have to do all these things? Finally, If she has covenanted to repair, and does not, when do I sue her for breach—now or at the end of the term? Can I use her security deposit to pay for the repairs?*

The last major variable on this question is brought in when the premises are converted from commercial to residential and the same issues are considered. *How much does a repair-and-deduct statute change what you previously told me, Larry? Is the statute limited to preexisting defects? Does it exclude disrepairs caused by Tina? How often can Tina assert this right, and how much can she deduct each time? Can she and I negotiate a different arrangement (and must it be in any certain form to safely escape the statute)? What about disrepairs not covered by the statute?*

2. Termination

The students already know that (for commercial premises) destruction of the premises does not terminate a tenancy since that topic has already been covered. They can also readily reason that if there is some disrepair that neither party is obliged to correct, then neither can use

to repair, but the landlord has a duty not to commit fraud and the tenant has a duty to avoid waste.

168. It is appropriate to include in the reading materials any local environmental regulations which relate to landlord-tenant questions and to discuss the effect of a covenant to comply with all laws.

169. Subsections of Title 42 of the United States Code should be assigned, but the real landlord/tenant issue involved—whether the tenant can elect not to comply with the Act (or any new environmental regulations), quit the premises, and be excused from further rent—comes up later. See 42 U.S.C. § 12182(a), (b)(2)(A)(iv)-(v) (1988).

the other's failure to repair as a ground for terminating the leasehold. The students will also see, when residential premises are involved, that repair-and-deduct statutes give a tenant the alternative right of quitting, and thus terminating, the tenancy. Other areas need more discussion.

With regard to repair-related obligations imposed on the tenant, the question, *If Tina does not honor her covenant to keep the premises in repair or commits waste, can I evict her or am I limited to suing her for damages?* introduces the doctrine of independent covenants. *If I want to be able to evict in such cases in the future, what should my leases state?* will remind the class about estates subject to condition subsequent.¹⁷⁰

Constructive eviction is introduced by asking, *If, on the other hand, the lease contains a covenant that I am the one who must make repairs, and I do not honor it, can Tina quit or is she limited to suing me for damages?* Since students tend to ignore the substantive requirements of this doctrine in their enthusiasm over the remedy afforded, those matters are reached by saying *I just double checked the lease, and I do not have to make repairs or even supply heat in the winter; therefore, if I don't do anything, what do I have to fear? How can Tina claim that I breached my covenant of quiet enjoyment if I had no underlying duty in the first place?*¹⁷¹ The dangers of the remedy (and a review of abandonment) are brought up by asking Tina's attorney, *If Tina thinks that she has been constructively evicted, what should she do? If you tell her to quit, and it later turns out that I was not at fault, won't she have wrongly abandoned? What will her liability be in that case?*¹⁷²

3. Rent Withholding (Receivership, Implied Warranty, and Rent Control)

Unlike constructive eviction and repair-and-deduct statutes, rent receivership statutes and the doctrine of implied warranty of habitability

170. If the summary dispossess statute permits eviction for waste, then the covenant of quiet enjoyment has already been made dependent and nothing more needs to be done (except to make the students perceive that it is unnecessary to draft a clause in the lease stating the same thing).

171. When the students grasp this point, it will probably make them forget—and require you to remind them—that a repair and deduct statute moots the issue entirely for residential premises.

172. Retaliatory eviction can be added as a footnote to this discussion by treating it as a penalty to the landlord for terminating the tenancy of a tenant who has made or demanded repairs. Other doctrines dealing with tenant departure rights, such as illegality or frustration, implied warranty of (commercial) suitability, or illegal lease can also be covered here if they were raised in the book or deemed important by you.

save a tenant from having to move out when the landlord does not make required repairs. These concepts are explored in terms of the potential dangers they present to a noncomplying landlord.¹⁷³

Receiverships are considered by asking: *A member stood up at our last landlord's meeting and said that the tenants in his building went to court and had a rent receiver appointed; can Tina do that to me?*¹⁷⁴ *If one is appointed, does that mean the tenants can just stop paying rent? Can the receiver make repairs I do not want made? Will I get any funds meanwhile? If I do make the repairs, will I get all of the back rent that was withheld? (Even if all withheld rents are to be unblocked after repairs are made, how will I make my mortgage payments in the meantime?)*¹⁷⁵

Implied warranty is rife with issues, both as to mechanics and economic effects. *If, instead, Tina asserts the implied warranty of habitability against me, what happens? Will she sue me? If she stops paying rent, can't I bring eviction proceedings against her? Will she be allowed to clutter up my summary dispossess action with a defense of uninhabitability? While the action is pending, will she have to pay the rent to anybody? What will she have to prove to prevail in that action? Can I defend on the ground that her lease says that she took the premises "as is" or that she promised to keep them in good repair? Can I show that I told her about the defects before she signed the lease (or that the defects appeared after she signed the lease)?*

The economic effects of implied warranty are illustrated by the following questions: *What happens if the judge finds that I did breach the implied warranty? Will I get any rent for the past? How much? If the rental value of the apartment is \$1000 with hot water and \$750 without it, how much will I get if I was only charging her \$750 a month (or less) anyway? If the judge merely sets the rent at the rental value (\$750 in both cases), is there anything to worry about? If the judge instead subtracts \$250 from the \$750 I am charging, I will surely fix the boiler, but won't I be able to then raise the rent to match the rental*

173. Logically, these two remedies would best be explored and compared by making them available choices for the tenant, who has her attorney counsel her as to their respective merits. But that puts the questions somewhat beyond your control (unless you have scripted them for an alert student to ask).

174. This question considers whether Tina is the right kind of tenant with the right kind of grievance under the relevant statute.

175. This is an obviously rhetorical, rather than substantive, question to be asked in order to make sure students appreciate the economic impact of rent withholding.

value of a hot water apartment (or to cover the cost of replacement)? Can I then evict Tina if she can't afford to pay the new increased rent? Since a new boiler will affect all of the apartments in the building, can I also raise the other tenants' rents? What if they say they would rather have lower rents and cold water than higher rents and hot water?

Rent-increasing repairs present a natural lead in to rent control. *Can I decide to repair the boiler (or replace it with solar panels) and raise all (periodic) rents, even if Tina hasn't sued me? Even if the other tenants have asked me not to do so? Under our local rent control ordinance do I have to get the approval of the rent board in order to make these improvements?*

If rent control has not been mentioned before, it requires some preliminary introduction before the issue of repairs and rent increases is actually discussed. *Is Tina's apartment subject to the rent control ordinance? What about the vacant apartment next door? The store downstairs? The bedroom occupied by a lodger in my single family house? My luxury apartment building across town? The apartment building I may build across the street next year?*

Each of these questions can be considered in its broader political and economic context. *Renee, as the tenant representative on the city counsel or rent board, do you think that there should be control of commercial premises? Of lodgers? Of new construction? Al, as the representative of other real estate owners in town, how will your people behave if Renee has her way?¹⁷⁶ If single rooms in private houses are controlled, will owners still rent them out? Will investors and speculators still build apartment buildings?¹⁷⁷ If future construction is exempted, will they change their minds?*

Vacancy decontrol, just cause eviction, and condominium conversions are corollary aspects of rent control. *Renee, do you want the rent control ordinance to cover vacant units? Are you worried about what might happen otherwise? How do you propose to prevent landlords from evicting tenants in order to raise rents? On what grounds will you permit them to evict?¹⁷⁸ Al, if you don't like having your apart-*

176. These questions are put to a student, rather than answered by me, in order to resist the accusation that it is not merely the sinister law professor-landlord who might respond adversely to rent control restrictions.

177. All these questions ask whether housing supply is elastic. You can explore the elasticity of demand by asking, *Tina, if your rent is substantially increased, how will you handle it? Will you take in a roommate, move to a smaller apartment, go back home, or give up law school?*

178. When termination of periodic tenancies was originally discussed, students may not have appreciated that the entire concern was the form of the notice of termination and not its substance, i.e., the reasons for terminating. Only in rent control (and

ment buildings subject to all of these regulations, can you think of a way of getting out from under them? Renee, how do you propose to stop Al's people from converting their buildings to condominiums, converting them to commercial use, or just demolishing them?

The mechanics of calculating a controlled rent are also provocative. *How do I determine what my base rent is? If I raised rents last year just before the ordinance took effect (after I read in the papers that it was coming), can the rent board roll them back? Can I have the rents increased by showing that I am losing money every month? (If so, can I assure a loss by getting a new mortgage with higher monthly payments?) Is a fair return on investment calculated on what I originally paid for the building, what it was worth the day before the ordinance, or what it is worth after the ordinance?*

Finally, rent control is tied back in to housing disrepairs. *Do I have to continue fixing the building if rent control has eliminated my profit? Can the rent board punish me for lowering my costs by not making repairs or reducing existing services? If I do make repairs, will the board permit me to pass on those costs to the tenants? What about repairs not ordered by the rent board or demanded by the tenants, but made because I want to upgrade my building; can I get approval to raise the rents because of them? Can the tenants stop me from improving my building?*

4. Tort Liability

Liability for personal injuries resulting from unrepaired premises is a critical financial consideration, because a one million dollar injury can result from a one dollar defect. Legally and academically, this is more of a tort than a real estate issue and is easier to teach from the perspective of a personal injury attorney dealing with an injured plaintiff than as a real estate attorney advising a landlord how to avoid potential liability, since most issues are best handled by comparing landlord liability with tenant (possessor) liability in tort. All the variables can be covered together if we assume that George, a guest of Tina, has been injured (e.g., scalded by hot water from a faucet in her apartment) and retains Peter as his personal injury attorney.¹⁷⁹

retaliatory eviction) contexts does that become relevant. One can discuss here whether a landlord should ever be permitted to terminate an existing tenant who is not in breach and is willing to pay market rent or to match other offers.

179. Laura and Larry remain as Tina's and my attorneys.

In good personal injury fashion, Peter should consider suing everybody who might be liable, in this case, both tenant and landlord. *Peter, is Tina potentially liable? What would the Torts professor say about a possessor's duty of care to an invitee? If you allege that Tina was negligent with respect to George, will you at least get to a jury (and therefore be able to force Tina's attorney to talk settlement)?*

Can you say the same about me, since I was not in possession of the apartment? Peter is forced to fit me into one of the exceptions to the general rule that a landlord is not liable, in order to keep me in the lawsuit. As a good personal injury attorney he should go through each of the exceptions to see whether he has (or can find) the facts to put me within one or more of them. Of course, that requires a consideration of all of the theories of landlord tort liability.¹⁸⁰

a. Latent Defects

*Peter, can George recover from me under the latent defect exception? What facts do you need to fit me there? If I can show that I had no actual knowledge that the water was too hot, am I safe; or can you contend that I should have known that fact?*¹⁸¹ *Larry, if I can be sued in such cases, what should I do about defects that I am aware of? Do I have to repair them, or is it enough if I inform all the tenants? Is it sufficient to tell them now, even though their leases are already in effect? If I warn the tenants, does that protect me against their guests, or do I have to warn the guests too? If Tina discovered the condition on her own and called me to complain about it, is a warning still necessary?*¹⁸² *Does my duty cover subsequent defects or only those in existence prior to leasing to Tina?*

The nature of the latent defect principle is brought out more clearly by testing its effect on Tina's liability as a possessor. *Peter, if this was a latent defect that I had not disclosed to Tina, does that automatically insulate her from liability to George on the ground that she didn't*

180. For each of these exceptions, a shadow set of questions should be asked (or covered by lecture) as to what would happen if the victim was also the tenant rather than a guest.

181. Specifically, did I have a duty to inspect? Students want to make landlords automatically liable for defects if they either knew or should have known of them. This converts the exception from fraud (nondisclosure) to negligence. The distinction between a duty to disclose conditions you already know and a duty to inspect for conditions you do not know comes up both here and in the vendor-purchaser context.

182. A tenant might be able to terminate the tenancy because the landlord belatedly informed the tenant about a concealed defect. Termination, however, is not the issue here.

know of it, or can you argue that due care required her to inspect the premises more thoroughly before allowing her guest to turn on the water? Once Tina did know (whether by me informing her or by finding out on her own), was her duty to George to warn him or to fix the faucet before letting him use it? If she is liable to George for negligence, does that mean I am not liable to him? If I am liable for non-disclosure, can she also be liable for negligence?

b. Common Areas

This is an equally fertile exception. *Since the water came out of the faucet inside Tina's apartment, is the common area exception useless in this case? What if you can show that the water was heated by a central boiler or controlled by a central thermostat? Why does a nonpossessing landlord become liable for injuries that arise in common areas or from common facilities? To compare this exception with the latent defect exception, I ask my attorney: Larry, what if I didn't know about the defective boiler? Why do I have to inspect the common areas when you told me earlier that I didn't have to inspect Tina's apartment for latent defects? If my inspection reveals a defect in the boiler or common hallway, is it sufficient for me to merely warn all of the tenants about it? How about a sign in the hallway saying "Look out for broken steps"? What if I put a covenant in my lease obliging Tina to keep the common areas in good repair?¹⁸³ Is it sufficient to inspect the common areas at the beginning of the lease, or do I have to look for subsequent defects too? Turning to the tenant's liability, Laura, if George was injured by a common facility or in the common hallway, is Tina also liable? Did she have a duty to warn him about a bad step in the outside stairs or hot water from the common plumbing?*

c. Dangerous conditions to outsiders, including public places of public admission and furnished rooms

The previous questions lead to the exception for dangerous conditions to persons outside the premises. *Peter can you fit George within*

183. Somewhere along the way, the class should recognize the inability of parties to delegate away their general tort responsibilities and the difference between exculpation and indemnification. *If Tina's repair covenant doesn't insulate me from liability to George, will it at least let me recover from her whatever I have to pay George?*

this exception? Why must the accident happen outside rather than inside the building? Why must he be an outsider rather than an insider to be in the protected class? On behalf of the landlord, Larry, why am I liable for these matters? Does my liability for external dangerous conditions extend to problems that arise after Tina rented the premises? Can I get out of liability by warning Tina about the defect or by having Tina covenant to take care of these matters? (Will that make her liable to George? Would she be liable to him otherwise?) Would I be liable to Tina, if she was the one who got hurt? If Tina is the one who broke the faucet, do I owe George a duty to fix it? To force her to fix it? These same questions can be reformulated to fit the related exceptions for places of public admission and rentals of furnished rooms.

d. Contracts to repair

Peter, what evidence do you need to fit George under this exception? How can you get past the fact that my promise was to Tina, rather than to George, to repair the faucet? What if Tina never notified me that the faucet needed fixing? Can you sue Tina on the ground that once she knew of the defect, she owed George a duty to make me fix it or at least to warn him not to use it until I did fix it? Does my contractual duty to repair eliminate Tina's tort duty of care? What if I had no repair covenant, but I promised Tina that I would repair the defect anyway?¹⁸⁴

e. Code Violations

This important exception can be derived from the prior one. Peter, can you impose a duty on me to make repairs if there is no covenant in the lease? Can the building code supply such a duty? Is George a member of the protected class, which can recover for personal injuries arising from noncompliance with the code? What if no building inspector ever told me to repair the boiler? What if Tina is the one who caused the premises to violate the code? What if her lease obliges her to repair code violations? Can you use the implied warranty of habitability as the source of a duty owed to George, or is that limited to Tina? Is Tina liable to George for code violations?

184. Alternatively, *What if the lease imposed the duty to repair on Tina, but I had nevertheless agreed to perform the repair in this case? If that works as a defense, what if I always put such a provision in my leases, not because I really expect my tenants to make repairs but in order to escape liability for personal injuries resulting from disrepairs?*

f. Negligence and strict liability

Peter, if you cannot fit me within any of these exceptions, can you argue that the courts of this jurisdiction should adopt the new standards of simple negligence or strict liability, which some other states now impose upon landlords? Larry, if that comes true, what will I have to do to protect myself? Will it be sufficient to inspect apartments only when they are vacated? If I see disrepairs, can I avoid fixing them? Can I pass the repair costs on to the tenants through higher rents?

g. Assaults on tenants and guests

This theme can be assimilated under some of the previous rules, but has enough special features to warrant separate treatment. Suppose George was injured in an assault while visiting Tina. *Peter, to recover from me, must you show that the injury occurred in a common area? Must you show that I had promised tenants that the building was safe, or that I had created a false sense of security there? Must you show that I knew the neighborhood was dangerous and did nothing about it? Can you sue Tina? What if the assailant was Tina or her dog? Am I liable if I knew that Tina had dangerous propensities or owned a pit bull? Do I owe tenants and their guests a duty not to rent to drug dealers or pit bull owners? Do I have a duty to evict them? Do I have a duty to inspect to see if that is happening?*

These last questions often make students uncomfortable. When an accident has already happened, they naturally want the landlord to be liable to the injured party. But they are no less naturally reluctant to require the landlord to take precautionary steps to avert the outcome—such as inspecting premises, prohibiting certain activities, and rejecting or evicting certain types of tenants.

III. CONVEYANCING

Many first year Property courses do not cover this topic;¹⁸⁵ when it is included,¹⁸⁶ it is often treated as a miniature Real Estate Transac-

185. Berger's casebook candidly states his belief that conveyancing does not belong in basic Property (and devotes only 100 pages at the end of his 1200 pages to it). Donahue and Chused should say the same, since they are both similarly skimpy, confining this topic to about 10% of their books; Singer is even stingier, with only 80 of his 1300 pages devoted to conveyancing!

186. Most books allot 200 to 300 pages, with Rabin (350 of 1100) and Cribbet (450

tions course.¹⁸⁷ In addition, it is difficult to distinguish—except for page counts—between the coverage conveyancing gets in the Property casebooks and the Real Estate Transactions casebooks.¹⁸⁸ This section of the Article can be applied to either kind of treatment.

Coverage here is organized in the usual fashion: an overview of the legal issues that crop up along the way as one moves from the initial stages of dealing with a broker, negotiating a sales contract, closing escrow, obtaining title insurance, and finishing with the subsequent discovery of hidden defects (including toxic contamination), with mortgage and income tax considerations plugged in along the way.

Pedagogically, conveyancing is easier to cover than most other topics in the course. Unlike landlord/tenant, conveyancing involves no real economic imbalance between the parties, no lengthy contractual duration requiring complex regulation, and no initial hostility between the parties to interfere with voluntary cooperative behavior.¹⁸⁹ History plays too slight a role to force much concern on old livery of seisin procedures, and there seem to be no serious economic or philosophical considerations involved in most aspects of this topic. Most of the learning is on a “how-to” basis.

To give a consistency to the topic the same two students should be buying and selling the same house every week. All supporting roles (brokers, escrow agents, etc.) and all other variables (price, location, etc.) should also be uniform.

The Decision to Purchase a House

For poor and young students, the thought of buying a house may be as remote from their experience as the concept of a fee tail special. Thus, it is useful to soften the impact of this new topic by edging into it. *Pearl, you just won the lottery (or inherited some money); what do you think about using the money to buy a house? Laura, can you counsel Pearl on this question, or is that question entirely outside the knowledge of a lawyer?* Perhaps a lawyer is not really the person Pearl

of 1450) at the generous end. Goldstein puts conveyancing at the front of his book while both Kurtz and Rabin put it at the end. Conveyancing is sufficiently different from the other elements of a Property course as to fit almost anywhere.

187. Donahue treats deeds and recording as distinct from modern land transactions, separating them by estates and concurrent ownership. All of the other books keep the entire topic together.

188. Indeed, Nelson and Whitman, in the Preface to their *Real Estate Transfer, Finance, and Development* casebook, state that its first six chapters could be used for a first-year, three-unit conveyancing course. See GRANT NELSON & DALE WHITMAN, *REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT* (4th ed. 1992). That is probably also true for Berger and Johnstone's *Land Transfer and Finance*. See BERGER ET AL., *LAND TRANSFER AND FINANCE: CASES AND MATERIALS* (4th ed. 1993).

189. This often makes it a kind of bread and butter practice for lawyers.

ought to see about this question, but it is one commonly put to attorneys. Opinions can be solicited from the entire class, *What are the pros and cons of home ownership?*

Some student will mention the tax advantages of ownership, and two advantages are worth translating into comprehensible notions for inexperienced first-year student tenants:¹⁹⁰ (1) mortgage interest and property taxes are deductible, whereas rent is not;¹⁹¹ and (2) the house may appreciate in value over the years, but none of that financial gain is taxed until it is sold later (or never, if the house is held until death).

Other students will volunteer nontax economic considerations, such as the traditional general appreciation of real estate vis-à-vis the dollar, the advantage of (fixed-rate) mortgage payments against generally rising rental payments, the different effects of making improvements to property one owns rather than to property one rents, and the end results of twenty years of mortgage versus rent payments.

You can get other students to name downsides to ownership. There may be a deflation of real estate values, which destroys equities and makes Pearl wish she had rented instead. Her funds might have been better invested into a vehicle that would generate periodic income to her, rather than one requiring periodic mortgage payments on top of her down payment investment. Pearl's future may be too uncertain to warrant settling down at this time. While it is nice to be free from a landlord's power over one's lifestyle, Pearl may not be ready to handle the responsibilities of having to care for property. She may not have the funds to make a down payment (which can lead to consideration of government devices for alleviating this problem).

Finally, to raise issues of policy, *Do the rest of us care whether Pearl buys or continues renting? Nora, as a homeowner, would you rather have Pearl owning or renting the house next door to you? Are you just being emotional and prejudiced in thinking that owners take better care of their property than tenants do? Pearl, would you be more likely as a tenant or as an owner to want to improve or repair or maintain the house? How do you feel about improvements to the general neighborhood? Do you welcome them if they will gentrify the area and*

190. A separate class on tax considerations of property is described later. Insofar as real estate acquisitions are so tax driven, however, it is not inappropriate to begin conveyancing with that topic.

191. Imputed income is probably of equal importance, but seems to be better understood as part of the tax topic than here. See *infra* notes 299-309 and accompanying text.

make rents rise? Is that why Congress gives tax incentives to owners and not to tenants?

A. Real Estate Brokers

Since most of the legal issues relating to real estate brokers are contracts and torts questions, it is understandable that a view of the Property course as one concerning the rules that are unique to land and other assets would omit this topic. On the other hand, since any comprehensive review of the law affecting real estate transactions inevitably goes outside those lines, concentration on the most common (and most litigation-prone) participant in those transactions is certainly appropriate.¹⁹²

The most common legal relationship involved here is when the broker acts as an agent of the vendor. Since class so far has focused on the purchaser, there should be a transition from her to the person who owns the property that she will ultimately purchase. *Pearl, now that you have decided to buy, how should you begin? What about walking down the street and knocking at the door of any house that appeals to you to see if it is for sale?* Since that is wasteful compared to looking only at houses that are already for sale, it makes sense to ask how owners effectuate their decisions to sell. *Suppose that Van decided to sell his house (because he got a job transfer, or a bigger family, etc.); Van, how are you going to go about selling? Will you just post a for sale sign on the property or will you go to a broker? What do you think a broker can do for you?* This question is intended to lead to a consideration of the value of using such "middlemen" in these transactions.

