

LAW SCHOOL SIMPLIFIED



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Civil Procedure

CLAIM PRECLUSION

This defense prevents a party from getting a “second bite at the apple.” It bars the re-litigation of a claim that has already been decided. It was formerly termed “*res judicata*” (Latin for “a matter already judged”), but scholars in the 1980s replaced it to increase clarity.

THREE REQUIREMENTS

For claim preclusion to apply, three things must be true:

1. *Same Parties*: The plaintiff and the defendant in Lawsuit #2 must be the same as in Lawsuit #1 (or in “privity,” meaning they are legally connected, like an heir or a business successor).
2. *Final Judgment on the Merits*: Lawsuit #1 must have ended in a valid, final judgment (this includes trials and certain dismissals, but usually not dismissals for lack of jurisdiction).
3. *Same Transaction*: The claimant is asserting the same facts or incident in Lawsuit #2 as they did in Lawsuit #1.

THE TRANSACTIONAL TEST

Courts ask “are the two suits dealing with the *same transaction* or *series of connected transactions*?” Say Lawsuit #1 and #2 both deal with the same car accident. If #1 only seeks money for property damage (fixing the car), and #2 later tries to seek money for

personal injury (medical bills), *claim preclusion* will bar #2. Because both claims arose from the same accident, the attorney *should have* raised them both in the original lawsuit. It is a “use it or lose it” rule: once the case is over, you cannot bring up new claims in a new lawsuit that should have been part of the first one.

ISSUE PRECLUSION

Issue Preclusion occurs when a final judgment on a specific issue prevents that same issue from being re-litigated in a later case. It is used when the current claim might be new, but the underlying fact or issue has already been decided in a previous proceeding. Note that this term supersedes the outdated, confusing term *collateral estoppel* (this was done during the same time as *res judicata* was replaced with “claim preclusion”). Using “Claim Preclusion” and “Issue Preclusion” makes it almost impossible to confuse the two because the name tells you what is being blocked

FOUR REQUIREMENTS

For an issue to be precluded, the following must be true:

1. *Valid and Final Judgment*: The first case must have reached a proper conclusion.
2. *Identical Issue*: The issue being raised now is exactly the same as the one in the first case.
3. *Essential to the Judgment*: The finding on that issue must have been necessary to the outcome of the first case (not just a passing remark by the judge).
4. *Actually Litigated*: The parties must have actually fought over the issue and had it decided by a judge or jury (a default judgment, for example, usually doesn’t count).

Example

Driver A and Driver B are in a car accident. Driver A sues Driver B for negligence and wins. B was found negligent.

Later, B sues the car manufacturer, claiming a product defect caused the crash. In this second suit, B is precluded from arguing that he didn't cause the wreck. The car manufacturer can use *issue preclusion* to prevent him from re-litigating his own negligence, since that specific issue was already decided in the first case.

TYPES OF LEGAL JUDGMENTS

I. PRETRIAL & CONSENT JUDGMENTS

Consent Judgment. A decision made by both parties that resolves a dispute through a settlement or agreement.

Confession of Judgment. The debtor acknowledges the debt is owed and executes a formal confession, which the creditor can then enter as a judgment. Often used alongside a structured payment plan.

Default Judgment. When a party fails to answer a complaint or show up in court, the judge may grant the appearing party the win by default.

Judgment on the Pleadings. If a defendant fails to deny the allegations in their Answer (or a letter response), the plaintiff can ask the judge to decide the case solely based on the Complaint and Answer. Because this skips the discovery phase, courts are very cautious before granting it. Let's say a plaintiff files a complaint alleging the defendant owes a specific \$10,000 debt. The defendant files an answer explicitly admitting they owe the full amount but simply cannot afford to pay. Since there are no disputed facts left to resolve through discovery or trial, the judge can grant judgment on the pleadings in favor of the plaintiff immediately.

Summary Judgment (Rule 56). Such is issued post-discovery if there is "no genuine dispute as to any material fact." The judge reviews the evidence (affidavits, depositions, etc.) and decides the case purely on the law. For example, say a plaintiff provides deposition testimony and bank records proving the defendant breached a contract. The defendant fails to produce any admissible evidence to contradict those facts. Because the evidence shows there is no "genuine dispute" for a jury to decide, the judge will grant SJ by applying the law to the undisputed facts. While a judge typically waits for a party to file a formal motion, they do have the authority to act on their own, known as *sua sponte* (Latin for "of its own accord"). The judge will issue a document called an Order to Show Cause.

II. JUDGMENTS DURING AND AFTER TRIAL

Judgment as a Matter of Law (JMOL). Formerly called a “Directed Verdict,” this is a motion for JMOL is made during trial. It claims the opposing party has provided insufficient evidence to reasonably support their case. It is granted only if a “reasonable person” could not differ as to the outcome.

Renewed Motion for JMOL (R-JMOL) (Formerly called Judgment Notwithstanding the Verdict, “JNOV”). This motion prompts a judge to overrule a jury’s verdict if there is no substantial evidence to support it. Crucial Rule: You must move for a JMOL during the trial to be eligible to move for an R-JMOL after the verdict.

Final Judgment. The court’s ultimate determination that finishes the litigation process and addresses all issues in the case.

Judgment of Acquittal. A ruling in which a judge releases the defendant after they are found “not guilty.”

III. SPECIALIZED RULINGS

Interlocutory Judgment. A partial or interim ruling on a specific point that does not end the entire case. These are often eligible for an “interlocutory appeal” while the rest of the case proceeds.

Injunction Judgment. A court order requiring a party to perform specific tasks or follow specified procedures (or stop doing something).

Declaratory Judgment. A ruling that simply establishes the rights, status, or legal duties of the parties without necessarily awarding damages or ordering an injunction. For example, a property owner files a lawsuit asking the court to officially interpret a confusing deed to confirm they have the exclusive legal right to use a shared driveway, regardless of whether a physical confrontation has occurred or money is owed.

Arbitration Award. When an arbitration award is converted into a formal court judgment, by process of a “confirmation hearing,” thereby giving the award the same enforcement power as a standard court order.

STANDARDS OF REVIEW FOR APPELLATE COURTS

The appellate court does not simply redo the entire trial. Instead, it reviews the lower court's decisions through specific "lenses" known as *standards of review*. These standards determine how much deference the appellate court will give to the trial judge or jury.

An appellate court does not "choose" which standard to use based on preference; the standard is automatically triggered by the nature of the issue being appealed. A single case on appeal often uses *multiple* standards of review because the appellant might be challenging three different things: a legal ruling, a factual finding, and an evidentiary decision.

The following are the standards of review:

DE NOVO REVIEW; QUESTIONS OF LAW

When the issue on appeal is whether the trial court applied the correct legal rule, the appellate court uses the De Novo standard. "De Novo" is Latin for "anew" or "from the beginning." Under this standard, the appellate court gives the trial court *no deference* at all. They review the legal issue as if it were being heard for the first time, ensuring that the final application of the law is correct without being tethered to a previous mistake.