1. Function and Qualifications

Even if Van pleads that he is simply too inexperienced to sell on his own, he could read a book or get help from friends rather than pay a broker. *Brad, you are a broker.*¹⁹³ *What can you do for Van that*

192. This topic receives extremely disparate treatment in the casebooks. Browder and Donohue do not cover broker matters at all, except by way of a little text. Dukeminier and Rabin have only some disclosure cases elsewhere in their books which incidentally involve brokers. Casner, Chused and Johnson each have one case (commission issues in Casner and Johnson, and negligence in Chused). The remaining books each contain two cases. On the other hand, it is a large topic in most of the Real Estate Transaction casebooks.

193. The student who is Brad should not actually be a broker because that will force you to spend too much time disposing of the misinformation with which he is probably filled. Class is more interesting when pure beginners are designated to play the roles of both broker and seller.

makes it worth it for him to hire you? Make a sales pitch to Van. Ultimately, and with help from others in the class, Brad ought to be able to contend that a broker can: (1) save the seller time by performing services that he would otherwise have to do himself (especially in screening out nonserious buyers); (2) enable the seller to get a better price by virtue of his expertise in the field; and (3) assist the seller in making important decisions by virtue of being a loyal ally (fiduciary).¹⁹⁴

The broker's qualifications come up next. *Brad, what entitles you to call yourself a broker? Do you have a license? How did you get it? Do you need to have a license to work for Van?* If the reading materials include a statutory or judicial definition of brokers, class can examine whether or not the activities Brad intends to perform constitute broker's activities and thus require a license.

In terms of earning the license, the point to bring out is that Brad had to pass some kind of examination, which means that he had to learn some real estate law. *Van, what do you (or the rest of the class) want Brad to have learned in order to be an effective broker? Should Brad's exam be like the bar exam in Property, that is, do we want him to know real estate law? Should it cover construction? Surveying? Finance?* In addition to education, there are probably other statutory requirements for good character and competence, which Brad must meet. This leads to the point that brokers are subject to a regulatory agency that supervises their behavior and can revoke their licenses when they misbehave (and when customers complain about them).¹⁹⁵

The licensing requirements surely increase costs and force brokers to charge more than nonbrokers. Thus, Van may be able to find someone else to do the same work for him more cheaply. Asking, *Brad, how do you propose to fend off such unfair competition?* should lead to coverage of the general requirement of having a license in order to collect a broker's commission.¹⁹⁶ The finder's exception is raised by asking,

194. You can observe that the public has apparently accepted these arguments, since most sellers use brokers.

195. Along the way, the professor can add background terminology. Sally, working in Brad's office, is a salesperson rather than a broker because she may have taken an easier exam than he took. Both of them may call themselves "agents." Brad may call himself a "realtor" if he has joined the National Association of Realtors and has paid his dues. It is also worth mentioning, if you know, the extent to which attorneys in your jurisdiction can act as brokers by virtue of their own licenses (and collect commissions rather than fees).

196. To this you can add that a nonbroker may be prohibited only from suing to recover an unpaid commission, but can keep any compensation already received. *Is*

Does that mean none of the rest of us can do anything (for hire) to help Van? Would it be illegal for Van to agree to pay me \$1,000 if I find someone interested in buying his house and merely introduce the parties to each other? Do finders need licensing as much as brokers do? How should we separate finders from brokers?

2. Commission Agreements

The listing agreement is an excellent vehicle for analyzing the services a broker will perform and the compensation he will receive under it. To get to it, we move to the broker's office. *Brad, when Van comes in saying he wants to sell his house, what are you going to do first (besides asking a lot of questions about the property)?* The first significant step should be to have the owner sign a listing contract. If the reading materials include one, Brad should use it; otherwise, he should draft such an agreement.¹⁹⁷

Class should now focus on the effect of the listing agreement. *Van, don't sign it until you have had Larry review and explain it to you. Larry, what kind of agreement is this?*¹⁹⁸ A likely response is that it is a sales contract, which triggers the question, *Is Brad really agreeing to buy Van's house, like a used car salesman does?* If the answer is that it is a contract for Brad to sell Van's house for him, you want to know, *Van, do you expect that Brad will call you up one day and say that your house has been sold, and that you should move out?*¹⁹⁹ *Van, if you don't want to give Brad the power to sell your house on his own, what is it that you do want him to do?* The goal is to make the class realize that we are talking about an employment/agency contract, not a conveyancing contract or even a contract that authorizes the agent to execute a conveyancing contract. The contract is merely one that authorizes the agent to solicit offers to purchase the property from

that sanction severe enough, or is it too severe? How is the public served by prohibiting Van from making an enforceable agreement with a nonbroker if he knows that is the case and wants to do so anyway?

197. A form listing has the advantage of including additional clauses that are useful for covering other aspects of brokerage law. Bruce, Chused, Goldstein, and Johnson all contain such forms.

198. It is even better to first send Van to Brad's attorney for a review of the listing agreement, to see if she recognizes the conflict of interest involved and handles herself accordingly. *In re Lanza*, 322 A.2d 445 (N.J. 1974), included in Goldstein, Haar, and Kurtz, involves a comparable problem in the buyer-seller context and makes excellent background material for this issue.

199. Goldstein actually includes a case on this point (citing *Forbis v. Honeycutt*, 273 S.E.2d 240 (N.C. 1981)). The form listing that Goldstein uses gives the broker the "right to sell at a price to which I consent." *Does that empower a sale without further consent if made at the asking price?*

the owner.²⁰⁰ As such, it is not automatically subject to all the real estate rules, such as the statute of frauds provision covering conveyances of real property. The contract may require a writing only if the statute has been enlarged to cover such contracts.²⁰¹

Finally, as a way of examining the broker's duties under the listing: *Laura, would your Contracts professor call this a unilateral or bilateral contract? If you can't tell from looking at it, what does Brad probably want it to be? Would he want a unilateral contract, which Van could revoke at the last minute? Since this is Brad's form, is it likely that it would create that danger? To be a bilateral contract, Brad must promise something; what should that be? If he promises to sell the house for Van and then fails, would that be a breach? Can you have Brad promise something he can surely and safely perform? What is Brad's real obligation if he promises to use his "best efforts" or "act diligently" on Van's behalf?²⁰² Van, is that good enough for you? Do you think Brad's promise means that he is obliged to advertise in the Sunday paper or to hold open houses? Laura, if Brad does absolutely nothing after taking the listing, what can Van do about it? Can he sue Brad for lost potential sales or is he limited to firing him?²⁰³*

200. This analysis may be at odds with what the caption of the document (e.g., "Exclusive Right to Sell") implies.

201. Other questions to ask when a writing is required are: *Brad, if you can't get Van to sign a listing, can you still claim a commission under a part performance exception if you actually do procure a buyer? Didn't you learn about the statute of frauds in order to get your broker's license? If so, should you be allowed to plead part performance (or waiver or estoppel) as an excuse for noncompliance with the statute?*

In addition, there are these optional minor points, which may be covered now or later: *Laura, if Van refuses to pay Brad his commission because the listing was not signed, can he at least sue Pearl for telling Van not to pay him (and thereby intentionally interfering with an advantageous relationship)? If Van does pay Brad, can Brad refuse to honor his agreement with Sheila (the showing broker) to split the commission with her if that agreement was oral?*

202. Goldstein's form states that the consideration is listing the property. Johnson's form states that the consideration is putting the property into the multiple listing system. Bruce's form is the most imaginative, making the consideration \$1, using the Multiple Listing Service (MLS), and agreeing to "try to find a purchaser."

203. You can also ask, *If Van sells the house himself, can he refuse to pay Brad a commission?* but the students may not be able to answer that question yet.

a. *Earning a commission*

Brad, what promise do you want Van to make to you? If Brad answers that he wants Van to sell when he (Brad) finds a buyer, you respond, *Do you really care if Van sells his house, so long as you get paid?* After the class appreciates the essence of this contract—an agent promising to render services and the principal promising to pay compensation for them—the class can discuss the various ways a commission may be calculated and whether the commission is negotiable or fixed (and subject to the antitrust rules).²⁰⁴

3. Ready, Willing and Able Purchaser

Van, when will you have to pay any commission that Brad earns? The intuitive answer that he need pay only when the deal closes is probably at odds with the language of the listing agreement.²⁰⁵ By using a form that requires payment as soon as a ready, willing, and able purchaser has been procured,²⁰⁶ you can begin with a discussion of that concept as a baseline (and postpone consideration of the other compensation provisions of the contract). *Larry, if Van has not yet signed the listing, is that provision acceptable or should Van insist on changing it?* The answer depends on how the provision operates in different situations.

Suppose Brad procures Pearl, who offers to pay Van's entire asking price in cash (and has the money to do so)? What are Van's obligations? The phrasing of the question is intentionally ambiguous and

204. Haar includes *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), on this point. This is also an appropriate place to discuss any other protective restrictions that state law may impose on listings, especially residential ones. In California, for example, our code requires that some listings include a termination date. CAL. BUS. & PROF. CODE § 10176(f) (West 1987).

It is also worth comparing the listing form used in class against the statutory requirements. There is a fair chance that it will not comply, and you can discuss what to do in that case.

205. *Tristram's Landing, Inc. v. Wait*, 327 N.E.2d 727 (Mass. 1975), which recites the contrary rule, is the most common case in the books on this issue. Five of the books use the case. Kurtz has *Dworak v. Michals*, 320 N.W.2d 485 (Neb. 1982), which says the same. Only Johnson has a case that follows the traditional rule, *Fearick v. Smuggler's Cove*, 379 So. 2d 400 (Fla. Dist. Ct. App. 1980), which adds coverage of tortious interference with contract, but is terribly brief. Although *Tristram's Landing* sets forth both the majority and minority rules (as well as the factual alternative of a special contract), students too easily read it as setting forth a majority rather than a minority rule; the case is better covered after the traditional rule.

206. The listing agreements in both Bruce and Johnson are so worded; the forms in both Chused and Goldstein appear to require a sale as a condition to earning the commission.

often produces the answer that Van must now sell his house to Pearl.²⁰⁷ The students must get accustomed to dealing with two different legal relationships simultaneously: (1) the existing contractual relationship between Van and Brad, which may obligate Van to pay a commission, and (2) the unformed legal relationship between Van and Pearl, which enables him to turn down her offer to purchase. If Pearl's offer makes her a ready, willing, and able purchaser, Van owes Brad, even though Van is free to reject Pearl's offer.

Suppose Pearl offers \$1 less than what Van was asking for? The significance of this variation is that, in addition to being free to reject Pearl's offer, Van can reject the offer without owing Brad a commission because Pearl is not a willing purchaser. But suppose Van decides to accept Pearl's offer? also has the dual consequences of leading to a sales contract with Pearl and earning a commission for Brad. This is true, however, only as of the date Van's acceptance converted Pearl into a willing purchaser.

Suppose that Pearl offers to pay Van's full asking price, subject to the condition that she sell her own house first (or qualify for a bank loan, etc.)? If the response is that Brad has earned a commission, then What happens if Pearl is then unable to sell her house (or qualify for a loan)? Someone should recall the concept of conditional contracts from their Contracts class to help on this question. Then, *What if Pearl is able to sell her house (or get the loan)?* goes to the last variable, when the commission entitlement arises neither from the offer nor the acceptance, but from the subsequent elimination of the condition.²⁰⁸

This line of questioning leads to *What if Pearl later changes her mind and refuses to go through with the deal; does Van owe Brad a commission?*²⁰⁹ In light of the foregoing, this fact should be irrelevant, since a commission has already been earned. *Tristram's Landing*, however, now becomes appropriate.²¹⁰ *Larry, is there any reason for Van*

207. Students forget that Pearl has only made an offer to purchase and that nothing in the law of contracts requires that offers must be accepted, even good ones, or that Van's promise is only to pay Brad a commission, not to sell his property. Nor is it likely that the parties intended Pearl to be a third party beneficiary of the listing agreement.

208. A fourth possibility—an offer that is both lower and conditional—needs little more than a mention after the main three possibilities have been covered.

209. The text of the listing will complicate matters if it states that payment may be delayed until the contract closes. Such a statement will require you to distinguish between a delayed time for payment and a condition precedent to payment.

210. See *Tristram's Landing, Inc. v. Wait*, 327 N.E.2d 727 (Mass. 1975).

to refuse to sign Brad's listing if Tristram will overrule it? Is this property subject to that rule? Is Brad free to negotiate a different arrangement (e.g., like the arrangement that the majority rule gives him), if the contract is explicit and refutes any implied contrary arrangement? Is loss of commission (rather than loss of license) the best way to enforce this public policy? Conversely, Suppose this is commercial property and Tristram's Landing does not apply, is Van free to negotiate a different arrangement? How should the listing be amended so that Van need not pay Brad unless and until Pearl completes her purchase?

a. *Procuring cause*

Laura, what about this provision in the listing that provides that Brad gets a commission if the property is sold by him, Van, or anybody else?²¹¹ Will you explain that to Van? If we delete that provision, what would Brad have to do to claim a commission? Procuring cause is at issue and, by switching to an open listing, hypotheticals can be put to measure that concept. If Pearl first noticed the house while driving to work because Brad's sign was on it, but she didn't do anything until after his listing had expired, was he the procuring cause? Suppose she didn't even start thinking about buying it until then (when she won the lottery)?²¹²

Finally, as a prelude to raising agency questions, multiple listing services and cooperating brokers can be brought into the picture. This can be done by challenging the value to Van of an exclusive listing: Brad, does it help Van to have you as his only broker? Is this likely to pro-

211. To cover the point this way, the listing obviously needs to be an "exclusive right to sell" or an "exclusive agency."

212. If the listing contains a clause protecting the broker as to later sales made to prospects with whom he had earlier negotiated, further questions can be asked: Is Van giving away anything by leaving in this clause? Wouldn't Brad earn a commission anyway for a later sale to anybody he had procured? In fact, isn't Van better off with this clause included, because it seems to let him avoid paying a commission by waiting out the safety period before agreeing to sell to Brad's customer? Then, when the provision seems silly, Suppose Brad talked to Pearl but had not done enough to be called her procuring cause; in that case, is Van better or worse off under the clause if he sells to Pearl? Then, after that seems to give a reason for the clause, But since Brad's listing is exclusive, is there any need for him to show that he was the procuring cause anyway?

You may also call attention to any provision calling for payment of a commission under other circumstances, such as when the property is withdrawn from the market. Is that provision valid, or is it an unenforceable liquidated damage or penalty clause?

This is also a place to note the distinction between "exclusive right to sell" and "exclusive agency" listings.

duce the best price? Wouldn't he be better off hiring several brokers to find a buyer for him? Someone will point out that if Brad has an exclusive listing and puts it into the multiple listing service it will be seen by all the other brokers and shown to their prospects, thus providing maximum exposure for the listing.²¹³

4. Agency

Agency issues are best raised through focusing on the cooperating broker. Suppose this is how Pearl was found: Sheila, a broker, met Pearl several months earlier at an open house on a property she had listed; thereafter, Sheila drove Pearl around every weekend to show her new houses coming on the market. Sheila saw Van's house in the multiple listing service and showed it to Pearl; she then helped Pearl prepare her offer for Van's house, which Brad presented to Van. Sheila, can you advise Pearl to reduce the size of her intended offer Van's house? Who is your principal?²¹⁴ Who is paying you? As Van's sub-agent, is it your duty to get the lowest price for Pearl or the highest price for Van? Did Pearl know that you were working for Van when you and she were discussing how much to offer for his house?²¹⁵

Dual agency and dual legal representation logically follow. Brad, if Sheila were not involved could you be Pearl's agent as well as Van's? Can you serve both of them fairly? (Should you advise a higher or a lower price?) Larry, as a lawyer, what would you do if Van and Pearl both came to you and asked you to draft the contract or to supervise the closing for them?²¹⁶ Brad, how can you do what lawyers are not allowed to do?

5. Liability

The purpose of the following questions is to raise the different theories under which sellers (as principals) and buyers (as third parties) can sue brokers.²¹⁷ Sellers are easier to begin with. Larry, if Brad gives

213. The economic advantage to both the listing broker and the showing broker can be observed by asking each of them—once a showing broker has been named in class—what they expect to pay or be paid from this arrangement and why that is satisfactory to them.

214. Pearl, do you think that Sheila is your agent or Van's agent?

215. If the state has an agency disclosure law, this is when to discuss it.

216. *In re Lanza*, 322 A.2d 445 (N.J. 1974), is in many of the casebooks and is excellent on this issue.

217. Along the way, there can be appropriate modifications when the broker is the

Van bad advice—like not advising him to have Pearl sign a mortgage for the price²¹⁸—can you make Brad pay for Van's loss? On what theories can you pin liability on a broker? Is there anything in the contract Brad didn't do or did wrong, which will enable you to sue for breach of contract? Did Brad breach any of his fiduciary duties to Van? Did Brad owe a duty of care to Van? What is the standard of care: simple or professional negligence?²¹⁹ If you contend that Brad should have told Van to get a mortgage from Pearl, can't Brad argue that would have been practicing law without a license? What should Brad do when Van asks him to explain what a mortgage is or asks him to prepare one?²²⁰

Laura, suppose Brad's actions harmed Pearl—or suppose Brad didn't tell her that the house had termites²²¹—does Pearl have the same theories available as Van? Can she sue for breach of contract even if she had no contract with Brad? Can she sue for breach of fiduciary duties (if he was not her agent)²²² What would you need to prove to make out a case of fraud? Did Brad have an affirmative duty to speak if he knew about the termites?²²³ If Brad asserts that he didn't know,

buyer's agent or a dual agent instead.

218. This is the situation dealt with in *Lanza*, 322 A.2d at 445; therefore, that case is an easy bridge to this issue by having the broker commit the malpractice rather than the attorney.

219. Additionally, *Does the fact that society required Brad to pass an exam in order to get his license mean that he should be held to a comparable level of competence?*

220. Bruce has *Cultum v. Heritage House Realtors*, 694 P.2d 630 (Wash. 1985), Haar has *Chicago Bar v. Quinlan*, 214 N.E.2d 771 (Ill. 1966) and Cribbet has *State ex rel. Indiana State Bar v. Indiana Real Estate Association*, all of which have good discussions of this issue (although Cribbet oddly puts this topic after vendor and purchaser). Wherever the class draws the line of practicing law, you can then test to see how easy it is for Brad to stay on the right side of it. *"Can he have the parties sign anything? Can he fill in blanks? Can he use printed forms? Is he safe if all of his forms provide that they are subject to an attorney's approval?"*

221. Alternatively, using *Lanza*, *Could the buyer have sued the seller's broker for not warning him of the water problems on the property?*

222. The concept of fiduciary duties can be treated separately, rather than as one of several theories available only to the principal. A question that presents the issue from both sides is, *Suppose Brad gets Pearl to offer \$500,000, but tells Van that the offer is only for \$400,000, persuades him to accept it, and then pockets the difference. On what theory can Van sue him? Can Pearl use the same theory? What if Brad was Pearl's agent rather than Van's?*

Another issue to discuss is Van's right to cancel when Brad purchased the property himself at the full asking price, but without informing Van.

223. Johnson and Kurtz both have cases involving broker fraud. However, Johnson's case, *Zimmerman v. Northfield Real Estate, Inc.*, 510 N.E.2d 409 (Ill. App. Ct. 1986), *appeal denied*, 515 N.E.2d 129 (Ill. 1987), is included in post-transfer remedies, rather than under brokers. Dukeminier and Rabin both have sections on the duty to disclose

*can you argue that he owed Pearl a duty of care even though he was Van's agent rather than hers? Can you argue Brad owed Pearl a duty to inspect? Specifically, can you argue what duties he owed to Pearl?*²²⁴

To get to the countervailing considerations of disclosure, *Larry, what should Brad do when he has adverse information about the property? Should he tell Pearl voluntarily? What if he knows that Van has AIDS?*²²⁵ To get into broader social issues, *Should Brad tell Van that Pearl is black? Should he even show the house to Pearl if Van said that he wants to sell only to a white person?*²²⁶

B. Vendor and Purchaser²²⁷

Real estate contracts begin their lives as offers. Learning about contracts for the sale of land by the case method is misleading since appellate decisions inevitably involve the interpretation of already completed contracts. Attorneys spend only a small percentage of their time giving legal advice about what an already executed contract means; they spend far more effort on creating the contract through formulating offers, negotiating with the other side, and drafting appropriate clauses.

defects, which include *Stambovsky v. Ackley*, 572 N.Y.S.2d 672 (App. Div. 1991) (non-disclosure by seller and broker that the house was haunted; *Dukeminier* includes a photograph of the house), and *Reed v. King*, 193 Cal. Rptr. 130 (Ct. App. 1983) (non-disclosure of previous multiple murders in the house).

224. *Easton v. Strassburger*, 199 Cal. Rptr. 383 (Ct. App. 1984), is California's unique affirmative answer to this question and is mentioned in several of the books, although it is reprinted only in *Chused*. You can have the attorneys for Brad and Pearl argue whether *Easton* should be accepted in your jurisdiction as a way of raising the policy and scope issues involved.

If your jurisdiction enacted a transfer disclosure law, some of its details can be reviewed here—at least in terms of the duties and sanctions imposed on brokers. The rest must wait for discussion of vendor and purchaser issues.

225. This is a natural question to ask if the class has read *Reed v. King*, 193 Cal. Rptr. 130 (Ct. App. 1983), which deals with the duty to disclose prior multiple murders. See *supra* note 223 and accompanying text.

226. Blockbusting and racial steering can be brought up at this point.

227. Most casebooks cover this topic at the start of conveyancing. Goldstein almost begins his entire book with this topic, but Rabin puts it after deeds, and Browder puts it after deeds, recording and title assurance. In Haar, the authors spread it between several of these topics. Donahue covers this entire subject with only 13 pages of text. If conveyancing is to be treated as part of modern commercial real estate transactions, locating the vendor-purchaser topic towards the beginning of conveyancing perfectly fits its role in the real world, since the contract always comes first.

Good real estate attorneys put deals together and do so in ways intended to avoid litigation and the hazards of judicial interpretation. This skill requires full knowledge of the relevant rules. Thus, most class time will be spent on helping the purchaser make an offer or helping the seller to respond or make a counteroffer.

If Pearl is interested in buying Van's house, her broker will either take her to an attorney or himself draft an offer for her to sign.²²⁸ Even when custom dictates that the contract be drafted by the broker, he can advise Pearl not to sign it until her lawyer has reviewed it.

The legal issue of the necessity of a writing can be raised even before Pearl consults with an attorney. *Brad, why do you have to bother with a complicated form; won't a telephone call to Van be just as good? How about just having Pearl and Van get together and shake hands on the deal? If you insist on a writing, how big does it have to be (really, how small can we afford to make it), i.e., what are its bare essentials? How precarious is Pearl's situation if she moved into the house following an oral contract? How precarious is her situation if she also paid Van some of the price? Do those acts take the case out of the statute of frauds?*²²⁹

Most of the casebooks contain a form contract, providing an easy starting place for discussion between Pearl and her lawyer.²³⁰ The first questions should deal with the function and role of this document. This can be difficult for students, as it is often difficult for first-time buyers, because the heading or text may be misleading.²³¹ Furthermore, students rarely believe that their Contracts course has much to do with

228. If the point was not previously covered as part of brokers, you can ask whether Brad is practicing law when he fills out the form or explains it to Pearl. Dukeminier has *State v. Buyer's Serv. Co.*, 357 S.E.2d 15 (S.C. 1987), which deals with the general question of how much such assistance constitutes the practice of law). See also *supra* note 220.

Also, if not covered earlier, you can raise issues of legal ethics by having Brad take both parties to one attorney to draft their contract and give them legal advice to see how quickly that attorney spots the conflict of interest involved. *In re Lanza*, 322 A.2d 445 (N.J. 1974), is a case on this point. *In re Lanza* is good here and included in both Haar and Kurtz.

229. Most of the casebooks devote a little attention to these questions through a case or brief text, although the statute of frauds is given an astounding 40 pages and 7 cases in Cribbet.

230. I found forms in all books except Cribbet, Dukeminier, and Rabin. Donahue's form is almost too short to use. Haar and Singer both have a short binder and the full-featured agreement intended to replace it.

231. Specifically, it is misleading if it is labeled "Deposit Receipt" and its text begins with references to the broker's receipt of a deposit. Some California forms do this, postponing any reference to the making of an offer until the end of the multipage document.

the real world strategy of creating a contract. *Laura, what will happen if Pearl does sign this document? Does signing it mean that she has bound herself to buying the property?*²³² *If she has already signed it, is it too late for you to do anything to change the situation?*

This last question is designed to bring out that this is an offer that will lead to a binding contract if Van accepts it, but that Pearl can nevertheless revoke or revise the offer before he accepts it—even though she may have already signed it. Furthermore, Pearl's offer can say anything she wants it to say. This is a difficult proposition for many students to accept. They are so imbued with the principles of the interpretation of fully executed contracts that they often believe that Pearl cannot demand some particular benefit because it is contrary to some rule or is not reasonable. Students are more comfortable having a court write the contract than in helping the parties to negotiate it.²³³ Laura's job at this stage is not to fatalistically interpret the provisions of this offer as if that were immutable, but to help Pearl determine whether those provisions are good for her and where not to replace them. This will be a class in how lawyers help clients make offers.

The form employed will dictate the structure of much of the remaining class time. The provisions that relate to marketable title, risk of loss, and remedies on default should be reserved for separate discussion, but a quick run through of the other provisions can convey many useful points. These matters can generally be discussed in the order employed in the form, with some combining when helpful. The next paragraphs mention a few of these matters.²³⁴

232. The actual offer in the California form usually appears only in the final paragraph. See *supra* note 230.

233. The legal regime in residential leasing supports this attitude, allowing little freedom for the negotiating terms. You can ask whether we, the public, care enough about the terms of the contract between Pearl and Van (or think that one has so much more bargaining power than the other) as to impose the same kind of system here.

234. Some provisions, such as those relating to escrows and proration, may be explained fleetingly and then deferred until the class addresses that topic. If the contract form also deals with payment of the broker's commission (as do all of the casebook forms except Donahue's), you can examine to what degree that form changed the arrangement created in the earlier listing.

With regard to title in the grantees, *How should Pearl and her husband take title?* affords a refresher of the previous coverage of concurrent ownership. (Indeed, that entire topic really boils down to the filling in of this provision.) Nominees and rights to assign can also be covered here.

- **Deposit.** The earnest money provision is a good opening gambit for escaping the tyranny of the form. *Must Pearl make a deposit just because the form has a provision for one? Can she make an offer without accompanying it with a deposit? Should she?* When the response is that Pearl does have to do so, ask: *What law says that offers must be supported by deposits? Did your Contracts professor say that?* It may be the case that Van will not take a sporting offer seriously, but that does not make the offer invalid or not in Pearl's best interests.

- **Contingencies.** *Should Pearl make her offer conditional on anything (e.g., qualifying for a loan, selling her own house first, or being satisfied the soil is not contaminated)?²³⁵ Explain to Pearl what could happen if the contract does not so provide and the condition does not occur. If Van does accept a contingent offer, do the parties have a contract or not?²³⁶ What happens to Pearl's deposit if there is a loan contingency and she can't obtain a loan? Can she get out of the contract by never applying for a loan?²³⁷*

- **Personal property.** *Will the dishwasher come with the house? Does that apply to the toilet bowl as well? What should the contract say if you aren't certain whether something is a fixture or not?²³⁸*

1. Marketable Title

The clause in the form regarding the condition of title may be difficult to understand.²³⁹ *Laura, what does this provision about condition of title mean? How essential is it? How much good does it do Pearl? What if there were no such clause in the contract? Would Pearl be better or worse off?* All of the books have cases establishing that a purchaser has a common law right to marketable title, so that the provision probably reduces rather than enlarges Pearl's rights.²⁴⁰

235. As always, Laura must be admonished to get the answers from Pearl, rather than deciding them herself.

236. Additionally, *Has Brad earned a commission yet pursuant to his listing contract?*

237. Goldstein and Cribbet both have cases dealing with this question. Bruce has four cases on offers subject to financing, but includes them in a section on financing rather than in the section on contracts.

238. Rabin includes an entire chapter on fixtures.

239. Every casebook form has one or more provisions regarding the seller's title, although with significantly different effects.

240. This episode also reinforces the point that an attorney has to first know the rule in order to appreciate the significance of a contract provision and who benefits from the provision.

The elements of the marketable title doctrine can be analyzed through a comparison of Pearl's rights under the contract with and without the clause. For example, *If the title turns out to be subject to an easement, can Pearl complain about it if there is a clause? If there is not a clause? What if the problem is that a name in the chain of title was misspelled?*

The usual form provisions requirement that the buyer must make a timely objection can be used to illustrate the logic of flyspecking. *Suppose that a record search shows that some name in the chain of title was spelled in different ways at different times; Laura, if Pearl isn't personally bothered by that fact, is it all right to just let it go? What will you say when Pearl later wants to sell the property and the next buyer's attorney is not as liberal as you were? Should you start acting as mean now as that next lawyer may someday do?*

Considering the inefficiency of the options introduces the rationale for marketable title. *Laura, are you going to search Van's title for defects before or after Pearl makes her offer? If you search before she makes her offer, what happens to that expense if Van rejects the offer? If you don't search until after it is accepted, what happens if you then discover a title defect?²⁴¹ How would you have to handle this if there were no doctrine of marketable title protecting Pearl?²⁴²*

Next, there is the practical application of the doctrine. *Laura, what if the title search you make (after Van accepted Pearl's offer) shows that a neighbor has an easement over the property? The urge is to act immediately through suing or canceling the contract.²⁴³ But if you withdraw today what will happen if Van buys up the easement from*

241. Here is another place where students know the rules but do not think to apply them. It is not uncommon for the same student to tell me, on the one hand, that a purchaser has a right to a marketable title, and on the other hand, that Pearl should examine title before she makes an offer so that she can withdraw if title is bad.

242. The doctrine can also be explored from the buyer's or broker's positions. *Brad, if you know that Van's title is subject to an easement, is there any sense in obtaining an offer that calls for a marketable title? Is there a way to lock Pearl into the contract and to not let her escape because of the easement? From a practical point of view, can you and Van afford not to know about the easement before Pearl makes her offer? If you know of the easement in advance, what do you do about it in Pearl's offer?*

243. Laura may also propose suing the neighbor. This gives you the opportunity to review interests that run with the land to determine whether Pearl will be bound if she completes the purchase.

the neighbor before the scheduled closing? Who will be in breach?²⁴⁴ Should you do anything before the close of escrow? Can Pearl keep it a secret and spring it on Van on closing day, in order to back out at that time? What if the contract says time is of the essence?

Finally, *What if on closing day Van says that he has almost worked out a deal with the neighbor to cancel the easement. Can Pearl close now and then later sue Van for breach of covenant of marketable title if the easement isn't removed?²⁴⁵*

2. Risk of Loss

The same kind of questions also work for risk of loss issues. *Does the form clause improve Pearl's position or should it be stricken?²⁴⁶* Pearl's lawyer needs to know whether her jurisdiction uses the majority, minority, or uniform rule as a background. The question can therefore be asked three times.

Because the majority rule is counterintuitive and works against Pearl, Laura needs to explain its rationale to her. *Laura, tell Pearl why the risk of loss is on her, since it still is Van's house.* The technical explanation of equitable conversion seems arbitrary, and some justification of it should be sought. The logic of the minority and uniform rules are much easier to explain. Each is distasteful to one party or the other, and his or her attorney should draft a clause reversing that situation.²⁴⁷

Students tend not to really appreciate what they mean when they speak of allocating the risk of loss. *What would happen if Pearl moved in early (in a uniform state) and the house then burned down?* The temptation is to say that Pearl has the duty of rebuilding it, rather than that she still owes Van the price. Raising the same issues when the risk is on the vendor, *What would happen if Pearl did not move in and the house burned down before close of escrow?*

244. If installment contracts are also being covered, it is certainly worth exploring the plight of the purchaser in that situation. Although an installment contract is more a mortgage than a contract, several books include cases on it in the vendor/purchaser chapter.

245. Both Bruce and Haar cover this issue in their chapters on deeds. It certainly fits there, especially as an introduction to title covenants, but it is also worth mentioning here.

246. There is a risk of loss provision in all of the form contracts except Browder's.

247. This not only lets the students treat it as a background gap-filling rule, but it also provides an example of the usefulness of legal advice if Laura has to explain to Pearl the consequence of taking possession early in a jurisdiction where the Uniform Vendor and Purchaser Risk Act is applicable.

There are related insurance questions: *In which jurisdiction should Pearl purchase fire insurance? Does Van need to keep his existing policy in force if Pearl buys her own policy? Should the contract state who will carry the insurance? Will such a provision amount to stating that the insured party agrees to be the risk bearer? What happens to the proceeds if Van carries insurance, but the risk of loss was on Pearl? What if it was the other way around?*

3. Defective Premises

The related, although less frequently covered, issue of discovering defects in the premises during the escrow period can be covered here.²⁴⁸ *Suppose, after the contract has been signed, Pearl discovers that the electrical system is defective and calls you. What can she do? Can she refuse to complete the deal? If so, on what theory? Did Van impliedly warrant the condition of the house? If there is no general implied warranty of quality in sales of real estate,²⁴⁹ on what basis can Pearl withdraw? Did Van have a duty to disclose the defect to Pearl?²⁵⁰ What if he didn't know about the defect himself? Did he have a duty to look for defects prior to selling?²⁵¹*

Derivative questions cover Pearl's need for contractual protection. *Laura, since Pearl does not have the same luxury of a postcontract inspection of the property as she has with regard to the title, is there anything she can do to protect herself when making her offer?* In addition to the obvious advice to inspect first, Pearl might consider making

248. Questions relating to the discovery of defects after the close of escrow are covered later in this article, since the legal issues are not the same. Browder includes *Caceci v. DiCanio* here, although the discovery of defects in that case occurred many years after title had passed. *Layman v. Binns* in the Casner Supplement does not even state whether the fight occurred before or after delivery of the deed.

249. In contrast, the rules applicable to leasing of residential premises, sales of goods, and perhaps sales of newly constructed houses, do imply a warranty of quality.

250. *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) (fraudulent concealment of a leaky roof), illustrates this point well and is included in both *Dukeminier* and *Singer*. *Stambovsky v. Ackley*, 572 N.Y.S.2d 672 (App. Div. 1991) (a haunted house), provides an even better illustration and is included in *Dukeminier*.

251. If there is a transfer disclosure statement statute in your jurisdiction, the questions should cover what rights the one purchaser has (against the vendor and the broker) when she is given no such statement or one that fails to disclose a defect. Additionally, nice comparisons between sellers' and brokers' duties regarding defects can be made.

her offer contingent on satisfactory reports from appropriate inspectors or demanding a warranty from the seller.²⁵²

4. Breach of Contract

One way to introduce the issue of remedies on default is to return to a situation where the seller is unable to perform, thereby eliminating any significant benefit of the bargain damages. *Laura, if Van can't perform on closing day (because his title is defective or because the house was destroyed by fire where the risk of loss fell on him), what can Pearl do? Is withdrawal her only remedy? Can she get her deposit back? Can she recover damages over and above return of the deposit? Is there any difference between English and American rule outcomes when the property is worth less than the contract price? What must Pearl prove about the value of the property to recover benefit of the bargain damages for Van's breach? Suppose that Van withdrew because prices had risen and he believed he could sell to someone else for more. What are Pearl's damages then? Instead of damages, can she get specific performance of the contract?*²⁵³

Consequences of a buyer's default should also include the liquidated damage²⁵⁴ alternative. *If Pearl is apprehensive that she may be unable to complete the deal, should she include or delete the liquidated damage clause in the contract? If Pearl removes the clause and defaults, how much will she owe? Larry, how much will your client claim as damages? How will you calculate them? What will Van have to prove regarding the value of the property at the time of breach?*²⁵⁵ *If the house has not fallen in value, can Pearl get back her deposit even though she defaulted? Is there a risk that Van can bring a specific*

252. Kurtz has *Mallin v. Good*, 417 N.E.2d 858 (Ill. Ct. App. 1981), on whether such clauses survive the closing. This is an issue that can be raised here: *If the contract has a provision requiring Van to repair the wiring, can Pearl afford to close before he has done so? Later, if Pearl has already accepted Van's deed, is it too late to sue on unperformed clauses in the earlier contract?* This same issue arises with regard to title defects.

253. Cribbet, Goldstein, and Kurtz all have cases on the purchaser's measure of damages; Rabin has an entire chapter on specific performance by the purchaser.

254. All except Goldstein and Donahue have liquidated damage clauses in their forms. Chused's form appears more to assume than to state one. See CHUSED, *supra* note 3, at 789-92.

255. Students are uncomfortable having the seller testify that the property was worth less than the selling price, because that sounds so much like fraud. Nevertheless, it illustrates an efficient breach. *If Van was selling a house worth \$100,000 for only \$90,000, how much did he suffer from Pearl's default? Isn't that the best thing that could have happened to him? Is selling the house for more than it was worth different from Macy's selling a camera for \$100 when it paid only \$60 for it?*

performance action against her?²⁵⁶ What if the contract contains a liquidated damage clause? Will Van be able to keep her deposit even though he resells the house for more thereafter?²⁵⁷ Can anyone argue for Pearl that the clause is invalid? With luck, you can get students to say that actual damages were not that hard to ascertain or that the amount chosen (what Pearl paid so far) was not a reasonable forecast, but was rather a penalty, which increased as Pearl performed more.²⁵⁸

C. Mortgages

All of the casebooks except Browder²⁵⁹ cover this topic.²⁶⁰ The authors are divided on putting the topic before or after deeds. Transactionally, it can be viewed as the usual way by which the purchaser performs her contract duty of paying the price to the vendor, so that locating mortgages near contracts and deeds is appropriate. The pedagogical inconvenience is that mortgage law is made more complicated when mortgaging is made a part of a purchase transaction in which the incipient mortgagor is not yet the owner of the property. The purchase contract can serve as a lead in to mortgages, but it is easier thereafter to separate mortgaging from purchasing property (i.e., to act as if the purchaser were already the owner of the security) and later tie it all together. It may be better to start with some other property already owned by the purchaser as the collateral: *Suppose Pearl intends to get the money to pay Van by borrowing on a piece of land that she owns in the country, and she comes to me to ask for a loan.*²⁶¹

256. *Centex Homes Corp. v. Boag*, 320 A.2d 194 (N.J. Super. Ct. Ch. Div. 1974), is applicable to this question and is in both Chused and Kurtz.

257. Rabin has an entire chapter on this point. Goldstein and Kurtz both have cases on it.

258. This point certainly is worth mentioning if the course addresses installment contracts. Even in the noninstallment situation, this principle should lead Laura to advise Pearl to consider the size of her deposit when the contract provides for liquidated damages.

259. The omission from Browder is all the more surprising given that Nelson and Whitman—our best known mortgage writers—are two collaborators in that work.

260. The usual page range covering this topic in the books is 10 to 30, although Johnson gives the topic 50 pages.

261. You can also lead up to mortgages by first converting the sales contract previously reviewed into an installment contract. *Laura, suppose Pearl lacks sufficient cash to buy Van's property, but Van is in no hurry to get the cash anyway; can you redraft the sales contract to give Pearl enough time to pay? Could they stretch out the closing time from 30 days to 30 years?* (Both *Skendzel v. Marshall*, 302

1. The Lender's Perspective

Mortgage law is best understood by making students appreciate how a lender or lending institution thinks and understand its desires and fears, because it is those attitudes that drive the transaction and generate its consequences. When the loan is first made, the lender structures the entire transaction and strictly for its own interests.²⁶² Later, when the loan is in default and there is litigation between the parties, the lender's real antagonist is not the borrower but the judge or chancellor—who sees the judicial role as one of redressing the initial imbalance by creating superior equities in favor of the debtor in order to deny the lender the ostensible benefits of its mortgage contract. Finally, it is the lender's reactive steps to avoid future judicial intermeddling that gives the situation its special dynamic. This overall perspective comes out clearly from a brief re-enactment of the history of mortgage law.

*Larry, this is the first time I have ever been asked to make a loan, so I need your advice.*²⁶³ *What risks do I run if I just give Pearl the money she wants and wait for her to pay me back?*²⁶⁴ I force my attorney to advise and protect me in numerous ways: First, he needs to tell me to make Pearl sign a written promissory note rather than to accept her oral promise of repayment.²⁶⁵ Second, he should warn me

N.E.2d 641 (Ind. 1973), and *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979)—the cases most used in the casebooks—include the relevant numbers to illustrate the financing features involved.) *Do they need to change any of the other provisions to fit this new arrangement (e.g., possession, installment payments, or interest)? Is a liquidated damages clause still appropriate? What if Pearl pays for the next 29 years and then misses her last installment; can Van really take the land back (which has probably appreciated in value) and also keep all that she has paid? Then, Could Van do that if he had taken a mortgage instead?* This is one place to cover installment land contracts, but the transition to mortgages is jerky, and the real comparison between the two devices will not occur for a long time.

262. As the stereotypically necessitous debtor, Pearl has no role to play at this stage, except to sign the documents that are put in front of her.

263. Having surplus funds to loan, I can afford to hire an attorney, whereas the impoverished debtor cannot.

264. My student lawyer usually prefers telling me, dogmatically, what steps to take or e.g., get a note, get a mortgage—rather than warning me of what dangers I face if proper steps are not taken. Consequently, it is necessary to challenge him at each step as to what might happen if I do not follow his advice: *What if I don't make Pearl sign a note; won't my testimony that I loaned her money be enough?* The lender's overreaching behavior is more intelligible when one appreciates how much it is dominated by fears of default and perjury.

265. Students will often confuse the statute of frauds—which may or may not apply, depending on the length of the loan—with the evidentiary problem of proving that a loan was made. I want my lawyer to caution me that a debtor who later dishonors her promise to repay me is also likely to deny that such a promise was ever

that the note is not equal to payment if Pearl defaults because it entitles me only to a judgment in court, which is not cash. Third, if Pearl has no assets when I do obtain a judgment, I will have nothing to reach by execution. Fourth (when I counter by asking Pearl whether she owns property), he should point out that there is no guarantee that her property will still be available for execution in the future if and when I have to sue her.²⁶⁶ So, fifth, I need to find a way to assure that the property that Pearl has now will be available later if she does not repay the loan. Larry has to make Pearl give me some "security" by figuring out how I can get my loan paid from Pearl's house if Pearl fails to pay. *Okay, Larry, in addition to making Pearl sign a note, I'll make her sign another document saying that I get the house if she doesn't pay the note. Will you draft it for me, please?*

Since the point to be demonstrated is how the mortgage arose out of the conveyancing rules then in effect, I will not let my student attorney write a document that says "Pearl mortgages to Roger" because that is too recent and sophisticated. *What would you have said 500 years ago before mortgages were invented?*

This is less terrifying than it seems to the students, since the legal system was simpler then, and we only need to comply with rules of conveyancing and estates in land, probably already covered in class. To satisfy the conveyancing requirements, the document must be a deed because that is how parties transfer interests in land. With regard to the appropriate estate, *How about having the deed say, "To Roger when and if Pearl later defaults on her note?"* If the students accept that idea, asking *What kind of estate did I get?* will usually get someone in the class to figure out that it created a springing interest, which would be invalid prior to the Statute of Uses.²⁶⁷

made, if she can get away with it.

Most of the casebooks do not have a form promissory note, and those that do often have one that is more complicated than it need be. You can help your student draft a simple, one sentence IOU, omitting all but the parties, the amount, and the due date, with wavy lines on the blackboard for all the "fine print" that other students want to add. As for the due date, a one year flat note is easiest to work with at this stage.

266. Other students may be able to warn that in the meanwhile the house may be destroyed, fraudulently conveyed, seized by other creditors or by the bankruptcy trustee.

267. You can comfort the drafter by observing that, for most attorneys, the fact that the legal system complicates matters is often a cause for delight at the challenge it presents (and the excuse it provides for charging higher fees).

As is often the case, the lawyer has to be indirect; rather than having the document state forthrightly what the client wants, he must instead fit the transaction into the nearest existing acceptable pigeonhole. *Can you have Pearl convey an estate to me that the common law judges will uphold?* Someone will propose a fee simple subject to condition subsequent, which you can get the proponent to draft by providing "To Roger (now) but back to Pearl if she pays her debt on the date specified in the note."²⁶⁸ Such a document creates an estate that the system recognizes.

A lender wants economic protection as much as legal protection. The document must not only be upheld in court, it must also make collection on default relatively simple and cheap. *If I have Pearl sign this document and then she doesn't pay the note when due, what will I have to do to get her property?* Much to his own surprise, my attorney realizes that since a fee simple subject to condition subsequent enlarges into a fee simple absolute automatically and instantaneously on default,²⁶⁹ I will not need to wait, nor go to court, to acquire the property if Pearl defaults because it is already mine.²⁷⁰ *The document is effective as well as valid?*

Another advantage of the mortgage will serve as an introduction to the equity of redemption. *Suppose Pearl's payment was due on April*

268. This is an odd condition subsequent, which the grantor (borrower) hopes will, rather than will not, occur. Furthermore, its effect appears to make the lender the immediate owner. When students make these observations, however, the response should be to ask whether those features impair the usefulness of the estate from the lender's point of view, since his perspective is the only one that his attorney should take into account in the negotiations. And to students' protests against the unfairness of such an arrangement, you must remind them that this is a history lesson being re-enacted, and the fact is that lenders "retain" attorneys who look out for their interests exclusively in preference to those whose consciences get involved in the transactions. Had loan documents been written to benefit borrowers, we would have vifgages instead of mortgages today.

269. The impossibility of the condition subsequent (timely payment) to thereafter occur is another reason for my lawyer to charge a high fee since his document spares me the cost of rehiring him to collect later.

270. It is generally easier to treat the property as vacant during the life of the mortgage. Possession can be considered if some student observes that an ejectment action will be necessary to evict the mortgagor if she was living on the property. You can ask that student the following questions: *Who is entitled to possession of the property during the loan if the deed gave me a fee simple subject to condition subsequent? Does the right to possession have any (financial) attraction to me if I already have a better house of my own to live in? Could I rent out Pearl's house for the life of the loan and keep the rent? Could I rent it to Pearl and thereby earn as rent what I might have been barred from earning as interest under medieval church law?* These considerations only increase the desirability of the mortgage as a loan device.

1;²⁷¹ *what should I do if she calls me on April 2 offering to pay? Is there any reason not to accept the payment (other than Shylockian malice)? What if the house is worth \$100,000 and the loan is only \$60,000? Can I tell her it's too late?* This potential windfall (which can be built in to the deal through an appropriate loan-to-value ratio) convinces me to accept the idea of a mortgage and to instruct Pearl to sign one if she wants the loan.