THE CLEARLY ERRONEOUS STANDARD; QUESTIONS OF FACT

In a bench trial where a judge decides the facts, an appellate court will only overturn those findings if they are clearly erroneous. This is a *moderate* level of deference; even if the appellate judges might have reached a different conclusion, they will not set aside the trial court's findings unless they have a "*definite and firm conviction that a mistake has been committed.*"

THE SUBSTANTIAL EVIDENCE STANDARD; JURY VERDICTS

Appellate courts show even greater respect to the findings of a jury. Under the *substantial evidence* (or *reasonableness*) standard, the court asks if there was enough relevant evidence in the record for a “reasonable mind” to accept the jury’s conclusion. This requires more than a “mere scintilla” of evidence. If a reasonable person could have looked at the trial record and reached the same verdict, the appellate court will not disturb it.

ABUSE OF DISCRETION; MATTERS OF DISCRETION

Trial judges have a wide range of “discretionary” powers, such as deciding whether to admit a specific piece of evidence or whether to grant a motion. On appeal, these choices are reviewed for an *abuse of discretion*. This is a highly deferential standard. The appellate court will only intervene if the trial judge made a “*clear error of judgment*”—for example, admitting evidence that was far more prejudicial than it was helpful.

ARBITRARY AND CAPRICIOUS; ADMINISTRATIVE DECISIONS

When a case involves a decision made by a government agency rather than a court, the standard shifts to whether the agency’s action was *arbitrary and capricious*. This is an extremely deferential test that simply asks whether the agency *considered the relevant factors* and *stayed within the bounds of a reasoned judgment*.

HOW MANY ARE USED IN A SINGLE CASE?

Is there a limit? Can any combination be used? Absolutely. In a single appellate opinion, you will often see a “Standards of Review” section that includes three or four different “standards,” so it’s not just one they analyze the whole case with. The court apply De Novo when interpreting a statute. Next, they analyze the case through Abuse of Discretion to see if the judge should have let a certain expert testify. Finally, they might apply Clearly Erroneous to analyze the judge’s final calculation of damages. They aren’t overlapping or mixing; they are being applied separately, in layers.

One is enough to overturn. If an appellant challenges three different rulings under three different standards, they do not need to “win” on all of them to succeed. If the appellate court finds that the lower court failed *in just one applicable standard*, that is sufficient to vacate or reverse the judgment. For example, if the judge applied the law correctly (De Novo) but committed an “Abuse of Discretion” regarding a vital piece of evidence, then that single error will overturn the ruling. Because the error is considered harmful, one strike is all it takes.

THE “SILO” RULE¹

Think of each standard as a specific tool for a specific job. The court looks at the “Statement of Issues” in the appellant’s brief and categorizes each one:

- Is it a question of what the law says? The court must use De Novo.
- Is it a challenge to the judge’s version of the facts? They must use Clearly Erroneous.
- Is it a challenge to the jury’s version of the facts? They must use Substantial Evidence.
- Is it a challenge to a “call” the judge made (like a scheduling or evidentiary issue)? They must use Abuse of Discretion.

Order of Deference: Low to High

- Low Deference: De Novo (Law)
- Medium Deference: Clearly Erroneous (Judge’s Facts)

1 In a diversity case, the federal court must determine if a rule is Substantive (State) or Procedural (Federal). The “silo” metaphor helps one to categorize them.

Substantive. If the law defines the rights and duties of the people (like the elements of a contract or negligence), it stays in the State Silo.

Independent. The federal court must remain an independent procedural body.

Law. The choice of law must follow the state where the court sits.

Outcome-Determinative. This is the core of the Erie doctrine. If applying a federal rule instead of a state rule would significantly change the outcome of the litigation, the court should usually “silo” that issue under State law to prevent “forum shopping.”

- High Deference: Substantial Evidence (Jury's Facts)
- Highest Deference: Abuse of Discretion / Arbitrary & Capricious

DISTINGUISHING FACT-FINDING FROM DISCRETION

“Clearly Erroneous” and “Abuse of Discretion” can feel similar because they both involve a judge making a decision, but they apply to different types of “work” the judge does:

- Clearly Erroneous (Fact-Finding) is about perception. The judge is acting like a witness to the trial. They are deciding if the light was red or green. If the record shows the light was clearly green but the judge wrote “red” in the findings, that is clearly erroneous.
- Abuse of Discretion (Decision-Making) is about judgment. The judge is acting like a manager. They aren't deciding what happened; they are deciding what to allow. For example, “I know the light was green, but I'm not going to let this witness testify about it because they showed up two hours late to court.” The appellate court only steps in if that “managerial” decision was totally irrational.

TAKE NOTE: THE HARMLESS ERROR DOCTRINE

Even if an appellate court finds that a mistake was made, this does not automatically mean the case will be overturned. Under the Harmless Error Doctrine, if the mistake did not actually *affect the outcome of the trial* or result in *substantial injustice*, the original judgment will stand.

INTERSTATE COOPERATION: FULL FAITH AND CREDIT

Beyond these standards, the litigation process is held together by the Full Faith and Credit Clause² of the U.S. Constitution. This requires state courts to respect and

2 Article IV, Section 1: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” In simpler words: Every state must respect and honor the laws, official records,

enforce the judgments made by courts in other states. Similarly, state courts are required to treat federal judgments with the same weight and finality that those judgments would receive within the federal court system itself.

and court decisions of every other state. Congress has the power to set the rules for how these documents are verified and how much legal weight they carry across state lines.

Constitutional Law

THE FOURTEENTH AMENDMENT

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Ratified July 9, 1868

Often called the “Second Constitution,” this amendment fundamentally redefined the relationship between the individual and the state. It ensures that no state can treat its citizens as “second-class” or ignore the fundamental rights of the “peoplings of Earth.”

Core Clauses

- *Citizenship Clause.* Grants automatic citizenship to everyone born on U.S. soil (Birthright Citizenship). This prevents the government from stripping citizenship away unless it was obtained through fraud.
- *Privileges or Immunities Clause.* Ensures that “citizens of the United States” are protected from state laws that would interfere with fundamental rights of national citizenship. It reinforces that state residency cannot be used to diminish a person’s status as a U.S. citizen.

- *Due Process Clause*. Prohibits states from depriving anyone of “Life, Liberty, or Property” without a fair legal process. This is the “Liberty Clause” that supports unenumerated rights like privacy.
- *Equal Protection Clause*. Requires states to treat all people equally under the law. This was the primary legal tool used to end segregation and fight for civil rights.
- *The Enforcement Clause* (Section 5). “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” This permits Congress to pass laws (like the Civil Rights Act) to protect existing rights, but it does not allow them to expand the Constitution or create entirely new rights from scratch.