2. Judicial Relief on Default

Now attention shifts from the loan execution stage to the default stage. *Laura, suppose the lender rejected Pearl's payment yesterday because it was late and now she comes to you; is there anything you can do for her?*²⁷² After Laura's pleas to me (as lender) for mercy fail,²⁷³ Laura must decide to sue. *Where will you file your case? A common law court is sure to uphold the transaction, since all of the rules of that system were followed; you will have to find some court where the judge doesn't abide by the common law rules. Is there such a place?* Chancery is the obvious answer to these rather forced questions (combined with a brief professorial explanation on the nature of equity jurisdiction).

After deciding on the right court, the next issue is: *What argument will you make to the chancellor?* The student's temptation is always to contend simply that the agreement is invalid on the ground of unconscionability.²⁷⁴ Although technically inaccurate, this argument is more or less what the chancellors stated when equity first began to intervene. More useful is to get Laura to argue that the documents are not really what they appear to be: that this is a loan transaction masquerading as

271. Use of a single payment note makes this point easier to illustrate; an installment note requires an acceleration clause to get to the equivalent situation.

272. Laura can be told that she works for Medieval Legal Aid. Alternatively, the fact that Pearl has funds (the rejected late payment) makes feasible her retention of an attorney.

273. As lender, I prefer the windfall of retaining property worth \$100,000 in lieu of a \$60,000 payment.

274. The debtor protection cases in the casebooks must be used with caution here, since students tend to treat the doctrines stated there as timeless, which makes mortgage law much too static. Forcing the debtor's attorney argue for relief before the chancellors decided to grant it automatically is the equivalent of making the lender's attorney invent a mortgage before the system provided one, a process that still goes on for both sides today.

a conveyance, and that the relationship is really borrower-lender rather than seller-purchaser. If form is disregarded in favor of substance, a lender should not be allowed to keep the collateral if the borrower is willing to pay the debt.²⁷⁵

The next question is: *What relief do you want the chancellor to give your client based on your theory?* The reflexive response is that title should revert to Pearl, but it is easy to show that solution is too greedy since the debt has not been paid. Laura must figure out that what Pearl needs is judicial permission to pay after the date when the conditional estate became absolute at common law. *So you want a court of equity to allow Pearl to redeem herself from her earlier default, i.e., give her a right to pay late?*²⁷⁶

To appreciate the impact of the creation by equity of the right of redemption, class attention should switch back to the lender's perspective. *Larry, it is April 3 and Pearl has neither paid nor asked for additional time; is the property mine? If you say that I am now the owner, will you buy it from me for \$90,000, a bargain price since its market value is \$100,000?*²⁷⁷ *How long do I have to wait until someone will pay me the full market value of "my" property—a month, a year? How long is laches? What happened to your assurance that my mortgage would get me the collateral promptly on default?*

The mere prospect of an equity of redemption—even when unexercised—is a significant economic fact and forces the lender to take the next step. *What can I do, now that Pearl defaulted and knows the chancellor will give her extra time whenever she asks for it? Can I sue her? If so, where? (There is no sense in suing in a common law court, because as far as the judge is concerned the title is already mine.) How will you argue to the chancellor, considering how sensitive he is to debtors wanting to pay late?*

With assistance from others, Larry should be able to propose that if I go to equity and offer Pearl even more time, the chancellor will decree that if she fails to pay within the extended time she will then be fore-

275. And be willing to compensate for the delay with interest on the amount loaned.

276. Alternatively, the court could give Pearl an "equity of redemption," the value of which depends on how much the market value of Pearl's property exceeds the debt on it.

277. If Larry does not yet get the point, *How will you feel if you do pay me \$90,000, and then Pearl redeems from you for \$60,000?*

closed from being able to pay after that.²⁷⁸ Thereafter the property will be mine, equitably as well as legally: a strict foreclosure.

Sale foreclosure is introduced by my asking Laura, *How much more time do you want for your client? If I give her six months (even though you only asked for three), will you stipulate that if she doesn't pay by then, her right to redeem thereafter is really over? You won't be upset after that, even though the property was worth \$100,000 and her debt was only \$60,000?* As Laura appreciates the forfeiture involved in strict foreclosure even after a delay, asking *How do you propose to avoid that consequence, in light of the fact that time has really run out?* forces her to argue that a sale of the collateral will make the lender whole and at the same time preserve the debtor's equity (further undoing the terms of the mortgage document).

To introduce the failure of the sale foreclosure mechanism, there should now be a public foreclosure auction.²⁷⁹ Students are invited to bid, but are deterred from doing so by the demand that their bids be all cash and unconditional, i.e., no offers subject to obtaining a loan or subject to inspecting the property or to obtaining a preliminary title report.²⁸⁰ As the sole remaining bidder, I enter a bid of \$1,000.²⁸¹ *Laura, can you object to my getting a deficiency judgment of \$59,000? What sort of restrictions do you want the legislature to impose to further protect Pearl against my underbidding and double recovery strategies?* A lecture or discussion of foreclosure moratoria, post sale redemption, fair value or upset price requirements, and antideficiency prohibitions can follow.²⁸²

278. To dramatize the process, *But what happened to your representation that the mortgage would make the property come to me instantly and without a lawsuit if ever Pearl defaulted?* This question can be asked repeatedly as mortgagor protection principles are developed as superior equities.

279. Underbidding is covered at great length in Dukeminier and more summarily in Goldstein.

280. The professor should also insist that any student bold enough to enter an overbid demonstrate his immediate ability to produce the cash.

281. At this time, I also wait for some student to be brave enough to ask me to display my cash in order to give me the opportunity to explain credit bidding.

282. Goldstein contains *Cornelison v. Kornbluth*, 542 P.2d 981 (Cal. 1975), on these issues, but it is too easy for students to read that case as involving the law of waste rather than the esoteric policies of California antideficiency law. A much more helpful case is *First State Bank v. Chunkapura*, 734 P.2d 1203 (Mont. 1987), in Johnson.

3. Clogging

The judicial and legislative successes of debtors' attorneys have undone all that was initially accomplished by lenders' counsel through artful drafting. Yet, lenders are as unwilling to accept these restrictions as the judges are to let them have their way; lenders may not make the rules but they can structure the transactions (with the assistance of high-priced lawyers) to evade the rules. As a result, mortgage law is always circular and transient. To illustrate this point, I admonish my attorney not to let Pearl's disaster recur. *What can you do for me to get around these rules when the next borrower approaches?* The solutions I want the class to consider often have to be proposed by me.

What if I make the next borrower waive all of these rights Pearl got? Should freedom of contract be allowed to prevail over superior equities? Equity cannot permit debtors to have their equity of redemption clogged through boilerplate waivers included in every mortgage. This means that equity must make its rules nonwaivable, and Larry will have to artfully camouflage any such waiver included.

Hidden security is a more interesting device. *If the judges won't let me have my way whenever a mortgage is involved, why do we call it a mortgage? Can you draft something that will look different but do pretty much the same?* Students will inevitably need help. *What if, instead of loaning Pearl Junior \$60,000 for a year, I purchase the property from her for \$60,000 and give her an option to buy it back from me at the end of the year for \$66,000? That wouldn't be a mortgage would it?²⁸³ At the end of the year if she didn't exercise her option, wouldn't the option just expire? Laura, would you agree? How would you argue that Pearl Junior should still have extra time, etc.²⁸⁴*

If the installment sales contract was not covered earlier, it fits here by asking whether a vendor should be able to obtain different results

283. If possession of the property has not been previously considered, this is a good place to introduce it. *Will there be any difficulty in saying this is a true sale if Pearl Junior continues living in the house? Is there some way to explain her staying? Can I rent the property back to her after she has sold it to me? If I charge her \$6,000 in rent for the year, I could even reduce her option price back to \$60,000 (or recover usurious interest by calling it rent).* With this background, the sale-leaseback is considerably more intelligible to students.

284. Many of the books have cases on this issue. *Duvall v. Laws, Swain & Murdoch* (in Johnson) has the added advantage that the creditor is a law firm who took the deed as payment for legal services. *Kawauchi v. Tabata* (in Chused) is an extremely difficult case, but there is very helpful commentary in his teacher's manual. *Mid-State Investment Corp. v. O'Steen* (in Haar) adds the dimension of showing how a mortgagee would like it to be—forcibly taking the property—but the opinion itself is not very illuminating. *Johnson v. Cherry* (in Rabin) and *Keonig v. Van Keken* (in Goldstein) are both comprehensible and policy oriented discussions of this theme.

according to whether he uses a purchase-money mortgage or an installment land contract.

Hidden security is a dramatic way to illustrate the unstable nature of mortgage law. Judges impose rules that lenders evade through new documents, which endure only until the judges catch on to them, while meanwhile the lenders are working on new devices anyway. Both institutions seem well matched in their struggle over debtors' purses. If time forces you to stop here, the students have been given a valuable insight into this energetic field.²⁸⁵

4. Transfers of the Property

Consideration of the effect of a sale of encumbered property permits a review of many earlier rules. *Suppose my mortgage is on Van's property and he wants to sell it to Pearl; can he? Does he have a marketable title? Does the existence of the mortgage mean that nobody will purchase the property? Will a conveyance to Pearl eliminate my mortgage? Will Van or Pearl owe the mortgage? What incentive will Van have to pay once he sells? Can he terminate his potential deficiency liability by getting Pearl to "assume" the debt?²⁸⁶ Will Pearl have any incentive to pay if she doesn't assume it? Do I gain anything by insisting that Pearl assume the mortgage?²⁸⁷*

5. Second Mortgages

This topic is useful as an introduction to priorities. *Suppose Pearl needs \$90,000 but I am willing to loan only \$60,000 to her; since her house is worth \$100,000, can she borrow the remaining \$30,000 from somebody else?²⁸⁸ Suppose Jerry loans her \$30,000 and takes a sec-*

285. You can close by mentioning that the current round of the struggle is in the bankruptcy arena, as lenders seek to insulate their foreclosure sales from automatic stays, cramdowns, and fraudulent conveyance or preference attacks.

286. Assuming and nonassuming grantees can be explained by a quick comparison to assuming and nonassuming assignees of leaseholds.

287. You can give yourself leverage to make this demand by supposing that you have a due on sale clause in your mortgage and explaining to the students how such clauses work.

288. Alternatively, if this is being tied into an acquisition, *Suppose she has only \$10,000 herself as a down payment, and my loan of \$60,000 still leaves her \$30,000 short. Can she borrow that somewhere else? Can Van loan it to her by deferring payment of that much of the price?*

Regardless of the structure, the amount of the second mortgage should be large

ond mortgage on the property, i.e., one that comes after mine. What happens if Pearl doesn't pay Jerry? After working out that a junior must foreclose in the same manner as a senior, we conduct a foreclosure sale on the junior's behalf.²⁸⁹ Each of you assume that you want this house and be prepared to bid the most you can safely offer for it. How much will you bid for property being foreclosed on to satisfy a second mortgage of \$30,000 (when the property is worth \$100,000 and is also subject to a first mortgage of \$60,000)? Some student will generally bid the entire market value of the property (\$100,000), which allows another student to point out that the title conveyed is still subject to my unexpired senior mortgage, making such a bid \$60,000 too high. A working out of the disposition of the \$40,000 that should be bid will let the class appreciate the economic logic involved and how the mortgagor's equity is thereby preserved. An explanation by the professor of how the bidding and fund disposition would go if the property declined in value to \$95,000, \$90,000, and then \$85,000 demonstrates lenders' concerns with loan-to-value ratios and why it is better to hold a first, rather than a second, mortgage.

Next is treatment of a senior foreclosure sale. Suppose that I am foreclosing on my first mortgage and the numbers are the same as they were originally (\$60,000 first, \$30,000 second, \$100,000 market value). How much will you bid at my foreclosure sale? Some student will probably bid \$70,000, thinking that the amount of the second mortgage should be subtracted, as was done at the junior sale, but you can demonstrate the fallacy of using symmetry by showing what his bid would be under that logic if the property value were only \$85,000.²⁹⁰ Although confusing at first, the numbers do persuade the class that economic consistency requires that a senior sale eliminate junior liens.²⁹¹

enough to consume most of the remaining value of the property to make the need for an equity cushion more apparent. It should also be a number that avoids duplication with any other one used in discussion (e.g., not a \$20,000 second, which students will confuse with the debtor's \$20,000 equity).

289. The different accounting treatments of senior and junior foreclosures are easier to understand if the junior sale is analyzed first.

290. If a senior sale transferred title subject to the junior mortgage, the top bid at that sale would be only \$55,000 (\$85,000 value, less \$30,000 mortgage), meaning that the first would suffer a deficiency, while the second would be paid in full (when it was later foreclosed).

291. Accounting for sales proceeds at values of \$100,000, \$95,000, \$90,000 and \$85,000 follows easily and enables students to see how the consequences match those derived from a junior sale. The fact that senior sales eliminate juniors also warrants mention that juniors are therefore given rights of redemption similar to mortgagors.

D. Income Tax

Since federal income taxation is the engine that drives many real estate transactions, it ought to be addressed in any Property course covering conveyancing, notwithstanding its fearsome reputation. Having a tax colleague in for a guest lecture is better than nothing, but tax professors too often complicate rather than simplify matters, which is the last thing unconfident first-year students need. For purposes of merely introducing some concepts and jargon to demystify the tax aspects of real estate transactions, the necessary fundamentals can be learned and taught by a normal, nontax Property professor.

Real estate taxation can be taught at the beginning,²⁹² the end,²⁹³ or the middle of conveyancing. Goldstein²⁹⁴ and Haar,²⁹⁵ the two books that fully cover tax, put it at the end of the topic.²⁹⁶ (Most of the casebooks only make passing references to the field.)²⁹⁷ The problems arising from lack of casebook material can be generally overcome by reprinting the first sentence or paragraph from the relevant Internal Revenue Code sections, which is all that the students need for the level of coverage presented here.²⁹⁸

There are two different sets of real estate activities to explore: (1) those relating to current income and deductions (and subsidiary questions of timing), and (2) those relating to gains and losses from sales (including treatment of mortgages). The current income aspects are

292. When put first, the approach would be to ask whether there are any advantages in buying real estate, rather than investing one's money in the bank and renting an apartment to live in.

293. If last, the questions would review the tax consequences of the transactions previously covered.

294. Goldstein is the only book containing any tax cases. *Estate of Franklin v. Commissioner of Internal Revenue*, 544 F.2d 1045 (9th Cir. 1976), is a grand way of showing how income tax considerations once used to dominate real estate law. But *Commissioner of Internal Revenue v. Tufts*, 461 U.S. 300 (1983), although important to tax lawyers, is too hard for most first-year Property students.

295. The text treatment of the topic in Haar, however, is now useless because it has not been revised since the 1986 Tax Reform Act changed most of the rules.

296. Casner also has 40 pages of text on taxation, but it includes property and estate and gift taxes as well; furthermore, the income tax discussion is devoted more to personal property than to real property.

297. The casebooks that mention this topic usually do so as part of concurrent ownership (where some of these considerations should also be mentioned).

298. The text of this Article will always indicate the Internal Revenue Code section that fits the discussion.

easier to cover first, even though they are not directly related to the purchase and sale transaction involved in the previous classes. The questions can be put to Pearl as the new buyer of property (or to her attorney) or to another student who is appointed to work for the Internal Revenue Service and to protect its interest in maximizing collections.

1. Current Income and Expenses

*Suppose Pearl is buying Van's building in order to become a landlady. Once she becomes the owner, what income tax consequences will she have, i.e., will she have to pay tax on the rents she receives? Is the rent income? Even though she didn't work to earn it? (Can income be derived from property as well as services?)*²⁹⁹ These questions are to introduce the scope of section 61(a) and the notion of economic benefit.

*Must Pearl pay tax on the entire \$10,000 of rents she receives this year? Suppose she had to pay a property manager \$1,000 to handle matters for her? Section 212 shows that the tax is on net, rather than gross income.*³⁰⁰

*Can Pearl deduct the rent she pays for her business office downtown? For her house in the suburbs? Section 262³⁰¹ is compared to section 212 to illustrate the distinction between deductible business expenses and nondeductible personal expenses.*³⁰²

The distinction between personal and business expenses can be followed up with borderline problems and examples of classic tax-driven behavior. *If Pearl also has a home in the suburbs, can she claim it is business property and deduct expenses relating to it if she rents it out in summer while she is away or if she uses the garage as a business office? The formulas of section 280A³⁰³ are too complicated for class discussion, but the principles of restricting and quarantining deductions can be stated separately from them.*³⁰⁴

What if Pearl makes a deal with her suburban landlord to give him a rent free apartment in the city in return for not having to pay rent on the house in the suburbs? After barter and noncash income have

299. See I.R.C. § 61(a).

300. See I.R.C. § 212.

301. See I.R.C. § 262.

302. The comparison also illustrates the asymmetrical treatment of inclusions and exclusions. Income is a broad concept, whereas deductions is a narrow one, because the government wants to maximize revenues.

303. See I.R.C. § 280A.

304. It is also possible to use the concept of losses to distinguish between personal and income property, comparing §§ 165(c)(3) with 165(c)(1) and (2). See *id.* § 165.

been discussed, *If Pearl lives in an apartment in her own building, shouldn't she be treated as paying rent to herself?* introduces imputed income and the preferential tax treatment its nonrecognition gives to homeowners.

Returning to expenses, *Can Pearl deduct mortgage interest and property taxes on her apartment building?*³⁰⁵ *On her house? Why are these personal expense deductions allowed to homeowners? Why don't tenants get equivalent deductions?* These questions allow discussion of the political and economic considerations as to who bears the burden of a tax, and how tax policy can be subordinated to housing policy and used to alter behavior by distorting economic choice.³⁰⁶

Capitalization of expenditures comes next. *If this is income property, can Pearl deduct the repairs she has to pay for?* This question is easy enough. A more difficult question is, *Can she also deduct the cost of the new roof on her apartment building? Why does section 263*³⁰⁷ *deny a deduction for capital expenditures? In fact, why can't Pearl deduct the entire acquisition cost of the building in the year she purchases it, so long as she actually spent that much?* The concept of basis as a vehicle for accounting for return of capital needs to be introduced here, probably by lecture.³⁰⁸

Cost recovery (depreciation)³⁰⁹ is introduced by considering a clearly wasting asset (e.g., a business vehicle) and asking how a taxpayer can be expected to recover her investment in the asset on resale after it has been driven to disintegration. Students readily understand that the cost of such assets should be depreciated over time, while you explain the notions of asset life,³¹⁰ salvage value, and depreciation method.

305. See I.R.C. §§ 163(h), 164.

306. Goldstein has excellent materials on these provocative questions.

307. See I.R.C. § 263.

308. E.g., *Suppose Pearl bought land for \$100,000 and sold it five years later for \$125,000. If she was not allowed to deduct the \$100,000 as an expense when she paid it, would it be fair to say that she had income of \$125,000 when she sold it? Tax lawyers would say that only \$25,000 of the \$125,000 received is income, and the other \$100,000 is return of capital (the investment for which a deduction was previously denied) or "basis." Pearl could not deduct the \$100,000 price when she purchased the lot, but that expenditure gave her a \$100,000 basis in the lot. If she later added a new pump on the lot costing another \$6,000, her basis increased to \$106,000, because she was also not allowed to deduct that capital expenditure.*

309. See I.R.C. § 167.

310. You should point out that the determination of asset life could be either a factual calculation or a political decision, based upon how much Congress wants to en-

Two consequences of depreciation need to be stressed: first, basis is reduced every time a depreciation deduction is taken (in order to avoid a double deduction), and second, the depreciation deduction is allowed every year even though no funds are actually expended in those years. These consequences will become significant later.

2. Timing and Deferral

The following adds another dimension: *Must Pearl also report as income this year the fact that her property appreciated in value by \$5,000 (since she is plainly better off economically than she was the year before)?* Students generally intuit the concept of “realization,” although often lacking the word for it.

The fact that one policy behind this principle is that taxes ought to be deferred until the taxpayer has the funds to pay them affords an introduction to tax planning. Pearl can control when the tax on her appreciation will be paid by deciding when to sell the building, which is not an option she has when her funds are deposited in a bank account instead.

Timing can then be taken up in its own right. *Since Pearl will ultimately be taxed on all of the appreciation of her house, does it really matter that it occurs at the end when she sells rather than along the way? Is she any better off for deferring?* Once students comprehend the time value of money, they can appreciate that tax deferral is itself tax avoidance.

That leads to deferral devices. *Is there a way for Pearl to continue to defer paying tax on the appreciation in her house if she no longer wants to own it? Suppose she sold it and then promptly purchased another house?* The principle behind section 1034³¹¹—that the new house remains Pearl’s personal residence even though at a different location—makes the concept of (non)recognition manageable to students. It can be followed by a quick lecture on related involuntary conversions,³¹² like-kind exchanges,³¹³ and installment sales.³¹⁴

Finally, *What if Pearl keeps the house until she dies?* brings in the stepped up basis principle of section 1014³¹⁵ and the policy question of why society permits so much wealth to escape taxation.³¹⁶ The death

courage people to purchase that kind of asset.

311. The formula itself, however, is too complicated for the Property course.

312. See I.R.C. § 1033.

313. I.R.C. § 1031.

314. I.R.C. § 453.

315. I.R.C. § 1014.

316. Section 1014 can also be compared with the carryover basis rule of § 1015 for

tax considerations of joint tenancy and community property—even if covered earlier as part of concurrent ownership—are appropriate for review again here.

3. Gains and Losses from Sales

For convenience, these next questions deal with Van rather than Pearl. *Does Van owe any tax on his sale Pearl?*³¹⁷ *How is it calculated?*³¹⁸ *How much "gain" does Van have (under section 61(a)(3))?* Section 1001(a)³¹⁹ distinguishes taxable gain from economic profit (e.g., whether Van got more or less than the house was worth); the class will have to think along different lines and use different terms to answer tax, rather than financial, questions.

The components of section 1001(a) have been covered indirectly and now need merely be brought into the calculation. Section 1011³²⁰ provides that adjusted basis is cost basis per section 1012,³²¹ as adjusted per section 1016.³²² Having Van tell us what he paid when he purchased the property gives us his cost basis and also his adjusted basis if (for the time being) there are no adjustments to it. The amount realized (for the time being) can be taken as the price he will receive from Pearl. Thus, if Van bought the house ten years ago for \$60,000 and now sells it for \$100,000,³²³ he has a taxable gain of \$40,000.

Capital gains issues are raised by asking *What if Van's house just appreciated without any effort on his part; if he didn't earn this income, should it be taxed?*³²⁴ *(or should it be taxed more heavily precisely because it was unearned)? Suppose that the only reason Van was able to sell for \$100,000 was because of inflation and the pur-*

inter vivos gifts. The senior citizen exclusion of §. 121 can also be described here.

317. Asking, *Even if the property was his personal residence?*, reminds the students that the distinction between business and personal expenses is not applicable when it is income, rather than a deduction, that is involved.

318. Inexperienced students often confuse income taxes with sales and property taxes and may base the tax on the value of the property sold or the selling price, rather than on the gain on sale.

319. See I.R.C. § 1001(a).

320. I.R.C. § 1011.

321. I.R.C. § 1012.

322. I.R.C. § 1016.

323. The numbers should be the same as used in calculating damages for breach of real estate contract.

324. There is an instinctive tendency, even on the part of progressive students, to limit the income tax to earned income.

chasing power of that \$100,000 is the same as or less than the \$60,000 he originally paid—is that really income?

4. Mortgages and Tax Shelters

The final theme to be covered is how mortgages affect basis, depreciation, and amount realized. The starting point is Van's original purchase of the house for \$60,000. *But Van didn't pay \$60,000 in cash; he put up \$12,000 cash and borrowed \$48,000 from the bank? Is his cost basis \$60,000 or only \$12,000? (Should the mortgage be included in Van's basis?)*³²⁵

Next is adjustments to basis. *Since Van's mortgage was included in his original basis, should it also be included in calculating basis adjustments, i.e., depreciation? Should Van be permitted to depreciate according to his \$60,000 cost or only his \$12,000 equity in the building?* Students may, for consistency more than anything else, allow Van to include the mortgage debt in his annual depreciation deduction, until you point out that by doing so they have just given Van a "tax shelter," i.e., an annual depreciation deduction for money he never spent.³²⁶ This can generate a tax loss on a building, which may in fact be producing real income which he can deduct against his outside income. A short lecture is then needed to show that the passive activity rules³²⁷ now confine such losses to offsetting passive gains, thereby ending most of these stratagems.

The final question is *How much is Van's amount realized if Pearl assumes his existing mortgage as part of her purchase price?* Consistency with earlier statements, treating Pearl's assumption as if she borrowed the funds elsewhere and gave them to Van (to pay off his mort-

325. *Since Commissioner of Internal Revenue v. Tufts*, 461 U.S. 300 (1983), is in Goldstein's book, this is an easy question to ask those readers. Other students have to be led to it. Students can grasp the logic of including the mortgage in basis if you separate the borrowing from the buying, e.g., if Van had borrowed the \$48,000 the day before buying the house and then used the borrowed funds to pay the price.

Two subsidiary points can be added, or omitted, depending on how lost the class has gotten. *When Van borrows money, is that a taxable event? Does he have income?* When a student figures out that Van's promise to pay the loan back offsets the receipt of the cash, you can ask, *What if the mortgage was nonrecourse, so that he did not have any legal duty to pay it back?* But the question of inclusion of nonrecourse mortgages in basis calculations tends to push the topic out of the range of most first-year students' comprehension.

326. This can easily be made more dramatic by calculating Van's annual depreciation deduction as if he bought the building for \$1,000 cash and a \$999,000 mortgage. *Estate of Franklin v. Commissioner*, 544 F.2d 1045 (9th Cir. 1976), in Goldstein, starkly demonstrates the strategy of buying a tax shelter rather than a building.

327. I.R.C. § 469.

gage), and the principle that relief from debt is income³²⁸ all make it easy to say that the amount realized on Van's sale to Pearl includes not only the cash he receives but also the unpaid balance of the mortgage debt. Some of the tax breaks Van earlier received will now be offset by the larger gain produced through the inclusion of the mortgage Pearl has assumed in the amount Van realizes.³²⁹

If kept simple enough, students can manage these concepts and gain a better appreciation of the dynamics of real estate.³³⁰

E. Deeds

A transactional organization of conveyancing covers deeds after contracts and before recording.³³¹ In class we assume that the vendor wants to perform his end of the contract and needs help in drafting, executing, and delivering an acceptable instrument to the purchaser.³³² Most of the issues relating to these steps are either simple or trivial, allowing much to be covered by lecture.

1. Drafting and Descriptions

A statutory or casebook form of deed is always available, making it easy to begin with a quick review of what features must be included³³³ and those that need not be.³³⁴ Since most of the casebooks treat

328. See I.R.C. § 61(a)(12). But students should be reminded that an assumption does not really relieve a mortgagor of personal liability, as a matter of mortgage, rather than tax law.

329. You can close by asking whether the entire mortgage debt should be included in amount realized if the mortgage was nonrecourse and the property was worth less than the mortgage, i.e., the *Tufts* question. Yet, most students will not have the faintest idea as to what you are asking. Along with nonrecourse mortgages, the reasons for using partnerships as vehicles for these schemes might also be mentioned.

330. In fact, a few might even enjoy the topic enough to take Federal Income Tax the following year.

331. Browder, Donahue, and Rabin all put the topic before contracts. At the other extreme, Bruce and Haar both locate it after recording.

332. This approach almost automatically excludes the question of whether other documents (or oral statements) can serve as deeds. Although considerable space is devoted to that question in both Cribbet and Rabin, it goes entirely unmentioned in most of the other books. I also exclude here the nature of the estate to be conveyed (covered in both the Cribbet and Goldstein deed chapters), since that was dealt with as part of estates in land.

333. Cribbet is the only book with a case on the effect of the grantee's name being left blank.

334. Examples of features that need not be included are consideration, witnesses,

boundary descriptions as a worthwhile component,³³⁵ having a student trace out a description found somewhere in the book affords an easy glimpse into the vocabulary of surveying. The goal should be to make the students able to understand what a description in a deed means even if they cannot actually locate it on the ground.

Since the seller's lawyer cannot really answer the question of how to fill in that part of the deed dealing with the description, the question can be reversed to ask whether the description contained in the deed Van received when he bought the property describes what he is now conveying. *Larry, if Van is conveying exactly the same parcel as he previously purchased, why not use the description contained in the deed he received. Then all you have to do is determine whether that refers to this parcel. Suppose the parcel involved is the one described in the casebook on page 99; where is that land located?*³³⁶ At the blackboard a description involving the federal survey and metes and bounds can then be mapped out.

Many of the books include a case involving conflicting deed calls,³³⁷ and those principles can be dealt with in conjunction with the description already employed. For example, if there is a reference to a stake fifty feet north of a street corner: *What if the stake turns out to be 51 feet from the corner—do we go to the stake or do we stop at 50 feet? What if the deed says the stake is north of the corner, but it is really northwest; do we follow the angle and go northwest or do we follow the monument call and go to the stake? If the deed refers to the parcel as five acres, but our lines enclose six acres, do we ignore the surface or shrink the lines? If the deed refers to a map, and the map markings conflict with the actual calls in the deed, which do we follow?*³³⁸

notarial seal, clauses reading "to have and to hold" or "and her heirs," and references to easements appurtenant or fixtures passing with the title. Asking students about inclusion of these items can serve as miniature refresher lectures on them. Title covenants are postponed until later.

335. Cribbet has four cases on boundaries, Rabin devotes a whole chapter to it. On the other hand, neither Donahue, Haar, or Singer cover this topic at all, and Dukeminier makes it a part of the recording chapter.

336. Even if there is not a sample description contained in the casebook text, some case or cases in the book should provide a location for you to appropriate.

337. Casner, Cribbet, Goldstein, Johnson, and Kurtz all do.

338. At this point, students should be able to appreciate (1) why lawyers are not surveyors, and (2) how uncertain property owners must feel when they purchase without a survey. One way to relieve some of the uncertainty is to make an agreement with the neighbor about the location of the line, by way of an agreed boundary, covered earlier in the course. Adverse possession is also a comforting component, since even if Van has not stayed within the legal boundaries, his possession outside of them long enough may have converted the actual lines into legal lines.

Boundaries and monuments having width³³⁹ can be covered in the same way. *If the deed sets the northern boundary as Main Street (or Fish Creek), do we go to the north edge, south edge, or middle of it? Do we go to the middle even when the grantor owns the land beneath the entire street and none of the land to the north of it?* For water boundaries, *What if the creek has changed its course in the past few years? What if that happened suddenly rather than gradually? If the stream or lake is tidal, does Van's boundary stop at the high water mark or low water mark? What if the body of water is navigable, even though not tidal?*³⁴⁰

2. Title Covenants

This topic can fit in several places. It can be covered as part of vendor-purchaser,³⁴¹ where it would be part of the bargaining over what kind of deed the purchaser wants from the seller. It can go with title insurance,³⁴² where its usefulness as an alternative form of protection would be considered. It also can be tied to deeds (as it is here), since those are the documents where the covenants are contained.³⁴³

The opening questions relate title covenants to the contract right to marketable title. *Laura, is it worth paying Van extra to get a warranty deed from him?*³⁴⁴ *Since Pearl made a search before closing, what need has she for further protection afterwards?*³⁴⁵ *If Pearl takes a deed without warranties and later discovers that the property is subject to a mortgage, which somehow was overlooked during the earlier title examination, can she sue Van because of it? Can she sue him for breach of the implied covenant of marketable title?*

339. Cases on this issue are in Casner, Cribbet, and Kurtz.

340. This is an appropriate place to cover the public trust doctrine: *If Van's legal boundary is at the low water mark, but the shore is subject to a public trust up to the high water mark, what uses can Pearl make of the shorezone after she acquires the property?*

341. Johnson almost puts it here, locating it directly following marketable title.

342. Browder, Cribbet, and Kurtz all do this. Goldstein has it as in independent section between deeds and title assurance ("Liabilities That Survive The Deed").

343. Which is where Bruce, Casner, Dukeminier, and Haar all treat it. Another alternative is to omit most of it, as Berger, Chused, Donahue, and Singer all do. Rabin, on the other hand, devotes an entire chapter to title covenants.

344. If the casebook form is a warranty deed, *Is it worth offering less for one without the warranties?*

345. Having Pearl, rather than her lawyer, do the search postpones malpractice issues for the time being.

Next is a comparison of the various covenants. *If Pearl had a warranty deed, which of the covenants would help in such a case? The covenant of seisin? The covenant of good right to convey? What good do they do? What about the covenant against encumbrances? Is the mortgage an encumbrance? What if there was an easement instead of a mortgage? Would the covenants of warranty or quiet enjoyment be breached if the mortgage was not in foreclosure? When would the covenant of further assurances come into play?*

Statutorily implied covenants follow. *What if Van offers a statutory deed rather than a warranty deed; would that help with respect to the mortgage? Does it matter that the mortgage was put on the property by Van's predecessor in title (Ursula) (If the implied covenants are special rather than general)? Is it worth checking the language of the deed from Ursula to Van?*

For running issues, *If Ursula's deed to Van was a warranty deed (and Van's deed to Pearl was not), can Pearl sue Ursula because of the mortgage she put on the property? Can she sue her for breach of her covenant against encumbrances to Van? For breach of her covenant of warranty to Van? Why does the second one run and not the first?*³⁴⁶

Finally, there are issues of damages. *How much can Pearl recover from Van on account of this mortgage if she has a warranty deed? What if Van moved out of town after selling his house to Pearl? Even if he is still here, what if he doesn't have any money? Can Pearl sue you, Laura, for not discovering the mortgage beforehand? Must she prove your search was negligent, or were you absolutely insuring the accuracy of that search?*

3. Delivery

A few of the casebooks give short shrift to the issue of delivery,³⁴⁷ but most of them treat it as a major topic. Its pedagogical drawback is that its academic complexity requires more time than its practical significance warrants. Probably ninety-nine percent of title transfers are either commercial or testamentary, not involving delivery issues. Of the remaining one percent of inter vivos gratuitous conveyances, probably ninety-nine percent of those deeds are simply handed over without

346. Related to this, *What if Ursula conveyed to Van 30 years ago, and the bank has not yet sought to foreclose the mortgage. Even if Van's cause of action for breach of the covenant against encumbrances has been actually or impliedly assigned to Pearl, what about the statute of limitations? Conversely, Is it yet time to claim a breach of the covenant of warranty if there has so far been no eviction?*

347. Haar omits it entirely and Singer has one page of text. Cribbet includes one case only tangentially related to this topic.

problem. Yet, the legal issues involve obscure distinctions and meta-physical rules whose effect is to force attorneys to prove, and judges to decide, relatively unknowable circumstances. Since my goal is to get all this done within as little time as possible, I present a series of small vignettes, making myself the grantor as well as interlocutor, but saving much time by answering as well as asking most of the questions.

I own property that I want to give to Gina, a student seated on an aisle five or more rows away. I fill out and sign a deed to her and then put down my pen. *Am I done? Have I transferred title to Gina? Would your Contracts professor say a contract has to be delivered in order to make it effective? What is this extra requirement of delivery?*

To cover what delivery requires, *My back is too sore for me to take the deed over to Gina; what if I just set the deed down on the table and say "Now, Gina the property is yours?" Can a delivery occur without a handing over? Has a completed legal act occurred even though neither Gina nor I moved?*

Then,³⁴⁸ *Gina, this deed will make you the owner of the property as soon as you come up and get it, but I tear the document up just before she arrives at the desk. Has title passed? When, if ever, did I have the requisite present intent?* I then repeat the same statement to Gina, but do not destroy the deed before she takes it from my desk. *Is this different from before? When did my future intent become present?*

The same statement is again repeated, but this time I collapse in mock death just as Gina reaches for the deed. *Is this different? Did I ever have the requisite intent? What if I hand the deed to Gina, saying that it will be effective on my death? How can a conditional death transfer get around the intrinsic problem that, before a grantor dies, his intent is futuristic rather than present, and that after he dies he has no intent whatsoever? What if I put the deed in my safe deposit box with a note saying that Gina is to take the property on my death?*

Next I hand the deed to Gina, saying *Take this deed, but don't record it until after I die so that my wife won't find out (knowing that recordation is not essential for title to pass). Was my intent present or future? If there was a delivery, what about my injunction not to record until later?*³⁴⁹

348. I have a dozen blank deed forms at my desk, crumbling up the old one and signing a new one for each successive scene.

349. As students conclude that the deed is either undelivered or absolutely delivered in these cases, you can remark that neither outcome was what the grantor wanted

Finally, as a critique of these rules, *Larry, why do you make it so hard for me to give property away on my death? Is some policy being protected? Couldn't I write a will to that effect? Couldn't I draft a deed that conveyed a future interest and deliver that deed absolutely to Gina now? Couldn't I make the future estate conditional—i.e., on my dying before Gina? Why is it so important to put the condition inside the deed rather than outside it (as a statement accompanying its delivery)?*

Escrow transactions are then introduced for comparison. *Why was a conditional delivery upheld in A v. B in the casebook? or Can I give the deed to you, Larry, to give to Gina on my death? Do I have to fill out the deed differently? What do you want me to say (or write) to you as I hand the deed to you for future delivery to Gina? I repeat Larry's words, but adding, So long as I don't tell you otherwise later; why can't I add that phrase? Won't you be able to carry out my instructions anyway if I haven't canceled them?*

To explore the effect of reserving the right to recall, *Larry, give this deed to Gina in one minute unless I revoke, and I do not revoke before he hands it to her. Did title pass? When? How? Suppose I died before the minute passed? What happens to your authority as agent on my death? If I had expressly waived any right of recall when I handed the deed to you, were you still merely my agent? Once I waived the right to revoke, what can we say about my intent? Had a completed legal act on my part then occurred?*³⁵⁰

The irrelevance of delivery issues in commercial transactions may be the most important lesson to convey. *Ezra, as a commercial escrow agent, when Van hands the deed to you pursuant to his sales contract with Pearl, what should he say? In addition to stating that the deed should be delivered to Pearl only when she has paid the price, should Van also waive the right of recall? Laura, should Pearl go with Van to make sure he says the right thing? If Van reserved the right of recall and then revokes before escrow closes, is Pearl out of luck? Will the judge decline to order specific performance in favor of Pearl because Van refused to have the right intent to pass title? Once there is an enforceable contract, does delivery really matter?*³⁵¹

and—being dead—there is nothing he can do now to rectify the situation.

350. Follow up observations can cover (1) the significance of the second delivery and the effect of an improper second delivery when the first delivery was conditional; and (2) the relation back of the second delivery to the first and the effect of a repudiation by the grantor when the first delivery was unconditional.

351. Cases in some of books which say that if the escrow is commercial the contract must be enforceable for delivery to occur are very confusing. They sound like they mean that there must be a contract whenever the deal involves a contract (i.e., is commercial). Obviously, no contract was required in any of the donative situations

Final questions on escrows are: *What if Ezra absconds with the money? Whose money was it? What if he runs off with the deed instead, putting in his own name as grantee? What if he records that deed and then sells to an innocent third person? What if he fraudulently induces Van to insert his (Ezra's) name and deliver the deed to him?*³⁵²

Lastly, *If Pearl and Van do close escrow and then change their minds, how does she get title back to him? Can she just give back to him the deed he gave to her?*

F. Recording

1. The Utility of Recording Acts

Every casebook covers recording acts.³⁵³ Chapters always consist of a combination of text and cases, with cases dominating about half of the books and text prevailing in the others. Cases are misleading materials for introducing this topic to students, because these opinions are always written from the perspective of hindsight and omniscience, giving readers the complete history of everything that occurred.³⁵⁴ But since the purpose of the recording acts is to create a workable system for prospective purchasers worried whether title is marketable, students should really read opinions that describe the situation from her point of view—from the “front end” perspective of a title searcher who knows only what can be seen in the records, rather than from the “back end” perspective of the judge who has heard testimony about everything that happened.³⁵⁵

previously presented or the donative cases in the books.

352. Chused has *Saxer v. Phillip Morris*, on the nature of the escrow business itself, which he includes in order to cover the issue of settlement costs. It is probably premature here, if title insurance has not yet been covered.

353. Except Chused.

354. For example, “O conveyed to A who did not record, and then O conveyed to B who did record.”

355. For this reason, I will not devote much time in this section to mentioning the more or less standard recording cases in the books, except for a few interesting enough to call to the attention of those of you who have not happened upon them.

Suppose:

O to A on January 1—not recorded;

O to B on January 11—not recorded;

B recorded on January 21;

A recorded on January 31.³⁵⁶

*As between A and B, who would win at common law?*³⁵⁷ It is easy for a student to say that A wins on the ground that O had nothing left to give to B after January 1. Yet, that is not looking at it from a searcher's perspective. *Laura, if you are searching*³⁵⁸ *Van's title on behalf of Pearl in order to determine if it is marketable so that she can buy, what do you do under this rule if your search shows that Van is the owner and does not appear to have ever mortgaged his property?*³⁵⁹ *Can Pearl buy? Can you conclude that her title is not subject to a mortgage just because none was ever recorded? If you can't give Pearl that assurance, what was the sense in your searching? What would you have to do to be sure that there is no prior unrecorded mortgage against the property?* The unanswerability of that final question reveals the functional uselessness of the common law rule of first in time, first in right. The class all knew of A's mortgage, because it had been put on the blackboard, but a real world Laura would not know that. The rule that says A prevails over B because A came first is not fair to people who could not find A in the records. More importantly, even if there is

356. As constants, O originally was the owner in fee simple absolute, both A and B are innocent people who paid full value for their interests, and O is not to be found.

357. A common student response in difficult situations is to avoid the priority issue by declaring that A (or B) should sue O for fraud, as if a fraud judgment is as good as a title. Announcing that O has fled to Brazil forces attention back where it belongs. *Patterson v. Bryant*, 216 S.E.2d 847 (N.C. 1939), in *Cribbet*, and *Martin v. Carter*, 400 A.2d 326 (D.C. 1979), in *Singer*, deal with the related issue of whether A's failure to record is a defense to his fraud action against O for having later conveyed to B.

358. If students ask at this stage just what searching is, you may have to invent a primitive recording system, but no details are yet essential, except that documents are put into it and that other people can look through it for those documents.

359. Too many situations are given to the students as rival conveyances by deeds from one grantor to two grantees, which means that theft is probably involved, and the situation seems unrealistic. (Why is no one looking at the land?) Utilization of lesser interests—e.g., easements and mortgages—makes the situation far more ordinary and believable. When the O to A transaction involves an unrecorded mortgage or easement, the question of whether a deed from O to B conveys a title subject to or free from the mortgage is a perfectly respectable priorities issue.

If mortgages as a topic has already been covered, an even better variation is for A and B both to take mortgages from O to determine who has the first mortgage. In this typical situation, nobody may have done anything wrong at all.

no A, Laura still cannot advise Pearl to purchase, because she does not know that. Some alternative system is needed.

2. Recording Acts and the Title Searcher

Once the class appreciates that the role of recording acts is to enable title searchers to do their job for purchasers, it is easier to generalize about these statutes. For instance, suppose a notice statute applies to the hypothetical scenario. One consequence is to reverse the former outcome in the case of A vs. B; a more important consequence is its impact on future searchers. *Laura, under a notice act, what can you tell Pearl about mortgages (and anything else you did not find in the records)? When you find nothing, can Pearl safely pay Van the price?*³⁶⁰

The role of the closing agent is also redefined. *Laura, is that all you have to do? If you search and then Pearl pays, is her title safe? What about C?*³⁶¹ *How soon after Pearl buys does she have to record? By searching before she buys (up to the last minute), Pearl beats Olga, a prior mortgagee; by recording after she buys (in the next minute), Pearl beats Queenie, a subsequent mortgagee, grantee, or whatever. Notice acts enable attorneys to fully protect their clients.*

From this perspective, the distinctions between the various types of recording acts are not significant. *What if this were a race jurisdiction? Would you do anything differently (i.e., search up the last minute and then record as soon as possible)?*³⁶² *What if this were a race-*

360. And if Laura does find the mortgage (because it was recorded), Pearl can then withdraw or else pay a lower price and not lose her investment. Searching is now worth the effort.

361. The state of ignorance of a title searcher is such that she does not know whether there is an "A" (someone who came before) or "C" (someone who will come after her client). She does not know whether her client is A, B, or C, but she has a duty to protect whomever her client is.

362. It is true that the reasons for searching and recording differ under different type recording acts, but the dual strategy is the same under all of them. Pearl may record in a race or race-notice jurisdiction in order to prevail against Queenie rather than Olga. As already noted, however, Pearl does not know her position in the situation anyway, so that the distinction is irrelevant.

notice jurisdiction? Different acts may change the outcome of the blackboard hypotheticals,³⁶³ but searchers and attorneys everywhere follow the same search and record strategy for their clients.³⁶⁴

3. Mechanics of Recording and Searching

Although one searches before recording in the real world, recording should be explained first in class, since searching is looking for documents that were previously recorded. *Laura, how are you going to have Pearl's deed recorded? After you hand it to the clerk in the recorder's office, what do you expect him to do with it? When the clerk returns it you with a recorder's stamp on it, does that mean that the government has now certified that Pearl owns the property? Is a recorded deed like a pink slip from the department of motor vehicles?*

The recording operation generates questions commonly found in the casebooks and makes the distinction between the records and the indexes. *What if the clerk accepts the deed and copies it into the records, but forgets to make any index entries for it: Is Pearl in danger?* The question has to be resolved from the earlier perspective of the title searcher: *Larry, if Laura can say that it is not Pearl's fault that the clerk fouled up and that Pearl's deed is nevertheless recorded, how will you have to search titles for your clients in the future? How will you go about looking for deeds that are in the records but not the indexes? What if the clerk makes index entries but gets the names wrong? Could a future buyer from Van find the deed to Pearl if it were indexed under Dan instead of Van? Under Earl instead of Pearl?* The same point can be made about the "wild" deed.