A Historical Note: The 14th Amendment effectively “incorporated” the Bill of Rights (the first ten amendments). Before this, a state could technically censor your speech or take your property without a trial because the 1st and 5th Amendments only applied to the Federal government. The 14th Amendment changed that forever, forcing every state to respect the same fundamental freedoms.

EQUAL PROTECTION CLASSIFICATIONS

The Constitution ensures that the government treats similarly situated people equally. When a law treats one group of people differently than another (disabled versus non-disabled), the courts apply one of three “Tiers of Scrutiny.” Think of these as different levels of a “legal microscope”: the higher the tier, the harder it is for the government to justify the law. By the way, these same exact tiers are used by the courts when analyzing the constitutionality of *laws affecting speech*, which I get to in a little bit later in this chapter.

1. SUSPECT CLASSIFICATIONS (STRICT SCRUTINY)

These classifications³ are race, national origin, religion, and alienage.⁴

Laws affecting these identities receive the most intense level of review. Under Strict Scrutiny, the law is “presumed unconstitutional,” and the government must prove the law is the *least restrictive way* to achieve a *compelling national interest*.

2. QUASI-SUSPECT CLASSIFICATIONS (INTERMEDIATE SCRUTINY)

These are gender (sex) and legitimacy.⁵ This is the middle level of review. Under Intermediate Scrutiny, the government must show that the law is substantially related to an important government goal.

3. NON-SUSPECT CLASSIFICATIONS (RATIONAL BASIS)

This is the default, most lenient level of review. Under Rational Basis, the law is “presumed constitutional,” and it will be upheld as long as the government has a plausible, rational reason for the distinction.

3 In legal writing, classification refers to the *action* the government is taking (grouping people), while identity refers to the *person* being affected. In a courtroom or a formal legal brief, “classification” is the technical term used in the 14th Amendment “Equal Protection” analysis. “The court looks at these protected identities to determine which legal classification the law falls into.”

4 Alienage means a person’s status as a non-citizen of the country in which they are residing. It is important to note that while the government can make some distinctions regarding citizenship at the federal level (like for voting or federal jobs), state and local laws that discriminate based on alienage are usually hit with Strict Scrutiny. This is because non-citizens are often considered a “discrete and insular minority” who cannot protect their own interests through the ballot box.

5 This refers to whether a person was born to married or unmarried parents. “Hey! Don’t call me no bastard!”

SPEECH IS LIMITED

Freedom of speech is a right that is limited to prevent *harmful* forms of speech. Remember, speech includes words *and* conduct. Even silent protestors⁶ and the pantomimes⁷ don't have immunity. The following categories of speech are not protected: Words that incite imminent lawless action, fighting words, true threats, defamation, fraud, and obscenity.

INCITEMENT TO IMMINENT LAWLESS ACTION

This includes violent and non-violent lawless action. An example of violent action: standing on someone's porch with a baseball bat, yelling "come out here so I can beat you up" would be considered likely to "incite imminent and unlawful violence." Such expressions (verbal in words, and the conduct of brandishing a baseball bat) would be considered assault in that scenario. Assault is a tort or crime involving intentionally acting in a way that puts someone in apprehension (reasonable fear) of imminent harmful or offensive contact, and where the victim is in fact in apprehension. Side note, American English uses "in fact" where British English uses "indeed."

An example of non-violent: a person standing before an angry crowd in front of a private office building and shouting, "The doors are unlocked; go inside right now and destroy the medical records," as this encourages immediate property crimes rather than physical violence.

In regard to propaganda of beliefs: merely seditious or subversive propaganda without "imminent unlawful violence" *is* protected speech. In *Texas v. Johnson* (1989), the Court held that burning the U.S. flag to express displeasure with

6 A protestor who stands wordlessly in the middle of a busy intersection during rush hour is "speaking" through their presence, but the government can constitutionally arrest them because their conduct violates "Time, Place, and Manner" restrictions by creating a public safety hazard.

7 A mime who follows a specific pedestrian for three blocks, mockingly mimicking their every move in an aggressive, "face-to-face" manner, could find their performance categorized as "fighting words" or "stalking," as the conduct is directed at an individual and is likely to provoke a reasonable person to violence.

government policies was “merely seditious” and thus could not be subjected to the “incitement of imminent, unlawful/lawless violence” doctrine or the “fighting words” doctrine.

FIGHTING WORDS

Expression that is so inherently inflammatory and directed at someone specific that they are likely to provoke an immediate physical fight. Waving your fist or a weapon at someone while saying “I am going to hit you” is exactly that. Basically “fighting words” are at the level of assault (putting others in reasonable fear of offensive bodily contact and harm).

The focus is on the potential for immediate violence as a direct result of the words themselves. Fighting words are typically delivered face-to-face to a specific individual. The immediate context of the encounter is critical. The words must be likely to provoke a violent reaction from the person to whom they are directed. The Supreme Court has narrowed the scope of the “fighting words” doctrine over time. The words must be directly aimed at an individual and likely to provoke an immediate violent response from a reasonable person in that situation.

Examples of Unprotected Fighting Words

- While standing inches away from another person, they say in your face “You are a pathetic, coward, and I’m going to spit in your face right now.” (This is a direct personal insult combined with a threat of offensive contact.)
- A person is walking along the sidewalk and someone comes walking up next to them, stops them and says “You’re trash. If you don’t fight me, I’ll beat you where you stand.” (The context of stopping someone and demanding a fight makes a violent response highly probable.)
- Driver A cuts off Driver B. At the stop light ahead, Driver B gets out, approaches Driver A’s window, and screams “I’m going to fucking kill you for that, you idiot!” (The proximity and the directness of the verbal assault at a specific person create a high risk of immediate violence.)

Examples of Protected Non-Fighting Words

- A protestor stands on a public sidewalk in front of an office building and holds a sign. They shout to a crowd of workers entering the building: “Every single one of you people working in this building is a corrupt pig!” (Because this is directed at a general group and involves political expression, it is protected speech, even if the employees find it insulting.)
- A person walks past a police officer and says to their face directly, “I hate every single cop in this town; you’re all useless.” (Even though this is to their face, the Supreme Court has held that “contemptuous” speech toward police often doesn’t count as fighting words because officers are expected to exercise higher restraint than the average citizen. In fact, it is generally constitutional to say “fuck you” to a police officer as long as the verbal expression is not accompanied by physical obstruction or threatening gestures. Not that one should, but just to illustrate the boundaries here.)
- After an argument in a store, a customer turns to walk away and yells back over their shoulder, “You’re an incompetent jerk and I hope this business fails!” (Because the speaker is moving away and the insult is a generalized expression of frustration rather than a face-to-face invitation to fight, it remains protected expression.)

These examples may be offensive, but they lack the specific “imminent violence” or “individualized target” requirements.