Attention can then turn to the searching process. *Laura, where are you going to start? Since Van is the purported seller (and the only*

363. This is true either as to the identity of the victor or the date of victory as the facts are shifted.

364. This is obviously a pragmatic rather than a policy perspective. In comparing the types of acts, however, considerations of fairness and efficiency can be discussed. E.g., *The Uniform Commercial Code gets by with a pure race system and the commercial world seems to have lived with that arrangement, so is it really worth complicating the real estate system by adding notice as a second consideration? If notice is crucial to protecting reliance, why should B—who bought without notice of A's unrecorded interest—lose merely because he did not also record before it in a race-notice jurisdiction? Does the race component of race-notice make for simpler trials and less dangers of perjury?*

You can also explain to the students the legal apparatus at work here, i.e., the idea that the recording act makes A's unrecorded title defeasible and gives O, as apparent owner, the power to divest A by conveying to the right sort of person. Later examples will involve O's power to divest being transmitted to his heirs or creditors.

name you know), what index should you start with and for what year? As Laura decides which book to go to, you supply the information she will find in it in order for her to move on to the next step: *There is an index entry in 1962 showing Van as grantee from Ursula; now where do you want to go?* A search of the grantee indexes should continue for three or four steps to get to a deed from the government to a predecessor many years ago. *Now that you have a chain of title going all the way back, how can you be sure that none of the owners ever encumbered the title while they were there?* forces a search through the grantor indexes from the past to the present.³⁶⁵

Curative acts and title standards can be introduced through old defective documents: *The acknowledgment on this mortgage payment form from 1927 appears defective; does that mean that you should tell Pearl not to accept the title?* For marketable title act issues: *Is it really necessary to go back more than forty years? How much effort are you saving if you have to look beyond then for old easements even though you are permitted to ignore old mortgages? Where will you stop if you have to worry about rival chains stemming from different roots of title more than forty years old?*³⁶⁶

Scope of search questions fit into the chronology already used. If the grantee index showed that Ursula took title from Ted in 1955, who took from Sam in 1948, *Is it necessary for you to check Ted out in the grantor indexes before 1948 when he got his title? But what if I tell you that Ted borrowed money from Mel in 1947 and gave him a mortgage at that time on the property (because he knew he was later going to acquire it), and that Mel recorded that mortgage in 1947? Since that sort of thing can happen, should you search for it? If so, can you stop at 1947? How far back in time do you have to go for each person in the chain if you decide to look for those things? How much work is that for you, versus how much effort would it be for Mel if the rule says you don't have to look?*

The same questions can be put with regard to searching in grantor indexes after owners were divested of their titles to see if there were documents executed during their ownership that were not recorded but

365. This search detours into the grantee indexes when the data you supplied includes, e.g., a mortgage, to see if it was paid and canceled or if it still exists.

366. You might mention here other sources of title information, such as tax and judgment liens, bankruptcy filings and tract indexes. The Supplement to Casner has *In re Walker*, 861 F.2d 597 (9th Cir. 1988), dealing with the race between a bankruptcy filing (and its attendant automatic stay) and a pending foreclosure sale.

were known to successors and then recorded later. The *lis pendens* can be introduced, in looking at the comparative efforts of the parties. Suppose Ted gave Chris a mortgage in 1954 that was not recorded until 1957 although Ursula knew about it; if the rule does not require you to search for documents recorded after ownership ends, what could Chris do when he went to record it in 1957? If he sued Ursula at that time (for a declaration that he had a mortgage on her property), how should notice of that action be recorded, i.e., who should be shown as grantee and grantor? If you find such a notice in the chain, does that mean Pearl can't buy?³⁶⁷

Finally, for deeds out, if you see an index entry showing a deed from Ted to Tyrone in 1950, but the entry shows that it refers to lot 2 and Pearl is purchasing lot 1, is there any reason to look up that deed in the official records? What if it turns out that the deed also conveyed an easement over lot 1 as well as the fee to lot 2? If searchers should check all deeds executed by each grantor in the chain, what should they do if they are buying a house in Levittown or Columbia, Maryland, where the grantor is the same for all parcels?

4. Notice³⁶⁸

Recording acts require both that a document be unrecorded and also that the subsequent purchaser be without notice of it in order for her to prevail over it. Notice is therefore not important when the instrument has been recorded, but it gains independent significance for instruments that are not in the records as they should be. Since a buyer is defeated by a claim she either knows about or is charged with constructive notice of,³⁶⁹ even if it was not properly recorded, that means that her attorney should search for any such claim, since it is better to actually know about a claim (and make a judgment as to it) than to not know of it, yet be charged with notice of it, and held inferior to it.

This scenario lets you illustrate that point in several ways:

O to A—a mortgage, unrecorded;

O to B—a deed reciting "subject to A's mortgage," recorded;

B to Pearl—who knows nothing and makes no record search.

These conclusions follow:

- Even though Pearl has no actual knowledge of the deed from O to B,

367. Bruce has *Kordecki v. Rizzo*, 317 N.W.2d 479 (Wis. 1982)), the only case I found in any of the casebooks dealing with a *lis pendens*.

368. These remaining topics are covered more briefly and partly by lecture.

369. Cribbet has *Mountain States Tel. & Tel. Co. v. Kelton*, 285 P.2d 168 (Ariz. 1955)), for the interesting proposition that contractors do not have constructive notice of recorded claims of underground easements on property being excavated by them.

she is charged with constructive notice of it since it was recorded. The system pressures purchasers to search the records by treating them as if they had searched and had seen everything that was properly recorded, whether or not they ever did so.

- Pearl is also charged with constructive notice of the contents of that deed to B—because it is useless to require searches if searchers do not have to read what is in the recorded documents. Thus Pearl is treated as if she knew that the deed referred to A's mortgage, whether or not she ever actually read it (or even looked for it).

- If Pearl had read the deed and had seen that statement in it (whether or not she actually did so), she should have gotten suspicious about it. "Who is A?" is a question she should have asked both herself and others, and a court could charge her with inquiry notice of what she might have learned had she asked.³⁷⁰

- Pearl should also look inside the property she is buying, because she will be charged with constructive notice of that too. Was anybody there? If so, was that person "suspicious," i.e., not a family member or someone whose name appeared on the records? If so she should also inquire of them.³⁷¹

5. Value

Suppose:

O to A—not recorded;

O to B—without notice of A, and recorded;

but both deeds are gift deeds.

*Why does A win? Why must B give value? Why didn't A have to give value?*³⁷² After exploring the reasons for the requirement of value

370. And if Pearl did not ask, she had better hope that Laura can persuade a judge or jury that the unread reference was not suspicious (e.g., a deed that said, "subject to all mortgages and other encumbrances, if any"), or that the unmade inquiry would not have produced this information (e.g., a reference to a Mr. Smith living in Manhattan and unknown to anyone involved in the transaction).

You can also mention that, conversely, one may be entitled to ignore some documents in the record that are actually seen, which do not belong there, such as unacknowledged instruments or self-serving claims, or which the system has said can be ignored, such as defects subject to a curative or marketable title act or an expunged *lis pendens*.

371. Tenants are "per se suspicious"; thus, they should always be interviewed.

372. To remind the students of a point earlier made, you can also ask *What if B*

questions can go to whether value was given. *Is it sufficient if Pearl's deed recites consideration? Does it hurt if her deed was a quitclaim? Did Pearl give value if she paid only eighty percent of the market price? What if Pearl gave Van a note and mortgage (for the entire price)? What if the note was negotiable and Van endorsed it to a holder in due course? What if the note was half paid (and the property consisted of two separable lots) at the time Pearl learned of the other claim? What if the property was indivisible and she had paid only ten percent at the time of discovery? What if she had paid ninety percent?*

What if B were a creditor rather than a buyer? What if B took a mortgage from O to secure a loan to him? What if B were an unsecured creditor (a merchant or an injured pedestrian); did B rely on the records in getting her claim? What if B obtained a judgment against O (on her unsecured claim) and recorded the judgment? What if B then executed on the judgment and had the sheriff sell the property to a third party?³⁷³ What if B were high bidder at the execution sale?

6. Limits of the Recording System

Students should appreciate that not all of the laws of property have been replaced by the rules of recording. First, some interests are not subject to the recording rules. Adverse possessors and prescriptive users do not have to record, since their claims are based on actions rather than documents.³⁷⁴ Short term tenants are frequently excused from having to record even when they are not in possession.³⁷⁵

Second, the grantee from a real owner is not required to be a bona fide purchaser. Suppose:

O to A—not recorded;

O to B—for value, without notice, and recorded;

B to C—who knows, pays no value, and does not record.

then conveys to C, who does pay value? How can C prevail over A if B had nothing (except apparent title and the power to divest)? A harder variation is to make C know of A, so that the issue becomes whether B's bona fides can be added to C's value.

373. *How could the sheriff sell property that O did not own (and therefore was not subject to B's judgment lien)?*

374. Cribbet and Johnson both have *Mugaas v. Smith*, 206 P.2d 332 (Wash. 1949) on this issue. You can add that this is another good reason for the title searcher to take an actual look at the property. While looking for suspicious claims, she is also likely to see signs of occupancy if an adverse possessor is there.

375. Students can easily convert this into thinking that short-term tenants therefore need not search the records before making down payments to their ostensible landlords.

Why does C win even though she is utterly out of compliance with the recording rules? Students are often so taken by the recording system as to want to apply it to everyone, even those sheltered by virtue of taking title from a true owner.

Third, recording compliance does not automatically assure a good title. The scenario:

O to A—not delivered (or not signed), but recorded

A to BFP—who records and pays value

illustrates that recording does not replace delivery.³⁷⁶ Asking how a title searcher can guarantee that all deeds in the records were really executed and delivered is a good bridge to title insurance.

G. Title Insurance

Title insurance is a wonderful way to illustrate recording principles because the provisions of a title policy are really nothing more than applied recording law rules. It almost perfectly demonstrates how statutory and judicial rules have been converted into techniques of drafting and behaving.

The chief reading material should be a title policy.³⁷⁷ Cases illustrating particular issues are interesting, but even their best use is to consider how subsequent policy revisions responded to their holdings. Since the class will walk through the policy, it would be mechanically easiest to follow the structure of the policy itself; however, for pedagogic reasons one must jump around in it in order to introduce concepts in an intelligible order.³⁷⁸

376. Since the Uniform Simplification of Land Transfers Act cures even nondelivery and forgery (after 3 and 30 years respectively), this point has to be qualified if that Act is covered. The distinction between an undelivered deed and one whose delivery was fraudulently induced can also be mentioned here.

377. All of the casebooks, except Casner, Chused, and Singer, do contain such a form. The omission in both Chused and Singer is not surprising, since the topic itself barely appears; Casner has 20 pages of text and cases instead of a form. Neither Donahue nor Haar include much on the topic, except a form.

378. A compromise can be made by systematically going through the entire policy while reserving some points for later discussion.

1. Coverage

Tyrone, a student, is appointed salesperson for a title company. *Tyrone, if Pearl purchases a policy from your company, what protection is she getting? What do you mean when you say you will insure that title is vested as shown in Schedule A? How were you able to decide to show Pearl as the vestee in your policy?* The student must figure out that in order to do so his company had to make the kind of search of the grantee indexes that was discussed during recording.³⁷⁹

Your coverage also assures that the estate described is as shown in Schedule A, i.e., a fee simple. How do you know that there aren't any encumbrances on it? The company had to have searched the grantor indexes (as we did) and found nothing there in order to say this. *But suppose you do find a mortgage while searching the records. Do you then refuse to issue a policy?* Getting someone to point out that such an item will be shown as a special exception lets you observe that a title company cannot wish away what it finds in the records and if a record search shows a defect, it cannot be omitted. What Tyrone's company insures is that there are no other defects apart from those listed, i.e., that it made a good search. (And if a good search showed nothing else, then Pearl has nothing to worry about, since any other claims should fail under the recording rules discussed in class earlier.)³⁸⁰

Your policy says that this coverage is subject to exclusions and exceptions. Why do you exclude defects "attaching or created subsequent" to the policy date? This answer will illustrate the difference between title and most other forms of insurance which protect against risks that occur after the purchase of the policy. Since the company only insures the accuracy of its search, coverage must stop as of the day the search ended. No insurer could cover the risk that Pearl would go out the next day and put a mortgage on the house.³⁸¹

379. Technically, if the search was made before close of escrow, it would show Van as owner/vestee, and the title company would have to ensure that his deed to Pearl was properly executed, delivered, and recorded before insuring her. That issue is better postponed until later.

380. If you want to go further on the question of basic coverage, you can analyze a lender's policy. *What must you do or know to insure that the bank has a valid mortgage on the property? To insure that it is a first mortgage? What will you do if your search shows that there is a pre-existing mortgage on the property. Can you still insure this mortgage?*

The other items of lender's coverage are better treated elsewhere. Mechanic's liens will come up in their own right shortly. Insurability of mortgage assignments can go wherever and whenever secondary market activities are mentioned.

381. Many of the books include cases which hold that title insurance does not cover certain particular problems (e.g., post-issuance defects). Asking *Why does your policy have this seemingly redundant exclusion in light of case law to the same*

*Why do you also exclude defects "created, suffered, assumed" or "agreed to" by the insured? Why do you exclude defects "known to the insured" and why do you exclude cases in which Pearl did not pay value?*³⁸² How the recording acts operate is the perfect answer to these questions, since instruments are valid against parties who created or knew of them or did not pay value, even though they were unrecorded and therefore not discoverable by a search. The scope of title insurance protection is functionally identical to the scope of recording act protection given to a bona fide purchaser.

The exclusion of possessors' rights illustrates a different aspect of title insurance and recording law. *Why do you except the rights of parties in possession?* The technical answer may be that the recording acts do not protect against such claims, but the title insurance point to get from the student is that his company does not have to exclude these items, since it could go out and look at the property. It is merely more efficient most of the time for the title searcher to stay in his title plant and to assume that the buyer will look at what she is buying and make her own judgment about the presence of suspicious possessors. But since the risk of possessors' rights is not as categorical as the earlier listed risks, the company can issue an extended coverage policy or an endorsement covering this risk if the buyer is willing to pay the company to inspect the property.³⁸³ *Why do you exclude boundary line disputes and claims of easement?* is subject to the same response—if Pearl wants boundary assurance, she can hire a surveyor herself, or she can pay Tyrone's company to hire the surveyor and insure the correctness of that survey in its policy.

Why do you exclude mechanics' liens? combines the previous considerations. This may require some explanation from you as to how such liens relate back in time so that Tyrone can figure out that he would have to inspect the property for signs of construction in progress at the time of policy issuance. The explanation of relation back also

effect? should prompt the consideration that the decision may be good only in that one state, whereas a policy exclusion is effective everywhere (and notwithstanding changes in case law). Even when title companies win, they are motivated to revise their policies to make the victory more permanent and universal.

382. I.e., "Loss or damage which would not have been sustained if the insured claimant had paid value."

383. The question of physical defects in the property is postponed until the end of this topic and is used as a lead-in to the general question of recovery for such defects, which is taken up in the next part of this Article.

makes understandable the exception for future property taxes and assessments.

Why does your policy exclude land use regulations? Why does it not exclude recorded notices of violations of them? These questions go into the nature of the public records system and all of the offices where information might be found relating to a parcel of land. *Suppose Pearl offered to pay you for a zoning endorsement, how would you find out what the zoning was? Where would you look to find out whether any governmental agency has voted to exercise eminent domain over the property but has not yet recorded its exercise of that power?*

If the class also considers lenders' policies, there should also be mention of usury, truth in lending, and the new creditor's rights exclusion. (Each of these, however, will probably require heavy doses of explanation by you.)

Off-record risks are raised by asking, *Tyrone, in light of the limitations of coverage, does Pearl gain any real protection from your title insurance policy that she couldn't acquire by having Laura search Van's title for her?* If necessary, you may have to follow this up with, *Laura, when you search a chain, do you check whether each deed was in fact signed by a competent grantor and properly delivered to the grantee? If there was a recorded but undelivered deed in the chain, does Pearl have good title? If not, can Pearl sue you for malpractice, or did you exclude that from your opinion to her? Tyrone, does your policy exclude those risks? Why not? Did your company take any steps to investigate them? Why not?*

2. Timing

A constellation of other questions deal with the integration of the insurance into the purchase contract. To begin, *Tyrone, when will you be able to issue a policy insuring Pearl that she is the owner?* introduces the structural difficulties the insurer must confront. The insurer can search now, but it must wait until the deed was delivered and recorded (by itself, probably) before it can say that the buyer rather than the seller owns the property. Yet, the buyer needs to know before the close of escrow (and the turnover of her funds) that she will be insured after the close. *Laura, is it satisfactory to you that Pearl's policy won't be issued until escrow closes? What if the company declines to write a policy at that time? Does this mean that Pearl will have to pay you for a marketable title search beforehand and then pay the company a second time for a title insurance policy afterwards? Tyrone, is there some way you can assure Pearl before closing that Van currently has a good title and that she will have a good (insurable) one after closing?*

Once the students invent a preliminary title report, it can be explored in its own right. *Tyrone, will the preliminary report be an insurance policy or just a report? Will you charge Pearl for it or give it to her free as part of the overall package? Laura, once Pearl has this preliminary report from a solvent insurance company, is there any need to buy a title insurance policy thereafter? If the preliminary report fails to pick up some defect, can't you just sue the company for negligence? In fact, might not Pearl be better off suing on a negligence theory rather than on an insurance theory, in order to get around the policy limits and strict timetables in the policy?*

At the other end of the time spectrum is the duration of coverage after the issuance of policy. *How long is Pearl covered under your policy? Does that mean you will be charging her annual premiums in addition to the initial fee? What happens once she sells the property? Does this policy insure her buyer? What if her buyer later sues her saying that the title was never any good; will you defend her? If Pearl takes back a mortgage for part of the price and her title turns out to be bad, is she still covered by you as a mortgagee even though she is no longer an owner?*³⁸⁴

3. Remedies

The final areas of coverage are the company's duty to defend and the options the policy allows it in responding to adverse claims. *If a neighbor claims an easement over Pearl's property that you did not list as an exception, what will you do? Can you elect to do nothing and ignore the neighbor if you think the neighbor is wrong? If you believe the neighbor is right, what will you do?*

H. Physical Defects Discovered After Closing³⁸⁵

The obvious transition from title insurance to the remedies available to a purchaser following a post-closing discovery of defects in the property is to ask whether such defects are covered by the title policy.³⁸⁶

384. And, in the case of lenders, *Does coverage end if the mortgage is sold in the secondary market?*

385. Although not a major topic in the Property course, most of the casebooks do give it some coverage, from 35 pages in Cribbet, down to 5 pages in Berger. Casner covers it only in the Supplement, and Donahue and Kurtz both appear to omit it entirely.

386. E.g., *Tyrone, if it turns out that Pearl's house was built on fill, does your*

Several of the books include cases holding against such a claim; even without such authority, students should be able to figure out the distinction between marketable title and unmarketable property.³⁸⁷ In the absence of title company liability, other defendants and theories must be sought.

As a transactional matter, this issue may have been touched on during the vendor-purchaser discussion (in terms of inspection, conditions or express warranties). It is covered here as a litigation question: the sale has been completed and the purchaser discovers that something is wrong. The task of the purchaser's attorney is to help her to win a lawsuit, not to close a deal. *Laura, who can Pearl sue when she finds out that her house was built on fill (has termites, illegal wiring, etc.)?*³⁸⁸ The seller is the obvious first candidate.

Many of the books include a case on an implied warranty of fitness, making it appropriate for the student to turn to that doctrine. This theory can be explored by seeing whether Pearl's case fits under it. *What kind of property does this have to be for Pearl to be able to sue Van on an implied warranty theory? How new does the house have to be? Can we claim this is new housing if Pearl is not the first owner? What if someone else (a dummy) held title for a short time in between?*³⁸⁹ Further questions assume that this is qualifying property. *What will you have to prove about the defect—that it violated some code? That it didn't conform to the plans? Will Pearl recover only the cost of repairs or for personal injuries too? Should you worry about disclaimers in the sales contract or deed?*³⁹⁰

Making it an old house leads to other possibilities. *If the house is very old, can you still claim implied warranty? Can you argue that the court should apply that theory to old as well as new houses? If the courts in this jurisdiction have limited that theory to new housing, does Pearl have any kind of case? What if Van told Pearl that there was no fill, even though that wasn't written in the contract? If sellers' duties of truthfulness and disclosure were covered before as part of vendor-purchaser, no more may be required here than to remind students of that.*³⁹¹ If not, *Do we have to prove that Van knew he was ly-*

policy protect her? Why not—since the house is not marketable any more?

387. You can also dispose of grantor nonliability under covenants of title at the same time or defer it until the question of seller liability has been raised.

388. This query does not include toxic pollution, which will be treated separately in the next section.

389. Cases raising the privity question are in Bruce, Dukeminier, Goldstein, and Rabin.

390. Cases involving disclaimers are in both Cribbet and Rabin.

391. Browder treats this entire topic as part of vendor-purchaser, and Dukeminier combines duty to disclose cases with implied warranty ones in the same section.

*ing when he said there were no termites? What if he knew there was fill, but never mentioned it to Pearl? Did he have a duty to disclose or merely a duty not to lie? If we can't prove that he knew there was fill, can we argue that he should have examined the property before selling it, just in order to warn a buyer of that fact?*³⁹²

Finally, there is the liability of other parties. *Is there anyone else Pearl can sue? What about her broker or Van's broker?*³⁹³ *Did either of them have duties regarding truthfulness? Concealment? Inspection? What about the contractor who originally created the defect? What about the bank who financed the construction?*³⁹⁴ *What if the bank merely appraised the property prior to making a loan to Pearl? What about the local building inspector? To close, What about the attorney who handled the closing for Pearl, i.e., you?*

I. Toxic Contamination

The few casebooks that treat this topic³⁹⁵ tend to cover it as part of conveyancing. While it could also be covered as a problem for existing landowners related to nuisance law,³⁹⁶ its practical import for attorneys is in terms of assisting buyers in making adequate environmental audits as part of purchasing property in order to avoid being held responsible for later clean up costs.³⁹⁷ Portions of the Comprehensive

Cribbet makes the topic a part of title assurance.

392. Cases involving the duty to disclose are included in Bruce, the Supplement to Casner, Dukeminier, Johnson, Rabin, and Singer.

393. This topic was covered previously in the section on brokers. The cases on broker liability in both Chused and Johnson are in this part of their books instead.

394. The liability of construction lenders is covered by cases in both Cribbet and Johnson.

395. Rabin has a chapter which contains one helpful opinion, *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). Cribbet has a short and uninformative case, *Sunnen Prod. Co. v. Chemtech Indus. Inc.*, 658 F. Supp. 276 (E.D. Mo. 1987). Dukeminier has a case dealing with the question of whether title insurance covers contamination, *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*, 283 Cal. Rptr. 231 (Ct. App. 1991), and an unrelated note in the section on disclosure duties. Johnson has a half page note. Chused has index entries for pollution, but no material actually covering it that I could find. The other books (based on table of contents searches under conveyancing and nuisance, and index searches under "CERCLA," "contamination," "hazardous," "pollution," and "toxic") appear to have nothing. The Real Estate Transaction books, especially Goldstein, all include this topic.

396. Kurtz has a case involving a leaking underground gas tank, *Mel Foster Co. Properties, Inc. v. American Oil*, 427 N.W.2d 171 (Iowa 1988), in the nuisance chapter but the issue is analyzed only under nuisance principles.

397. The discussion could also come up in the context of advice to an existing

Environmental Response, Compensation, and Liability Act (CERCLA)³⁹⁸ are sufficient reading material to support an introductory class discussion on this theme if it is not included in the casebook.