TRUE THREATS

Expression that conveys a serious intention to commit violence, causing fear in a specific target. The speaker doesn’t necessarily have to intend to carry out the threat. The focus is on the fear and intimidation caused to the recipient and the potential for violence. True threats are often directed at a specific individual or group. Hyperbole or jest are generally not considered true threats. The Supreme Court has ruled that the prosecution must show that the speaker had a subjective understanding that their

communication would be viewed as threatening violence, or at least acted recklessly in that regard.

DEFAMATION

A statement of fact that injures a third party's reputation. The tort of defamation includes libel (written statements) and slander (spoken statements). I break those down in the Torts chapter.

FRAUD

For the economy and private transactions to operate smoothly, there must be a baseline of communicative honesty. Therefore, the government maintains a compelling interest in policing "misleading commercial speech." In this context, the law distinguishes between "puffery," the harmless exaggerations of a salesman, and actionable fraud, which involves a knowing misrepresentation that a reasonable person would rely upon to their detriment. Ultimately, the Constitution protects your right to be wrong, but it does not grant you a license to profit from a lie. Let's distinguish legal puffery from illegal fraud.

LEGAL PUFFERY

These are considered "safe" exaggerations that are not legally binding because they cannot be objectively proven true or false.

- "The most comfortable shoes on the face of the Earth." (Subjective; comfort cannot be universally measured.)
- "Serving the world's best cup of coffee." (A classic matter of opinion that no reasonable consumer expects to be a verified fact.)
- "Our software will revolutionize the way you think about productivity." (Vague "corporate-speak" that makes no specific, measurable promise.)
- "The ultimate driving machine." (A lifestyle claim that doesn't guarantee specific mechanical performance.)

- “You’ll feel like a million bucks after one session in our spa.” (A figurative expression of a mood rather than a biological or financial guarantee.)

ILLEGAL FRAUD

These are actionable misrepresentations of material fact that are intended to deceive the consumer into a transaction.

- “These shoes are made of 100% genuine Italian leather.” (If they are actually synthetic material, this is a provable lie about the product’s physical composition.)
- “This coffee is certified organic and Fair Trade.” (These are legal designations; if the beans lack these certifications, the claim is fraudulent.)
- “Our software is guaranteed to reduce your server costs by exactly 25% within the first month.” (This is a specific, measurable, and objective promise of fact.)
- “This vehicle has never been in an accident and has only 10,000 miles on the engine.” (Falsifying a vehicle history report or rolling back an odometer is a textbook example of fraud.)
- “This spa treatment uses a FDA-approved chemical that is clinically proven to cure eczema.” (Claiming a medical “cure” or government approval that does not exist is illegal and dangerous.)

OBSCENITY (ob-sen-ity)

Extremely offensive sexual content that, when taken as a whole, appeals to shameful interests and lacks any serious literary, artistic, political, or scientific value. Note that “vulgar” refers to expression that is characterized by lewdness, profanity, or a lack of refined taste, typically offending contemporary standards of decency without necessarily reaching the specific legal threshold of obscenity. Note that in the eyes of the law, the “obscenity” category is reserved exclusively for sexual expression, meaning that even the most gruesome depictions of extreme violence or “gore” are generally not classified as obscene and must instead be regulated under separate, specific criminal statutes.

To be considered obscenity, all three criteria must be met:

1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
2. The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
3. The work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Adult-consenting pornography without any extreme nature is not considered obscene. However, it is considered “vulgar” and “indecent” because it depicts sexual matters in a way that offends traditional standards of modesty, therefore it is legally restricted as to Time, Place, and Manner laws (TP&M). For example, an individual cannot simply walk into a retail store and play pornography on their phone; such conduct violates TP&M restrictions and could subject them to charges of disorderly conduct or public indecency.

There are two types of pornography considered obscene:

1. Obscene adult pornography involving extreme abuse, violence, incest, bestiality, etc.
2. Child pornography (child is considered a “minor,” under the age of “majority,” which is 18 years old in most states). In general, child sexual abuse is still called child sexual abuse regardless of whether the child is an adolescent. The ages of the perpetrator and the victim can be factors in determining the severity of legal charges and penalties. The younger the child, the more severe the consequences.

TIME, PLACE, AND MANNER

If the speech is at the threshold of illegality, not quite making it over but close to it, then it would be constitutionally legal for the government to regulate it as to TP&M of its distribution. Hence the Parental Advisory label issued by the RIAA (Recording Industry Association of America).

One is not legally protected in saying absolutely anything, anywhere, anytime. It’s not an unlimited right.

FIRST AMENDMENT LAW ANALYSIS

In regard to laws or regulations that affect freedom of speech, the Supreme Court evaluates four pillars to determine whether such statutes are constitutionally supported. Note, this page is merely an overview; the following pages explain these terms in detail.

Step I Forum (Four Types, Environment): The legal classification of government property where speech occurs, including traditional public, designated public, limited public, and non-public forums, which dictates the level of control the state may exercise.

Step II Speech Classification (Three Tiers, Subject): The categorization of speech based on its level of protection, ranging from fully protected (political, religious, and artistic), to semi-protected (commercial or student speech), to unprotected (incitement to imminent lawless action, fighting words, true threats, defamation, fraud, and obscenity).

Step III Speech Law (Two Types, Action): The distinction between content-based regulations (targeting the message or viewpoint) and content-neutral regulations (targeting the time, place, or manner of the speech without regard to its substance, which must serve a *significant government interest*).

Step IV Judicial Review (Three Tiers, Standards of Review): The application of varying standards of scrutiny (strict scrutiny, intermediate scrutiny, or rational basis review) to determine if the government has met its legal burden to justify a restriction.

It moves from Forum (Environment) → to the Speech Classification (Subject) → to the Speech Laws (Action) → to Judicial Review (Standards of Review).

STEP I. FORUM (FOUR TYPES, ENVIRONMENT)

1. *Traditional Public Forums.* These are locations that have been devoted to assembly and debate “immemorially” and by long-standing tradition. For example, streets, sidewalks, and public parks. When analyzing laws that affect content of speech in these places (content-based restrictions), the courts use Strict Scrutiny. Example: A city cannot ban a group from holding a peaceful protest on a public sidewalk just because the city disagrees with the group’s political message.
2. *Designated Public Forums.* These are locations of public property that the government has intentionally opened for use by the public as a place for expressive activity. For example, a public university’s “free speech zone” or a municipal theater. The legal standard for content-based laws is strict scrutiny (the same as traditional forums). Example: A public university creates a “free speech plaza” for students to host rallies, it cannot then pick and choose which student clubs are allowed to use it based on their opinions.
3. *Limited Public Forums.* Locations opened by the state for a specific purpose, a specific group, or a limited range of topics. For example, a school board meeting or a university room reserved for student organizations. The legal standard is that “restrictions must be reasonable and viewpoint-neutral.” Example: A school board can legally limit the number or length of public comments, but they cannot allow praising comments while banning critiquing comments.
4. *Non-Public Forums.* Such is government-owned property that is not by tradition or designation a forum for public communication. Examples: Military bases, prisons, airport terminals, and internal school mail systems. Legal Standard: restrictions must be reasonable and viewpoint-neutral. For example, government can legally prohibit political campaigning inside a post office or on a military base to ensure the efficient operation of those facilities.

Note on Private Property: The First Amendment does not stop private individuals, businesses, or property owners from setting their own rules about what can be said on their premises. However, if the government passes a law restricting speech on private property (a law banning political signs in your front yard), courts apply “strict scrutiny” because the home is the most protected space for expression.

STEP II. SPEECH CLASSIFICATION (THREE TIERS, SUBJECT)

Fully Protected: Political, religious, and artistic speech.

Semi-protected: Commercial speech or student speech; student speech is semi-protected because schools may restrict expression that materially and substantially disrupts the educational environment.⁸

Unprotected: Incitement to imminent lawless action, fighting words, true threats, defamation, fraud, and obscenity.

8 A school may legally discipline a student for distributing leaflets during a final exam that encourage classmates to walk out of the classroom, as this directly interferes with the school’s ability to conduct its educational mission.

In *Tinker v. Des Moines* (1969), students wore black armbands to school to protest the Vietnam War. The school suspended them, fearing the armbands would cause trouble. However, the Supreme Court ruled in favor of the students because the armbands were a “silent, passive expression of opinion” and the school could not prove that the protest actually caused any material or substantial disruption to the school day.

In *Mahanoy Area School District v. B.L.* (2021), the Court ruled that a school could not punish a cheerleader for a vulgar Snapchat post made off-campus on the weekend, because her speech did not target specific individuals and failed to cause a “substantial disruption” inside the school building.

STEP III. SPEECH LAWS (TWO TYPES, ACTION)

CONTENT-BASED LAWS

These regulations target the substance of the speech, meaning the “message itself” or the specific words being used. Because they discriminate based on what is being said, they are subject to strict scrutiny and are rarely upheld. (Strict scrutiny means the government must prove the law is the *least restrictive way* to achieve a *compelling national interest*.)

EXAMPLE 1: A city ordinance that prohibits any person from displaying a sign that criticizes a specific political candidate or religious group.

EXAMPLE 2: A state law that bans the distribution of pamphlets specifically regarding the topic of labor unions while allowing pamphlets about other subjects.

EXAMPLE 3: A law that prohibits the publication of any book or article that depicts a specific historical event in a negative light.

CONTENT-NEUTRAL LAWS

These regulations focus on the Time, Place, and Manner (TPM) of the expression rather than the message. These laws regulate how, when, or where one expresses themselves and must be narrowly tailored to serve a significant government interest. Such laws are applied regardless of the substance or message of the expression and are held to Intermediate Scrutiny. (Intermediate Scrutiny means the law must be *substantially related* to an *important government goal* and *leave open other ways for people to communicate*.)

EXAMPLE 1: A municipal law that bans the use of amplified loudspeakers in residential neighborhoods between the hours of 11:00 p.m. and 7:00 a.m. to ensure public peace and quiet.

EXAMPLE 2: A regulation requiring all groups, regardless of their message, to obtain a permit 48 hours in advance before holding a parade that blocks city traffic.

EXAMPLE 3: A rule prohibiting the posting of any physical signs or “flyering” on utility poles to prevent litter and maintain the structural integrity of the equipment.

STEP IV. JUDICIAL REVIEW

(THREE TIERS, STANDARDS OF REVIEW)

These serve as the “litmus test” for constitutionality, determining how strictly a court will examine a government action.

TIER 1: STRICT SCRUTINY (THE HIGHEST HURDLE)

This applies when laws affect fundamental rights (such as Free Speech) or suspect classifications (race, religion, national origin, and alienage). The government must prove the law is *the least restrictive means necessary to achieve a compelling government interest*. Such interests have been national security, public health (quarantines), and protecting the integrity of elections. Artistic depiction of violence is protect speech (think *content*). That is distinguished from speech that “incites imminent lawless action,” “fighting words,” and “true threats” (think *context*).

In *Brown v. Entertainment Merchants Association* (2011), the Supreme Court struck down a California law banning the sale of violent video games (the protected free speech) to minors because the state failed to prove the law was the least restrictive way to protect children from harm. Lesser restrictive ways would be a Parental Advisory label, or what else?

This tier is incredibly difficult for the government to win against because fundamental rights and suspect classifications are held to the highest regard.

TIER 2: INTERMEDIATE SCRUTINY (THE MIDDLE GROUND)

This is for laws involving quasi-suspect classifications, primarily gender and illegitimacy, as well as content-neutral speech regulations (Time, Place, and Manner laws). The government must prove the law is *substantially related to an important government objective*. Such objectives include ensuring gender equality, maintaining public order, and promoting traffic safety.

In *United States v. Virginia* (1996), the Court struck down the Virginia Military Institute’s male-only admissions policy because the state could not provide an “exceedingly persuasive justification” for excluding women.

TIER 3: RATIONAL BASIS REVIEW (THE DEFAULT)

This applies to all other classifications not covered by the higher tiers, such as *age*, *disability*, and most *economic or social welfare legislation*. A law is presumed constitutional as long as it is *rationally related to a legitimate government interest*. Such interests include General public health and safety, consumer protection, and city zoning.

In *FCC v. Beach Communications, Inc.* (1993), the Court upheld a federal law that regulated large-scale cable facilities while exempting small systems that served only one building. The Court ruled this distinction was constitutional because there was a “rational” reason for it: the government wanted to avoid the massive administrative cost and burden of regulating thousands of small, private cable systems that didn’t use public rights-of-way.

HYPOTHETICAL

Let's examine a hypothetical scenario and determine if the law affecting speech is constitutional. A city council passes an ordinance titled "The Civic Peace Act." This law prohibits *any person from distributing pamphlets that "critique or disparage local government officials" within the specific confines of the City Hall lobby and the adjacent public sidewalk*. We will look at the four pillars of forum, classification, law type, and judicial review.

The first pillar requires identifying the Forum. In this case, the law affects two distinct environments: the public sidewalk and the City Hall lobby. The sidewalk is a Traditional Public Forum, a location historically devoted to assembly and debate. Conversely, the City Hall lobby is likely a Limited Public Forum, a space opened for the specific purpose of conducting municipal business. Because the sidewalk is a traditional forum, any attempt by the government to restrict the content of speech there faces *strict scrutiny*, whereas the lobby allows for restrictions that must be *"reasonable and viewpoint-neutral."*

The second pillar is Speech Classification. The pamphlets in question contain critiques of local government officials, which qualifies as "political speech." Under the law, such speech is considered Fully Protected expression, sitting at the highest tier of the subject-matter hierarchy. Unlike unprotected speech, such as "incitement to imminent lawless action" or "true threats," political criticism is one of the core interest the First Amendment was designed to protect. Therefore, the government cannot easily justify suppressing this message based on its subject alone.