A natural bridge from postclosing discovery of defects to contamination is to ask Pearl's attorney, *What remedies does Pearl have if the defect she has just discovered is underground contamination rather than improper construction?*³⁹⁹ That question is really just an introduction to the topic of the special nature of the liability that a buyer suffers in purchasing contaminated property. *Is the pollution of the soil on Pearl's property any different from the termite infestation or illegal wiring in her walls, i.e., is it something that she can just decide to put up with rather than fix while she owns the property?* To put it more in the context of the concern of a potential purchaser, *If a visual inspection doesn't show pollution and no neighbor has complained, is there anything wrong with her acquiring property that may be contaminated? Suppose it later turns out that this property is polluted, but Pearl doesn't mind; can anybody make her do anything about it?* Although that is a question one would take to an environmental attorney when and if pollution is actually discovered, it is also a question all real estate lawyers must anticipate as potential dangers for all purchasers.

1. Cleanup Liability

A walk through of CERCLA's provisions is one way to answer the environmental question.⁴⁰⁰ Section 107(a) reads (selecting out the key phrases for the students), "the owner . . . of a facility . . . from which there is a release . . . of a hazardous substance . . . shall be liable for . . . all costs of removal."⁴⁰¹ *Laura, if Pearl buys this property*⁴⁰² and later discovers that it is polluted,⁴⁰³ what does that mean for

owner of contaminated property, but the general question of landowner liability for conditions of the premises is more a tort than a property question.

398. 42 U.S.C. §§ 9601-9675 (1988). I will refer to the applicable sections at appropriate times in the text, using the Act's numbers rather than the codified numbers (e.g., § 101 rather than § 9601). In addition to the federal statute, provisions from the applicable state statutes can also be included, especially if their provisions go significantly beyond CERCLA.

399. If title insurance was the previous topic, the question could be whether Pearl's title policy covers contamination.

400. The students cannot possibly answer this question on their own. A good deal of hand holding is needed to take them through the sections hereafter discussed.

401. See § 107(a).

402. If § 101(9) is included, you can ask, rather than declare, whether the house is a facility.

403. You can also discuss which contaminants are covered by CERCLA and which

her? The point to bring out is that the statute makes the current owner a potentially responsible party for clean up.⁴⁰⁴

But Pearl wasn't the polluter; why would she have to clean up someone else's mess? introduces the principle of strict liability and the policies behind it. This leads to the innocent landowner defense. *Would Pearl be protected by any of the defenses under 107(b)?* To answer this and the following questions, the students usually need to be led clause by clause, with frequent references back to the base point. *Why is an owner not required to clean up from a "release . . . caused solely by . . . an act or omission of a third party?"*⁴⁰⁵ *Why does the defense vanish if the third party is in a "contractual relationship" with Pearl?*⁴⁰⁶

*If Van was the polluter, would his contract and deed to Pearl constitute such a "contractual relationship?"*⁴⁰⁷ Section 101(35)(B) reads, "Contractual relationship . . . includes . . . land contracts [and] deeds."⁴⁰⁸

When is a deed not a contractual relationship? If Pearl acquired it "after the disposal" and at that time "did not know and had no reason to know" of the release.⁴⁰⁹

How could Pearl prove that she had no reason to know? Under section 101(35)(B), she had to make "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice." That brings us back to the present: *What will you do in order to make sure Pearl qualifies for this defense if*

are not. The definitions found in § 101(14)(F) exclude petroleum, and the exclusions in § 104(3) of naturally occurring substances and products incorporated into buildings mean that radon and asbestos are also not covered. This makes it worth asking whether state statutes cover those contaminants.

404. You can ask if tenants, holders of easements, or others also qualify as owners or operators. More sophisticated questions can relate to the liability of officers, directors, and strawpersons. Lender liability is discussed separately later. See *infra* notes 412-22 and accompanying text.

405. *That is, if a third party polluted, Pearl would not have to clean up.*

406. *Thus, if the third party polluter was under contract to Pearl, she does have to clean up.*

407. *If it was, then Pearl must clean up.*

408. *So Pearl does have a contractual relationship with Van and therefore must clean up.* But, the statute then says, "unless . . ." *Sometimes a deed may not be a contractual relationship; therefore, Pearl would not have to clean up.*

409. *Pearl purchased after the contamination, so if she could also prove that she had no reason to know of the previous polluting, she was not in a contractual relationship with Van, and she would not have to clean up his pollution.*

contamination later turns up? What kind of questions are you going to ask and of whom? What is an appropriate inquiry into previous ownership? If a chain of title search shows that a former owner was named ABC Chemical Co., what do you advise? How will you inquire into previous uses? Are government records worth looking up? Of what sort? Permit applications? Health violation reports? Nuisance complaints? The section also requires an "appropriate inspection" of the property. Does that mean Pearl has to hire specialists to take soil and water samples whenever she is interested in buying property? When is a "Phase 2" investigation required? Does this mean Pearl must discover the contamination in order to claim that she made an appropriate inquiry? These questions let you explore what constitutes due diligence in an environmental audit.

If Pearl passes all this, does she qualify for the defense or is anything else required? The end of section 101(35)(A) refers back to section 107(b)(3), which requires that Pearl also: (a) exercise "due care" as to any toxics discovered, and (b) take "precautions against the foreseeable . . . consequences" of the pollution. Does that mean Pearl has to clean up the property in order to avoid cleanup liability under the statute?

Finally, If Pearl is an innocent landowner, is she safe? Under section 101(35), she is also thereafter required to disclose the pollution to the next buyer in order to retain the defense. How much will Pearl be able to sell the property for, if the next buyer knows that he will have to clean it up (since the information will certainly disqualify him as an innocent landowner)? If so, is she economically compelled to clean it up anyway?⁴¹⁰

2. Vendor-Purchaser Issues

Questions of CERCLA coverage are really background material for the real estate questions concerning how a purchaser should approach the acquisition of potentially contaminated property. Besides advising Pearl to hire a good environmental consultant, is there anything else Laura should say about this in her offer to buy the property? The answer should give Pearl both the right to inspect, in order to establish an innocent landowner defense, as well as the right to withdraw if the property is contaminated. Under the contract we drafted a few weeks ago, is Pearl entitled to inspect before closing? Can she withdraw if

410. My students get interested in the question of whether cleanup liability is dischargeable in bankruptcy, although I have no materials in the course dealing with bankruptcy nor do any of the casebooks (except in the context of concurrent ownership).

she doesn't like the inspection results? With this extra legal knowledge you now have, should you have drafted her offer differently? These are questions all real estate attorneys worry about even if they are not environmental specialists.

Obtaining inspection rights is important, but an extensive investigation can be more expensive than is warranted for a small purchase. Instead it may be more sensible to negotiate over the consequences of undiscovered pollution. *Are there any provisions Pearl ought to include in her offer that will do her some good if it later turns out that the land is contaminated? Can the contract provide that it will be Van's obligation to clean up the property, rather than Pearl's, if the government ever requires cleanup?* This directs attention to section 107(e)⁴¹¹ and the difference between the three sentences of subsections (e)(1) and (e)(2). More background may be required. *If officials order Pearl to clean up, can she tell them to sue Van instead? If she has to clean up, can she thereafter sue Van for part of the cost?*⁴¹² With the answers to those questions as a foundation, *How much does a hold harmless clause help Pearl? If the contract with Van is silent, would Pearl be unable to make him share some of her costs? How would contribution be calculated under section 113(f)? How about a warranty clause?*⁴¹³

There are also the perspectives of the seller and the broker. *Larry, is there any advice you have for Van if he is fearful that the land is contaminated? Should he tell Pearl about the old underground tank that has not been used for 30 years? Should he put an "as-is" clause in the contract? A clause releasing him from clean up liability? Brad, as a broker, do you routinely inspect for toxics?*

411. 42 U.S.C. § 9601(e) (1988).

412. And, *If a hold harmless agreement is ineffective under the first sentence, what is the purpose of the second sentence?*

413. *Might some clause let Pearl rescind her purchase and therefore get out of the category of owner-operator?*

3. Related Questions

- **Title insurance.** *Laura, is Pearl protected against toxics by her title insurance policy? Does toxicity make title unmarketable? Is there is language in her policy about this? What does exclusion 1(a) and definition (f) in the policy mean?*⁴¹⁴
- **Cleanup liens.**⁴¹⁵ *The mortgage lender*⁴¹⁶ *can ask, If our investigation reveals no contamination, is it safe for us to loan money to Pearl to buy the property? If toxics are revealed and the government cleans up and puts a lien on the property, what is the priority of its lien vis-à-vis our mortgage?*⁴¹⁷ *If the government does not clean up and Pearl stops paying the mortgage,*⁴¹⁸ *how much can we expect to see bid at a foreclosure sale?*⁴¹⁹ *If no one else bids and we have to take the property back on foreclosure, will we have to clean up? Is there any risk that the government will make us clean up even if we don't foreclose, claiming that we are a responsible party just because of our mortgage?*
- **General liability insurance.** *Laura, is Pearl protected by any other insurance? Will her homeowner's liability policy protect her?*⁴²⁰ *Does "a sum she is legally liable to pay as damages because of property damage" cover her when she is compelled by the government to clean up her own property or only when she is sued by neighbors for damaging their properties?*⁴²¹ *Is this a covered "occurrence" if the contamination is due to slow leakage? Which insurance company is responsible if the leakage has gone on for many years and she had many different policies over that time? What protection does she have*

414. Dukeminier has *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*, 283 Cal. Rptr. 231 (Ct. App. 1991), for background, but the policy in that case was issued a year before most policies were revised to account for this problem, making it somewhat obsolete.

415. See § 107(a); see also § 107(a)(1) on the issue of lien priority.

416. If mortgages have not yet been covered, you will have to explain to the class the nature and priority of liens, and the text questions may need to be postponed or omitted.

417. And, in states where the such liens have super-priority, *How can we make loans to owners under those conditions?*

418. *Laura, would you advise Pearl to continue paying the mortgage if the clean-up costs exceed the value of her equity?*

419. *Larry, how much would you bid for property that would normally be worth \$500,000 but required that \$400,000 be spent on cleaning it up?*

420. *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253 (Cal. 1990), is a recent decision that refers to all of the other significant cases on this issue.

421. Asking, *If the state department of motor vehicles orders Pearl to fix her brakes, can she get her liability carrier to pay for the repairs?* will make the point clearer to students who are generally more familiar with automobile insurance than with property insurance.

if her policy contains the new absolute pollution exclusion clause? Should insurance companies be permitted to exclude coverage, or should the state department of insurance insist on it being excluded in order to deter people from polluting?

IV. LAND USE

Land use law presents issues that are often radically new and different to property students. All other topics in the course have involved the owner of a property interest dealing with another owner, either in a negotiated transaction or else in the conventional kind of litigation in which a plaintiff sues a defendant in court, with both parties represented by counsel and both having the ability to settle their dispute at any time. Land use involves not only a new subject matter but also a new legal environment, where owners are required to seek permits from government officials, where these permits may be withheld if neighbors protest or if other officials find them objectionable, where disputes over the permits are aired at public meetings where anyone may speak,⁴²² (without reference to the rules of evidence)⁴²³ and where decisions are made by commissioners who are not trained in law.⁴²⁴ When the losers then seek an attorney, generally the first time any legal personnel is involved, what is he supposed to do? Who does he sue and for what? When he presents the matter to a judge, what is she supposed to do? What is the issue before her? How is she supposed to decide the merits? Nothing in the rest of the property course prepares students for answering these questions. For these reasons, the topic is usually postponed until the end the course.⁴²⁵

422. I.e., the owner, neighbors, brokers, members of the Chamber of Commerce, contractors, environmentalists, preservationists, housing advocates, etc.

423. No one is under oath, there is no cross examination, statements are often applauded or booed, and there is considerable parading up and down the aisles.

424. The staff of the planning department has probably gone to planning school, while the members of the planning commission—who are usually supposed to represent community values—have probably not gone to either planning or law school.

425. Most of the casebooks (Browder, Bruce, Chused, Donahue, Dukeminier, and Goldstein) put it there, although a significant minority (Berger, Cribbet, Kurtz, and Rabin) place it before conveyancing. Casner, Haar, and Singer have it near the end, with a scattering of different smaller topics (respectively, miscellaneous rights and taxes, "New Property" and "Property in People") coming after it.

A. *Writing a Master Plan*

Since this legal setting is alien to most students, its novelty and unreality should be minimized as much as possible. One way to do so is to convert the students into planners, in order to imbue in them the needs and aspirations of those wishing to regulate others' use of land.⁴²⁶ All students are appointed to our local planning commission, covering whatever neighborhood or town each actually lives in.⁴²⁷ As members of that agency, they are to propose what to do to improve the community. The first class is a mock planning commission meeting.

Class is told that before any concrete proposals can be accepted, the commission is required to "plan," in order that the regulations be in accord with a comprehensive plan.⁴²⁸ For pedagogical purposes, planning is treated as a necessary and preliminary formality, compelling the drafting of a document⁴²⁹ containing statements of land use policy.⁴³⁰

The students' planning goals are collected on the blackboard,⁴³¹ along with appropriate instructional comments made in response to them. Many proposals should be rejected on technical grounds, since they deal with nonland use matters (such as feeding the hungry) and give you the opportunity to define the field and show the distinctions between planning for the physical development of the community and, among other things, social planning, which is for some agency other than the planning commission.⁴³² Other proposals may relate to land

426. This approach puts the goals and mechanisms of regulating land use in front of the legal restrictions imposed on regulation. It is the reverse of the organization in Berger, Browder, Cribbet, Goldstein, Johnson, and Kurtz, who put taking issues in front of regulatory mechanisms. It is even more at odds with Casner, Chused, Donahue, and Rabin, whose coverage almost entirely omits land use tools.

427. Utilization of a planning commission, as opposed to some other regulatory agency with direct or indirect control over land use, such as a water board or air board, requires some introductory explanation by the professor, but most observations are better covered while the mock commission does its work.

428. This gives you an opportunity to explain how the state has delegated its police power to regulate land use to local communities, but conditioned its exercise upon compliance with the terms of the enabling act, which often requires that planning precede or accompany the enactment of regulations.

429. If such a plan does exist for the community where you teach, bringing it to class generates substantial student interest.

430. Many policies expressed by students are really ordinances in form or effect, and must be recast to fit the generality required of a plan. For example, a proposal "to get rid of the McDonald's on First Avenue" may have to be rewritten as one "to eliminate fast food activities on residential streets." Inducing the students to learn this technique gives them realistic insights into how elegant sounding planning goals often cover up dirty back room deals.

431. These statements should also be recorded by the student commission secretary, along with the names of the proponents, because in later classes the proponents will be asked to convert them into ordinances.

432. For example, proposals to reduce traffic might go the traffic or the police

use matters, but must be excluded because they have been preempted by state regulation.⁴³³ Others may relate more to government acting on its own property rather than regulating private property, and therefore also beyond our commission's jurisdiction.⁴³⁴ Students can be encouraged to keep ideas from being sent elsewhere by rephrasing them.⁴³⁵

The teaching goal is to get a list of some twenty ideas to comprise a master plan. Any requirement of consistency between the ideas should be waived. The professor's job is to coax out a mix of affirmative and negative proposals and a collection of goals that relate to a wide variety of land use features, especially housing.

One benefit of using such an approach is that it puts students into the right frame of mind, namely "civic mindedness" and psychological investment in one's own ideas. It also puts the initial emphasis on the mechanical questions of use and postpones high level consideration of the constitutional issues involved until everyone has a more practical foundation. Finally, it provides a structure for the remaining classes: the planning goals collected in the first class will serve as vehicles for a review of all land use techniques and their attendant difficulties. Your job after this class and before the next class is to decide which proposals to use to illustrate which techniques and which problems.⁴³⁶

commission. Some ideas could go either to a planning commission or to a building department (e.g., stairway size, electrical requirements), and you may or may not want to keep them on the list.

433. Suggestions to impose taxes on certain activities or to regulate businesses currently subject to overriding state control, such as banks or liquor stores, would fall into this category.

434. It is wise to keep one such proposal on the list, such as more parks, if eminent domain is to be covered.

435. An example would be converting a proposal to reduce on-street parking—which should go to a traffic commission—into one requiring two-car garages in new residential construction or permitting more parking lots in some zones. Most ideas contain some physical component for land use planning purposes (e.g., more commercial zones to further jobs, density bonuses for buildings containing soup kitchens to feed the hungry) if you want to keep them alive for future class purposes.

436. Some proposals may need to be modified somewhat in order to be linked to the desired technique. One year, for instance, I persuaded the proponent of more golf courses to support miniature golf courses as well, in order to then consider using eminent domain to convert another student's lot into one. These corrections can be made at the beginning of the following class, after you have had time to review the entire array.

It is also possible, if no planning goal fits the topic you want to discuss one day, to yourself propose that some goal be added to the plan. (E.g., *Ought we have any policy regarding adult movies or billboards?* if you want to cover First Amend-

B. *Converting the Plan into Regulations*

1. Eminent Domain

Most of the casebooks start with eminent domain,⁴³⁷ which is certainly the most direct way for government to accomplish some of its purposes. I choose one of the student proposals that involves a potential municipal activity. One year George said his town should have more dog runs. *Can we use eminent domain to accomplish that? Where should we locate the dog run, since all of the land in the community is already developed? Can we put the dog run in a back yard? Helen, how large is your back yard? Ida, how large is yours? Are there any trees in it? I propose to the Commission that we condemn Ida's backyard for dog run purposes; all in favor? Laura, as city attorney, can you protect us if Ida sues? Is a public use involved? Will findings help? Please draft them for us. Will Ida be able to argue to the judge that a dog run is not a good idea, or that it should be located somewhere else? Can we take the yard from Ida and then give it to Mark on the condition that he operate a for profit, private dog run on it?* These questions provide a vehicle for discussing the extent of the eminent domain power, its growth into urban renewal and slum clearance, and the role of the judiciary in reviewing this activity.⁴³⁸

2. Zoning

Some student's planning goal inevitably requires a conventional segregation of uses. *Nina (or Laura, the city attorney), what ordinance should we enact to carry out your proposal to eliminate [stores] from [residential] areas?* By starting from a situation with no existing legal apparatus into which this idea can fit, the student must create from scratch (with your help) a miniature zoning system. She will have to draw a map dividing the city into districts with different use labels⁴³⁹ and then draft an ordinance listing the permitted uses in each district. By not including the undesired use in the list for one of the districts,

ment issues.)

437. However, Berger, Casner, Goldstein, and Haar put it at the end; and Donahue and Rabin both appear not to include it at all.

438. Since the most significant characteristic of eminent domain is that the government must pay for what it does, you can go directly to takings questions by asking whether the government would also have to pay if it zoned the property DR (dog run), making that the only permitted use of the site. The organization employed here raises takings issues only after reviewing all mechanisms.

439. A division of the city into a single residential and a commercial district is enough to get started. As new ideas are added, further districts and distinctions are made to accommodate them.

she will effectively exclude it from that district. *Laura, is that legal? Can we tell the owners of property in that part of town that they cannot use their land the same way as owners in the other parts can?*⁴⁴⁰

The map is next refined to incorporate additional related ideas from the master plan: Residential and commercial districts are further divided as more distinctions are made within those categories. As this is done, definitional questions are put to proposers. *How do we define fast food establishments in order to distinguish them from other restaurants? Single-family houses? Also, Are there any uses that we want to eliminate entirely from the community such as nuclear power plants and toxic waste dumps from commercial areas*⁴⁴¹ *(or trailer parks, motels, or fraternity houses from residential zones)?*

Next are questions about mapping. *Paula, where do you want to draw the line between your proposed residential and commercial districts: down the middle of the street,*⁴⁴² *along the rear lot lines*⁴⁴³ *or straight down the middle of the block?*⁴⁴⁴ A separate theme is the question of the size of zones. *Can we make our Dog Run zoning district exactly the size of Ida's back yard? Conversely, could we zone only her property for liquor store use so as to eliminate all competition to it?* These questions raise spot zoning, anti competition and plan comprehensiveness issues.

Height and bulk restrictions are covered similarly: *Ray, how do you want to enforce your policy of restricting tall buildings? Is there any part of town where tall buildings should be permitted? Should we have uniform (but different) height limits in residential and commercial neighborhoods, or should there be a separate overlay zoning map for heights? Should we allow taller buildings on the tops of hills or in the valleys? Along the coast or inland? On corners or mid-block? Should the height limit be uniform across the parcel or stepped back from the*

440. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is now germane to this discussion of the elementary validity of zoning.

441. As to which use to eliminate, you can then ask the proponents where they think these locally unwanted land uses should be sited, and further, whether they are guilty of environmental racism for wanting to dump them onto communities with less wealth or political muscle.

442. Which has the effect of giving a different character to the two sides of the street, appealing to neither.

443. Which will produce jagged gerrymander-appearing lines, unless all lots have the same depth.

444. Which may put different parts of a single lot under different zoning classifications.

lot line to the interior in order to preserve a sky plane? Should it be averaged to conform to the heights of the surrounding buildings? The same questions can be asked about building and lot sizes,⁴⁴⁵ floor-area ratios, and setbacks for front, side, and rear yards.

3. Other Tools

Noneuclidian elements can be similarly treated.⁴⁴⁶ Here is the sequence in which I cover them:

- **Flexibility devices.** To one of the residential proponents: *Does this mean that there will be no corner grocery stores anywhere in the district and that everyone has to get in their car to buy a carton of milk? How can we allow some, but not too many, little groceries? Can we make them variances?⁴⁴⁷ Conditional uses (special exceptions)? If so, what conditions should pre-exist,⁴⁴⁸ and what conditions might we want to impose?⁴⁴⁹ What about having the city council rezone one corner of a block instead?⁴⁵⁰*
- **Bonuses.** To the proponent of some desirable use: *What kind of inducements can we offer to developers to get them to give us more of them?⁴⁵¹ Then, ask other students What other amenities should we try to encourage through this device?*
- **Design review.** To someone who complained about unattractive features in the community: *How can we keep ugly buildings from getting built? Can we draft any rules in advance that will guarantee attractive structures? If we require that every building have front lawns or bay windows, does that assure that they will be pretty? Can we tell builders that we claim the power to reject their designs, even when their plans conform to the zoning envelope? What should our ordinance say? What kind of standards must we set to guide the review board? Can we just tell the members not to approve of anything they*

445. Suggestions may include maximum building sizes in city neighborhoods and minimum lot sizes in the suburbs.

446. The appropriate threshold question for each technique could be, *Does our enabling act authorize us to do this?*

447. That question should trigger a review of when the variance procedure is appropriate and the role of a board of adjustment.

448. E.g., "No other grocery store within two blocks."

449. E.g., "No late hours or no trash cans outside (or more trash cans outside)." A restriction on transferring title raises good questions about the proper limits of such conditions.

450. This is also a suitable place to note the difference between the legislative role of the city council and the administrative role of the planning commission or board of adjustment and to ask whether such formal differences should lead to different standards of judicial review when the loser challenges the activity.