The third pillar examines the nature of the Speech Law. The "Civic Peace Act" is a Content-Based Law because it specifically targets the substance of the message: it only bans pamphlets that "critique or disparage" officials. If the law simply banned *all leafleting* regardless of the message to prevent littering, that would be content-neutral. However, by picking and choosing which viewpoints are allowed based on the words used, the government has moved beyond regulating "Time, Place, and Manner" and into message discrimination.

The fourth pillar is the application of Judicial Review, specifically Strict Scrutiny. Because this law targets *fully protected political speech* in a *traditional public forum*

through a *content-based restriction*, the court must apply its highest “litmus test.” Under strict scrutiny, the city must prove the law is the *least restrictive means to achieve a compelling government interest*. While the city might claim an interest in “civic peace,” a total ban on critical pamphlets is *rarely the least restrictive way to maintain order*; less restrictive options exist such as anti-harassment ordinances.

The “Civic Peace Act” would likely be struck down as unconstitutional. By failing to respect the traditional forum of the sidewalk and discriminating against fully protected political content, the government cannot meet the “high hurdle” of strict scrutiny. The government is a neutral arbiter of the public square, not a censor of dissenting voices.

THE 5TH AMENDMENT

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a *grand jury*, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be *twice put in jeopardy* of life or limb; nor shall be compelled in any criminal case to be a *witness against himself*, nor be deprived of *life, liberty, or property*, without *due process of law*; nor shall private property be taken for *public use*, without just compensation.”

- *Grand jury*: Requirement for a formal indictment in federal capital or “infamous” crimes (does not necessarily apply to states).
- *Twice put in jeopardy*: Also called “double jeopardy,” a person cannot be tried twice for the same crime or occurrence. This also supports the Blockburger Test. Note: This does not prevent a civil lawsuit (liability) following a criminal trial (culpability).
- *Witness against himself*: You cannot be compelled to testify against yourself (also called self-incrimination). This is the basis for Miranda Rights. Be sure to invoke the right immediately: “I need to speak with my attorney before answering any questions.”
- *Life, liberty, or property* and *due process*: The government cannot take life, liberty, or property without a fair procedure (notice and a hearing).
- *Public use*: The government can take private property for public use but must pay just compensation. This is called the “takings” clause. A regulatory taking occurs if a government regulation is so restrictive it eliminates the investment-backed expectations or economic value of the property. Note: the government *may* take your property for various reasons, such as wartime necessities, interference with critical infrastructure, or to mitigate a public hazard. In all these cases, they are constitutionally required to pay you.

14TH AMENDMENT

“...No State shall make or enforce any law which shall *abridge the privileges or immunities* of citizens of the United States; nor shall any State *deprive any person of life, liberty, or property, without due process of law*; nor shall deny to any person within its jurisdiction the *equal protection of the laws*.”

The 14th Amendment is often called the “Second Constitution” because it extends the Bill of Rights to the state level through three primary clauses:

THE DUE PROCESS CLAUSE

“...nor shall any State *deprive any person of life, liberty, or property, without due process of law...*”

This is the vehicle for “incorporation,” the legal process that forces state and local governments to honor the fundamental rights listed in the federal Bill of Rights. Let’s look at the “magic.” The Supreme Court interpreted the word “LIBERTY” to automatically include the core protections of the Bill of Rights, thus they are binded to the states through this amendment. If State X passes a law completely banning citizens from owning firearms, the federal courts will strike it down. Under the due process clause, the Second Amendment is “incorporated” and binding on State X, meaning if state tries to deprive Person A of their liberty to own a weapon, that’s a violating the U.S. Constitution.

This clause also protects substantive due process:⁹ the word “LAW” implies an inherent standard of justice, meaning an arbitrary, tyrannical, or unconstitutional

9 The exact phrase “Due Process” appears twice because the 5th Amendment stops the federal government from violating your rights, while the 14th Amendment stops state and local governments from doing so. Under both amendments, the protection is split into two simple categories:

Procedural Due Process (The How): The government must use a fair playbook, giving you notice and a fair trial, before taking your *life, liberty, or property*.

Substantive Due Process (The What): The substance of the law itself must be fair. Certain fundamental rights (like privacy or travel) are so deeply rooted that the government cannot pass a law where “the substance” essentially takes them away, no matter how “fair” their court procedures are.

statute is not considered a valid “law” even if it was passed using the correct legal procedures.

THE EQUAL PROTECTION CLAUSE

“...nor shall any State deny to any person within its jurisdiction the *equal protection of the laws*.”

This mandates that the law must treat similarly situated people in a similar manner, regardless of identities. A state law cannot discriminate based on a protected identity pillar (race, ethnicity, national origin, class, gender, sexual orientation, disability, religion, or age).

State Y passes a statute charging higher licensing fees to female business owners than male business owners. A person here can sue the state. The Equal Protection Clause forces the state to justify why it is treating citizens differently based on gender, usually resulting in the law being declared unconstitutional. While sovereign immunity prevents citizens from suing a state for money damages, it does not prevent them from suing state officials to completely strike down an unconstitutional law.

THE PRIVILEGES OR IMMUNITIES CLAUSE

“No State shall make or enforce any law which shall *abridge the privileges or immunities of citizens of the United States...*”

States cannot interfere with the rights that come with national citizenship, such as the right to travel between states or to petition the federal government. If State Z attempts to impose a high financial “entry tax” on any American citizen traveling or migrating across its borders, it would be struck down as unconstitutional. Any citizen has an absolute right to travel freely between states without state interference.

THE BIG PICTURE: “INCORPORATION”

Through these clauses, the 14th Amendment ensures that the “Liberty” promised in the Constitution is a universal national standard, regardless the state you live in.

Before this amendment was ratified, the Bill of Rights only applied to the federal government. Back then, a local state could legally censor your speech or deny you a

jury trial. The 14th Amendment changed the game by “incorporating” those federal protections, making them permanently binding on every state, city, and local official in the country.

God Bless America!

Criminal Law

HOMICIDE: COMMON LAW

Under Common Law, Homicide is the “big tent,” and it is divided into two main rooms: Murder (Killings with Malice) and Manslaughter (Killings without Malice).

Common law homicide¹⁰ is based on historical court decisions rather than modern codes or statutes. It typically defines murder as: “The unlawful killing of a human being committed with malice aforethought.”

10 Two words will always be two words. Just like a couple is still two people. If the dictionary has varying synonyms, they may have overlap, but they are not the exact same thing. If they were the exact same thing, denotation and connotation-wise, it would have been extinguished.