451. E.g., trees, plazas, child care centers, mid-block corridors, and theaters.

*don't like? Does the state enabling act give us such power? If not, what amendment should we propose to the legislature to get the necessary authority?*⁴⁵²

• **Nonconforming uses.** *What steps can we take with regard to existing buildings or activities that we don't like? Can we make an owner tear down the building (or stop an activity at once) if it does not constitute a nuisance? What kind of formula should we use in calculating how long a building or activity may continue under an amortization scheme?*

• **Preservation.** *How can we assure that the existing attractive buildings are not destroyed or disfigured? Can we also protect buildings that are not themselves attractive but where important people were born or lived or died? Can we protect interiors? What if the buildings are not open to the public? Once a building is designated, what restrictions should we impose upon the owner? If she pleads hardship, are there any tradeoffs we can offer?*⁴⁵³ *Can we preserve an entire neighborhood, even though some of the buildings in it are not attractive or historical?*⁴⁵⁴

• **Cluster and PUD zones.** *How can we avoid making each block look the same as the others (with identical front and side yards, etc.)? If our chief desire is that there be no more than ten housing units or at least forty percent open space on a block, could we let the owner of an entire block decide how she will lay out the houses, perhaps even putting some of them right next to some others, so long as we get the proper overall amount of housing units and open space? Could we do the same regarding mixing residential and commercial uses, so long as*

452. I bring in a few pictures of grotesque buildings, to ask the review board how it would react to their construction in our neighborhood. For some sources, see CLAY LANCASTER, *ARCHITECTURAL FOLLIES IN AMERICA* (1960); MICHAEL SCHUYT ET AL., *FANTASTIC ARCHITECTURE: PERSONAL AND ECCENTRIC VISIONS* (1980); and ALLAN VAN DINE, *UNCONVENTIONAL BUILDERS* (1977). Dukeminier includes a drawing of how the house proposed in *Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970), may have looked.

453. Such tradeoffs include upzoning the property, purchasing a preservation easement, reducing property taxes or providing for income tax benefits.

454. Pictures of New York's Grand Central Terminal, for example, make these issues more meaningful to students who have not been there. Chused and Dukeminier both include pictures of the tower proposed to sit over the Terminal. These two books, as well as Goldstein contain several interesting illustrations and maps. Daily newspapers often contain land use articles of current interest that may fit into class discussion during these weeks.

no more than ten percent of the developed area was put to commercial use?

• **Subdivision control.** *What about the farms beyond the outskirts of present development where there are no streets or utilities? Is it sensible to zone that land when we have almost no idea of what is appropriate out there? Can we impose a zoning designation on the land that will force owners to request rezonings of their properties in order to develop them?⁴⁵⁵ Since there are no roads out there now, how can we assure that those streets tie in to our existing streets? In addition to street layout, how much can we control the way the land is subdivided into lots? How should we define what subdividing is? Should we make the definition include converting apartment buildings into condominiums?*

• **Exactions.**⁴⁵⁶ *Who will have title to those streets being laid out in the new subdivision? Can we make the subdivider dedicate them to us as a condition of map approval? Can we make her pave them before we accept them? Can we make her build the curbs too? Can we ask for five feet of land on the other side of the curbs and make her plant trees there? Can we ask for a whole park? Can we ask for a park on the other side of town, where it is needed more? Can we simply ask for money in order to build the park ourselves? Can we make these requests of individual builders even when no subdividing is happening?*

• **Development Agreements.** *If the subdivider is willing to do all this, how can we guarantee her that we will honor our end of the deal and not impose new conditions later? What if we get turned out of office and antidevelopment forces take over? Can we contract away the police power? Can we prohibit the voters from passing new restrictions by way of initiatives that could apply to this property?*

• **Environmental Impact Review.** *Does the activity under consideration require an environmental impact statement (EIS) or an environmental impact report (EIR)? If a threshold analysis shows that the project probably has no significant environmental effect, is an impact statement still necessary? If an EIS or EIR is to be prepared, what must it contain? Who gets to review the report? Must we consider public reaction to it? If it shows that there will be adverse environmental effects, must we disapprove the project? Can we require the*

455. Interim zoning can be raised as a companion to this theme: *What if we suddenly get word that a developer plans to build high rises in the unzoned outskirts? Since our planning and zoning process requires months of hearings first, how can we get some restrictions in place before she obtains a building permit?*

456. Since I make takings a separate topic, the constitutional issues implicit in these questions are not developed at this time.

developer to mitigate adverse environmental effects as a condition to approving the project?

• **Growth Control.**⁴⁵⁷ *Should we impose direct numerical limits on any kind of activities?*⁴⁵⁸ *Can we tell an owner that he cannot engage in or construct an otherwise permitted use of his property just because we have too much of that activity already? Can we limit downtown office growth? Can we limit residential growth on the outskirts?*⁴⁵⁹ *How should we restrict the growth? How should we allocate the limited number of permits to be issued annually?*⁴⁶⁰ *Can we put a complete stop to residential growth through a moratorium?*

C. *Attacks on Land Use Devices*

The same student proposals also support inquiry into the constitutional restrictions on the land use power. Several of the more problematic restrictions may support inquiries to the city attorney as to their resistance to owner and third party attacks. This format, as opposed to having an affected owner seek legal advice as to whether she can challenge an already enacted regulation, allows a greater latitude of class discussion, including consideration of options that could save the restriction from invalidation while still accomplishing the local purpose.

1. *Takings*

*Larry, if we deny Helen a permit to [develop] her property, so as to render it entirely worthless, can she sue us? What if we make findings that state that a legitimate public purpose is involved, and that reasonable means have been employed? This scenario, in which all economic use has been taken, puts the situation squarely within *Lucas v.**

457. Since exclusion is treated as a separate topic, the discussion here concerns mainly techniques.

458. This is an appropriate question to ask of anyone whose planning goal was to reduce the level of a particular activity.

459. Subordinate questions here are: *Is it desirable to limit residential growth? Will new housing increase or deplete the municipal treasury? Does residential or commercial activity generate more revenues through property and sales taxes? Does residential or commercial activity require fewer expensive local services (especially schools)?*

460. Methods of allocating may include waiting lists, point accumulations, geography, or auctions.

South Carolina Coastal Council,⁴⁶¹ and is the easiest way to get into takings law, because no balancing of any sort seems required in that situation.

What if we modify the restrictions, so as to leave some value in Helen's property? Is there still a categorical taking or do we now have some possible defenses? What would we have to prove; that is, what are the tests? The two factor standard of *Keystone Bituminous Coal Ass'n v. DeBenedictis*⁴⁶² offers a more useful discussion agenda for this question than the "essentially ad hoc, factual inquiries" version in *Penn Central Transportation Co. v. City of New York*.⁴⁶³ Following *Keystone*, therefore, *What should we declare our state interest is? Is it legitimate?*⁴⁶⁴ *Can Helen contend that we are merely attempting to acquire a resource to facilitate a uniquely public function as Penn Central seems to condemn?*⁴⁶⁵ *Can we show that the restriction or exaction has a real connection*⁴⁶⁶ *with that state interest? Once we establish the link, does it matter how much we restrict or demand of Helen?*⁴⁶⁷ *How do we show that we are merely attempting to suppress a harm to the public rather than compelling Helen to confer a benefit on the public?*

With regard to the second factor of viable use, *How far can we go in reducing the value of Helen's land without getting into trouble?*⁴⁶⁸ *Can Helen claim that we took all of the value of the part of her property that we restricted, or can we show that the entire parcel still has value despite the restriction on part of it? Can we add some value to her property by including transferable development rights in the regulation? Can we acknowledge her loss of value but contend that it was*

461. 505 U.S. 1003 (1992).

462. 480 U.S. 470 (1970). I.e., "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Id.* at 485 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

463. 438 U.S. 104, 124 (1978).

464. Incidental to that question, many of the land use cases can be reviewed as to what state interests they involved. Other than *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), I do not believe that any of the major taking cases found a state interest to be illegitimate.

465. For example, if we were to zone Helen's property "park" in order to save ourselves the cost of building a municipal one, then the student's attention should be directed to *Fred F. French Investing Co., Inc. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976).

466. *In light of Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *can an "essential nexus" be shown?*

467. I.e., *Is there "rough proportionality" between the need created by the development and the demands made on the owner, pursuant to Dolan v. City of Tigard*, 114 S. Ct. 2309, 2319 (1994)?

468. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

not an "investment backed expectation?"⁴⁶⁹ Can we show that restrictions upon other parcels generate an "average reciprocity of advantage" to Helen?

Finally, If a court decides that our regulation does amount to a taking, what will it do to us? If it merely invalidates our existing restriction, can we promptly enact another one only slightly different from it? Can damages be awarded against us?⁴⁷⁰ How will they be calculated? Can we limit our liability to the difference between the permissibly reducible value and the actual reduction caused by the restriction? If we have to pay, can we pay in transferable development rights?

2. Speech and Association

Speech issues are raised by asking a student opposed to pornography: Can we restrict adult movie houses without being charged with suppressing speech? What kinds of findings should we make?⁴⁷¹ Can we enact a regulation saying adult theaters are not permitted anywhere in town, or must we permit them somewhere? Can we confine them to the heavy industry zones that are deserted at night? Should we concentrate or disperse them? Can we do the same with billboards? Newsracks? T-shirt street vendors? Churches?⁴⁷²

Associational rights are raised by attempting to exclude nonfamilial groups from single-family zones. Can we keep [rooming houses, college or law students, or halfway houses] out of the neighborhood by defining single-family housing in terms of occupant relationships rather than architectural features?

469. I treat this as a vested rights question and ask whether we could immediately abate a nonconforming building if the ground itself still had a value greater than the 25% value that remained in *Euclid*. At what stage in the development process do expectations become investment backed so as to become vested rights and thereby insulated from rule changes? While Helen was thinking about purchasing the property? After she had taken an option on it? Signed a binding contract? Closed escrow? Paid an architect? Submitted plans? Dug a foundation?

470. Under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311-12 (1987). This is also when inverse condemnations actions might be explained.

471. See *City of Renton v. Playtime Theaters Inc.*, 475 U.S. 41 (1986).

472. This could include church-related activities, such as bingo games, parochial schools, halfway houses, and prayer meetings in private homes.

3. Exclusion

This final topic is introduced by expressing a concern that the class' land use regulations make housing too expensive for the poor. Proponents of the previous goals are now asked *What effect on housing costs will [your element] have if we enact it?*⁴⁷³

Open space and mandatory architectural amenities are easy cases of cost-generating requirements. Growth control is more provocative. *If we enact a moratorium on new housing, what effect will that have on the cost of housing (in town and nearby)? On prices of existing homes or on the value of your house? On rents? On vacant parcels? Who are the economic winners and losers? Of those groups, who gets to vote? Can we provide any incentives to the tenants in town to induce them to support growth control? If we add rent control to growth control, do we have a winning package?*

To move from economics to law, *Suppose our plans do raise prices but we like them anyway. Can the housing activists sue us? Do we have to worry, since the local state judges are themselves property owners in town? Can we be sued in federal court? Are we guilty of violating the Equal Protection Clause?*⁴⁷⁴ *Is the test discriminatory intent or discriminatory impact? If intent has to be shown, can we avoid that by never actually saying anything wrong at public meetings? Are the poor a suspect class? Who has standing to sue? What issues change if we are sued under the Fair Housing Act? What if we are sued in state court and this is New Jersey? What is our Mt. Laurel obligation? What if we are in [another state] instead?*

Finally, to cover inclusionary goals, *What techniques are available, if we sincerely want to do something about the unhoused? How would density bonuses work? What effect will mandatory set asides have on the cost of housing? How will we decide who gets to purchase one of the mandated affordable units? How can we make sure that the units remain affordable? What about those people who do not get to purchase one of the new units? Should we build the housing ourselves? Should we build projects or scattered individual units? In what neighborhoods should they be put? Should we provide subsidies instead of trying to build housing? Should the subsidies go to housing suppliers or to consumers? If we grant subsidies to the poor, should we restrict*

473. Students are often embarrassed to perceive the unintended price effects of their restrictions.

474. Housing discrimination can be treated as a major topic of its own, rather than as an aspect of exclusion. Kurtz and Singer both have separate chapters on discrimination after their land use chapters. Rabin also seems to do so (in addition to interspersing rent control and public trust chapters amidst them).

the funds to housing needs or let the recipients spend the money as they think best?

CONCLUSION

The McCrate Report⁴⁷⁵ regards counseling⁴⁷⁶ and negotiating⁴⁷⁷ as skills essential to competent representation. In law school we too easily assume that this requires us to offer specialized courses in these fields. Those traits, however, can also be nurtured by us in our substantive courses if, as part of teaching rules, we show our students how to use them to help their clients both in their ordinary activities as well as in their court battles. The Property course is no less interesting or challenging when taught with those values in mind.

475. *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, A.B.A. Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum* (1992) (commonly referred to as the McCrate Report).

476.

6.4 *Counseling the Client About the Decision to Be Made*. In order to counsel a client effectively, a lawyer should be familiar with the following skills, concepts, and processes: . . .

(b) Assuring that the client understands his or her legal rights and responsibilities with regard to the processes of making and implementing the decision, including the relative roles of the attorney and client in these processes . . . ;

(c) Explaining to the client all of the options available to him or her with regard to the decision to be made, including:

(i) The potential benefits of each option, including any potential positive effects on the client's legal rights or responsibilities;

(ii) The potential costs or risks which each option entails, including any potential adverse effects on the client's legal rights or responsibilities;

(d) Assisting the client in evaluating the various options available to him or her by:

(i) Providing the client with the benefit of the lawyer's legal expertise (as it bears upon the decision to be made), including:

(A) Informing the client of any legal rules, principles, procedures, or other aspects of the law or legal processes that may bear upon the decision or the desirability of any of the options

Id. at 180. That pretty clearly involves the kind of planning advice sought to be achieved in this article.

477. Section 7.1 describes "transactional negotiation" [as] "establish[ing] terms for a future interchange or for a continuing relationship between the parties." *Id.* at 185.

APPENDIX: ESTATES IN LAND

This topic might be teachable in a planning format, but to make that kind of treatment realistic, one would have to include, on the one hand, modern taxation and trust rules and exclude, on the other, all the older features of common law estates that have no current validity.⁴⁷⁸ Since our pedagogical interests in this area are to inform students of the history behind the old rules, such a lawyering approach would be misleading as well as inefficient. Litigating or reading recent appellate decisions regarding these concepts also tends to mislead because the system of estates in land resembles geometry more than law; most things have their place and only one place, and most answers are either correct or incorrect. Given that approach, there is not much sense in discussing with the students whether different results would have been better on grounds of policy, fairness, or efficiency.⁴⁷⁹ Delivering essential historical information as quickly as possible saves time for richer coverage of more current topics.⁴⁸⁰

With only a small amount of historical inaccuracy, most of the history of the estate system can be laid out fairly coherently in a few hours of lecture.⁴⁸¹ The main component is a listing of the common law present estates and future interests in land, all inserted into a large chart. The

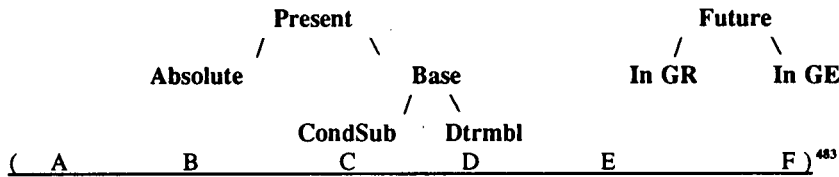
478. One would then have an elderly owner come in to your office to dispose of her estate. Johnson makes a bow in that direction with a section entitled "Choice of Law on Ownership" in their chapter on Common Law Estates.

479. The casebooks take dramatically different approaches on this topic, many covering most points by text with a few cases on "hot" issues (such as determinable versus subject to condition subsequent), although others still approach this via the traditional case method. (Goldstein has 17 cases in this field; Cribbet has 16. No book includes the case which I believe is most useful—*Lucas v. Hamm*, 56 Cal. 2d 583, 1961—where the California Supreme Court held that it does not constitute malpractice for an attorney to get the Rule Against Perpetuities wrong because it is so hard to master.) Page allocations are similarly widespread, running from 40-60 in Bruce, Browder, and Haar, to 130-40 in Casner, Dukeminier, and Goldstein; the shorter lengths support the kind of one-week coverage this Article contemplates.

480. It is certainly true that numerous rules came between the Statute of *Quia Emptores* and the Rule Against Perpetuities, and many of us sweated blood and tears learning them as students. But to succumb to the temptation of justifying that suffering, and also of dazzling students with our mastery of obscure lore, is to short-change other topics in a course already overcrowded.

481. Getting through this much material in this little time is only possible if student generated "what if . . ." questions are mostly ruled out, so that you can keep the material in the predetermined order and not get sidetracked.

finished chart is set forth below,⁴⁸² but it is the writing out of the chart on the blackboard that is the important part.



Freeholds

Fees

Simple	FSA		0	0
		FSSCS	PwrTrm	EI
			FTD	PssRvtr
				EI
Tail	FTA		Reversn	Remainder
		FTSCS	Rvn + PT	Rem + EI
			FTD	Rvn + PR
				Rem + EI
Life Est	LEA		Reversn	Remainder
		LESCS	Rvn + PT	Rem + EI
			LED	Rvn + PR
				Rem + EI

Nonfreeholds

Years/Term Etc. Etc.

The columns are filled in vertically, with appropriate description and information by lecture as you go along. The headings are gradually put on the board. First, "Freeholds" and "Nonfreeholds" are entered in Col-

482. Several of the casebooks contain similar charts (Berger, Browder, Donahue, Goldstein, Haar, Kurtz, Rabin, and Singer). The reason for the particular one offered here is that it is entered onto the blackboard in an order that makes the accompanying lecture intelligible.

483. The column letters (A, B, and so on) are included here only for convenience; they do not go on the blackboard.

umn A, with an explanation of the importance of ascertaining the termination dates of estates (as an introduction to the principle that the estates are classified by time rather than space).⁴⁸⁴ Then “Fees” and “Life Estates” are entered (all in Column A), with coverage of heritability and words of limitation.⁴⁸⁵ Finally, “simple” and “tail” are entered (still in Column A), with a discussion of the nature of heirs. Each estate listed is “bigger” or “larger” than the one below it.

Before the other columns are started, the headings over columns B, C, and D,—“Absolute”, “Condition Subsequent” and “Determinable”, respectively—are entered on the board with the explanation that these are drawn horizontally rather than vertically in order to show that estates can be classified by their quality as well as their quantity. The previous listing covered estates without qualification, e.g., absolute, and in those cases the full name of the estate adds that word. Column B is filled in and Columns C and D are explained and also completed, in the array shown above.⁴⁸⁶ Appropriate rules are mentioned along the way. After the qualified fee simples are described, the lesser variations follow easily.⁴⁸⁷ Estates subject to executory limitation are not yet mentioned.

Before Columns E and F are begun, the headings in the top line of the chart—“Present” and “Future”—are entered and the concept of future interests is introduced. Ignoring remainders for the moment, one can say whenever the grantor does not give away a fee simple absolute,⁴⁸⁸ he will have something left.

Column E is then completed: first through the three Reversion boxes, covering situations in which the grantor gave the grantee a “smaller” estate than he held, and then through the Power of Termination and Possibility of Reverter boxes on the fee simple row, covering those cases in which the estate granted was “worse” or “poorer” rather than “smaller.” Finally, the remaining boxes—“Reversion plus Power of Termination” and “Reversion plus Possibility of Reverter”—are completed as derivatives of the ones already done.

484. The nonfreeholds are left to landlord-tenant for significant coverage; here they are barely mentioned.

485. Both fee tails and life estates can be elaborated in terms of the various permutations.

486. A qualified estate should not be listed on the same line as the corresponding absolute estate, but on descending steps in order to allow the list of future interests to line up with them.

487. The illustration “To T for 10 years, so long as she pays the rent on time” is easy for the students to grasp.

488. This is what the grantor is always assumed to have at the beginning.

Column F covers the case in which grantor gives the future interest to a third person rather than retaining it. "Remainder" is written in whenever the corresponding box to the left is a reversion, both interests existing behind temporally smaller estates.

The Remainder box, however, requires further explanation and a second chart. Because remainders are created by an express conveyance, rather than by the mathematical subtraction generating the reversion, the grant must describe the duration of the remainder. Since a remainder can be given a quality as well as a quantity, it may be made subject to a condition subsequent in the same manner as a present estate, meaning that there are defeasible and indefeasible remainders.⁴⁸⁹ Since a remainder is a future interest, it may also be subject to a condition precedent, which introduces the Contingent Remainder; the previously mentioned remainders are then more accurately described as Vested. A blow-up of the remainder chart shows it to consist of four⁴⁹⁰ smaller boxes:

REMAINDERS

		<i>Condition Subsequent?</i>	
		No	Yes
Condition Precedent?	No	Indefeasibly Vested	Vested subject to divestment
	Yes	Contingent	Contingent subject to divestment

489. The remainder subject to open can be explained in terms of partial defeasance.

490. Six boxes may be used if the Remainder Subject to Open is inserted as another option.

Returning to the main chart, the final boxes of Column F are filled in with coverage of Shifting Executory Interests and the role of the Statute of Uses. If desired, you can now amend the names in the present estate columns to pick up that feature.⁴⁹¹

Following completion of this chart, you may want to do some lecturing on the more notable common law rules affecting estates—e.g., the destructibility of contingent remainders, the Rule in Shelley's Case, or the Rule Against Perpetuities.⁴⁹²

Waste and Partition⁴⁹³

There are two modern issues arising from the separation of ownership over time that can be covered in a less dogmatic fashion. Waste and partition are real world estate problems that do require lawyers' talents. Waste issues are raised by asking my student lawyer *My wife died and left her house to me for life and then to our children. Do I have to keep it in repair, just to keep them happy? How much do I have to spend on it for their sakes? Must I replace the roof, or can I just patch it up to stop the leaks? Can I tear the house down and replace it with an apartment building against their wishes? What if it is my niece, who is not likely to inherit the property anyway, who is, objecting?*

When my lawyer says that some of this constitutes waste, ask *Where in her will did my wife say that my interests were to be subordinated to the children's?* This raises the policy question of why the rights of the present tenant are defined derivatively (i.e., as that which does not harm the freehold), rather than vice versa (giving the remaindermen whatever is left after the life tenant has made appropriate use).⁴⁹⁴

491. E.g., "Life Estate Subject to Shifting Executory Interest," rather than "Life Estate Subject to Condition Subsequent."

492. However, I have no helpful way of abbreviating or clarifying these issues.

493. Most of the casebooks include one or both of these topics as incidents of estates. (Casner puts it before estates, as part of possession; and it is covered in Bruce in Landlord and Tenant, which precedes estates.) Most books use *Melms v. Pabst*, *Brokaw v. Fairchild*, or *Moore v. Phillips* on waste; for partition, *Baker v. Weedon* is the clear favorite.

494. *What should she have said in her will if she wanted me to have the "full" use of the property even if that does not leave that much for the children? What was her most likely intent?* gets to the same point.

Partition⁴⁹⁵ follows by asking, *What if I can't afford to keep the property up, or it's too expensive for me to live there, but I do not have money to buy something more affordable? Can I "cash out" my share of the estate now? Even if the children don't want to? What will happen to the property? Who will get to live there afterwards? How much of the proceeds from the partition sale will I get?*

495. Although partition in respect of future interests does not appear in all of the casebooks, Bruce, Johnson, and Rabin have cases involving their valuation, which raises some of the same issues.