- *Killing* is the physical act; the “general” or “layman’s” language.
- *Homicide* is the formal legal term for “causing the death of another.” A homicide can be intentional and premeditated, intentional but not premeditated, or even justifiable (such as self-defense). Both Common Law and the MPC use homicide as the foundational category for *all* killings.

Application: When we discuss common law, we use the term *homicide* for the act and murder only when malice is proven. When we discuss the MPC, we use *criminal homicide* as the umbrella term, which is then categorized by degrees of culpability (murder, manslaughter, or negligent homicide).

- *Murder* in common law is the specific label for any unlawful killing with malice aforethought. In the MPC, we move away from “malice” and instead use degrees to categorize the severity of the homicide.

Under this framework, there are four distinct types of “malice” that can sustain a murder conviction, presented from highest to lowest. Note, all four of these include “malice aforethought.”

I. MURDER (WITH MALICE, FOUR TYPES)

INTENT TO KILL (EXPRESS MALICE)

This is the most straightforward form of malice, often referred to as “Express Malice.” The defendant acts with the specific purpose of ending a human life. *This became first-degree murder.*

INTENT TO INFLICT SERIOUS BODILY HARM (IMPLIED MALICE)

“You wanted to hurt them badly, but maybe not kill them.” Even if the defendant did not specifically intend for the victim to die, they possess the required malice if they intended to cause a “grievous” or “serious” bodily harm that ultimately resulted in death. *Typically graded as second-degree murder.*”

ABANDONED, MALIGNANT, OR DEPRAVED HEART (IMPLIED MALICE)

“You didn’t necessarily want to kill a specific person, but you didn’t care if someone died.” This is “extreme recklessness that is indifferent to the value of human life.” The defendant does not necessarily intend to kill per se, but they act with such extreme disregard for a “substantial and unjustifiable risk” to others that the law treats it as murder. Remember the phrase “extreme recklessness” and you should be good. Example: Firing a gun into a crowd from far away “just for fun,” or driving a car at 100 mph through a playground. *This became second-degree murder.*

FELONY MURDER RULE (IMPLIED MALICE)

The “Legal Fiction” category. Here, intent is irrelevant because the underlying crime was dangerous. This Rule is a legal doctrine that holds a defendant liable for murder

if a death occurs during the commission of an “inherently dangerous felony.” Such felonies traditionally include: burglary, arson, robbery, rape, and kidnapping (BARRK).

Under this rule, it does not matter if the perpetrators had no intention for anyone to die. For example, if two people rob a bank and drive away, and a police officer fires shots at the vehicle’s tires but misses and hits a pedestrian who later dies, the robbers are liable. Because the death occurred as a direct result of their violent felony, they would be charged with Felony Murder and could face life in prison. *This became first-degree murder.*

II. MANSLAUGHTER (WITHOUT MALICE)

If the killing is unlawful but the defendant did not act with malice aforethought, Common Law categorizes it as Manslaughter:

- Voluntary Manslaughter: Often called the “Heat of Passion” killing. This is an intentional killing triggered by adequate provocation (something that would cause a reasonable person to lose self-control) before the defendant had a “cooling-off period.”
- Involuntary Manslaughter: A killing caused by criminal negligence or while committing a “malum in se” misdemeanor (the Misdemeanor-Manslaughter Rule). Think of this as the “unintentional” bucket where the recklessness wasn’t quite “depraved” enough to be murder.

TRANSITIONING FROM COMMON LAW TO THE MODEL PENAL CODE

The common law approach is why we still hear the term “malice” used in modern courtrooms. Even though the majority of states have moved toward the MPC, these four categories of malice remain the “ancestors” of our modern laws on murder. On the NextGen Bar Exam, for questions that ask if a crime is murder or manslaughter, memorizing these traditional definitions is essential.

Common law murder serves as the “raw material” that modern statutes. Cold-blooded premeditative murder (intent to kill) or deaths occurring during “inherently dangerous felonies” (BARRK) became first-degree murder.

Intent to inflict serious bodily harm or *depraved heart murder* translate to second-degree murder.

For questions about culpability and pinpointing the exact mental state, memorize and use the following MPC definitions (Purposely, Knowingly, Recklessly, Negligently). For example, if a question asks whether a defendant acted “recklessly” by firing a celebratory shot into the air, you are being tested on whether they consciously ignored a known risk. The answer here would be *reckless* because they knew the danger but fired anyway ... a form of “conscious disregard.” The answer would only be *negligent* if they truly didn’t realize the risk, though society’s standards and common sense dictate that firing a gun at any point always carries a known danger.

If a question is asking what “grading” or “degree” should be, you will thus need to know the common law foundations and where they fit: *intent to kill* and *felony murder* translate to first-degree murder. *Intent to inflict serious bodily harm* and *abandoned, malignant, or depraved heart* translate to second-degree murder. While Common Law gives us voluntary and involuntary manslaughter, the MPC simplifies these into manslaughter and negligent homicide.

HOMICIDE: MPC

Homicide is broad legal category defined as conduct which causes the death of a person. Depending on the level of intent and the circumstances, it is divided into several degrees of severity, beginning with the most serious.

FIRST-DEGREE MURDER

The most severe form of homicide is first-degree murder, which involves the intentional, premeditated, deliberate, unlawful killing of another person. Some legal definitions use the phrase “with malice aforethought” instead of premeditated.

In many modern state statutes (reflecting MPC § 210.2), this is defined as “purposely or knowingly causing the death of another person after deliberation upon the matter.”

Deliberation is defined as “cool reflection” for any length of time, no matter how brief. However, if the reaction is an “instant reaction,” such time would be considered too brief and not enough for deliberation, thus making the charge second-degree murder.

Sentencing: Generally, a minimum term of 30 years without parole eligibility.

SECOND-DEGREE MURDER

Moving down the scale of culpability, second-degree murder involves an intentional, unpremeditated killing of another person that is not provoked. This differs from first-degree murder because the intent is formed in the moment rather than through prior reflection.

A defendant in this category might think: “I just decided then and there, I am going to kill them.”

Sentencing: Often carries a sentence of 15 to 30 years, though specifics vary by state.

VOLUNTARY MANSLAUGHTER

In cases where there is intent but also an emotional catalyst, the charge may be reduced to voluntary manslaughter. This is the intentional, unpremeditated killing of another person resulting from a disturbed state of mind, or “heat of passion.” Distinguished from second-degree murder, voluntary manslaughter is a lesser charge reserved for impulsive (unpremeditated) killings that are provoked by “adequate provocation.”

Example: A person comes home to find their spouse engaged in sex with another person.

Additionally, a person who kills another may be charged with voluntary manslaughter if they were the original attacker in the situation but loses their right to self-defense because they escalated the conflict. This can occur in a bar fight where one person defends themselves with deadly force against non-deadly force, resulting in another’s death.

Sentencing: Typically results in 15 years to life. Under the “85% Rule” used in many jurisdictions, 85% of the sentence must be served before parole eligibility.

INVOLUNTARY MANSLAUGHTER

When a death is caused without any intent to kill, it falls under involuntary manslaughter. This is the unintentional killing of another person through an act of recklessness that shows indifference to the lives and safety of others, or an act of negligence that could reasonably be foreseen to result in death. The act that results in death may be intentional, such as pushing somebody in anger, but their death (such as by their subsequently falling, striking their head, and suffering a lethal head injury) may not have been.

Drunk driving and killing someone as a result is a primary example of involuntary manslaughter. However, some states have a specific “vehicular manslaughter” statute defined as “causing the death of a human being due to illegal driving of an automobile.” This definition includes acts of drunk driving, speeding, reckless driving, and gross negligence.

Sentencing: Typically, five to ten years in prison, also subject to 85% required time before parole eligibility.

CRIMINALLY NEGLIGENT HOMICIDE

Finally, some states recognize criminally negligent homicide, which some jurisdictions refer to as “reckless manslaughter.” While manslaughter is the unintentional killing through recklessness, this charge is purely based on negligence.

The perpetrator’s actions were not necessarily reckless or intentional, but they “fail to exercise the level of care that a reasonable person would in a similar situation” (the definition of negligence found in MPC § 2.02), and as a result, their actions caused the death of the victim. For example, seeing someone overdosed or comatose and knowing they took drugs, but not calling an ambulance would be criminally negligent homicide if a legal duty to act existed. For example, some legal theorists point to the controversial circumstances surrounding Marilyn Monroe’s death; they argue that if individuals present at the scene failed to seek immediate medical treatment for a known overdose, those actions could theoretically meet the standard for criminally negligent homicide.

Sentencing: Generally five to ten years.

Evidence

PHYSICAL OBJECTS, GRAND JURIES, CIVIL COURT, AND PAROLE HEARINGS

Beyond the seven primary exceptions, it is important to distinguish between the exclusion of testimony and the exclusion of physical objects. Under *United States v. Patane* (2004), the “fruit of the poisonous tree” doctrine does not apply to physical evidence discovered as a result of voluntary statements made without Miranda warnings; only the statements themselves are suppressed. Say a person is arrested and before being Mirandized, voluntarily tells police, “The stolen laptop is in my trunk.” The man’s statement is excluded, but the physical laptop found in the trunk is admissible as evidence. The Court’s logic is that while the law protects your right to keep your mouth shut, it won’t “pretend” a physical object doesn’t exist just because you decided to open it. So the statement is excluded, the but discovered evidence is admitted.

Remember, grand jury hearings are permitted to consider illegally obtained evidence, as established in *United States v. Calandra* (1974), since indictment rulings are considered “lower stake”: they are not final judgments of guilt, but rather a determination of whether there is enough probable cause to pursue prosecution.

Last but not least, the Exclusionary Rule generally does not apply in civil proceedings or parole revocation hearings because the judiciary in these situations would rather show the truth despite police misconduct. For example, consider a parolee whose home is searched by officers without the requisite RAS, resulting in the discovery of an illegal firearm. The judge would likely invoke the Exclusionary

Rule to suppress that weapon in a new criminal prosecution, but the rule offers no protection at a parole revocation hearing. Because the Board's primary concern is the parolee's suitability for reintegration into society, they are permitted to consider the illegally seized gun as evidence. The court is balancing: deter police misconduct, but also ensure reliable evidence is admitted. In the eyes of the Court, the deterrent effect is strongest in a criminal trial stage because the officer's primary goal is a conviction. But for a civil case or parole hearing, the "deterrent" benefit is considered too "marginal" to justify the cost of hiding the truth. *See Pennsylvania Board of Probation and Parole v. Scott* (1998).

PROFESSIONAL AND PERSONAL PRIVILEGES

Privileges protect the sanctity of specific relationships where "full and frank" communication is necessary for the relationship to function.

ATTORNEY-CLIENT PRIVILEGE

This protects confidential communications between an attorney and a client for the purpose of seeking legal advice. It is held by the client and lasts forever, even after death. The justice system only works if clients can tell their lawyers the absolute truth, including the "bad facts," so the lawyer can provide an effective defense. Let's say a client emails her lawyer a secret list of illegal company accounts to prepare for a tax audit. The prosecution cannot subpoena that email because it was a confidential communication for legal services.

The Crime or Fraud Exception: If a client seeks an attorney's help to plan or commit either a future crime or a fraudulent act, the attorney-client privilege is completely destroyed. Say they tell a lawyer, "I'm going to rob a bank tomorrow and I need you to help me hide the money," the privilege does not attach because it is being used to facilitate an ongoing or future offense. At that point, the attorney can notify law enforcement with indemnity.

PHYSICIAN-PATIENT & PSYCHOTHERAPIST PRIVILEGE

Not a federal rule, but most states recognize such. The rationale here is that to get healthy, patients must be honest about their symptoms, drug use, or mental state. If patients feared their doctor would be forced to testify against them, they might hide life-saving information. For example, an ER patient can safely admit to illegal drug use so the doctor can treat an overdose properly without worrying that the doctor will be subpoenaed to testify about that admission at a criminal trial.

Such privilege is almost always waived if a patient files a lawsuit against their doctor claiming they were injured, because they have put their own physical health “at issue.” For example, if a patient sues their surgeon for a botched knee surgery, they cannot use the privilege to block that surgeon from introducing the patient’s medical records to prove the knee was already permanently damaged before the operation. This waiver exists because the law prevents a plaintiff from using privilege as a “shield” to hide pre-existing conditions or medical truths while using the lawsuit as a “sword” to demand money for those exact injuries. For example, please add a one sentence example.

The Psychotherapist Rule: Federal law strongly protects confidential talks between a patient and a therapist for mental health treatment. For example, a man tells his therapist about his deep-seated anger issues. Those records are privileged. However, if that man sues someone for causing him “emotional distress,” he usually must hand over his therapy records if requested by the defendant so the defense can see if his anger existed before the incident. The defense will discover the therapist’s existence because the plaintiff is legally required to disclose all treating healthcare providers under oath during the mandatory interrogatories, depositions, and insurance record requests of the pretrial discovery phase.

MARITAL PRIVILEGES

I. MARITAL COMMUNICATIONS PRIVILEGE

This protects communications made between spouses in confidence during the marriage. For example, if a person privately confesses to their spouse at home that they embezzled money from their employer, that conversation is completely privileged and cannot be introduced at trial.

The protection survives even after the marriage ends (divorce or death), provided the communication occurred while they were married. Both spouses hold this privilege. This means one spouse can prevent the other from revealing a confidential secret.

Note however if a spouse reveals the information to a third party, the communication is no longer considered confidential, and the privilege is waived. It must remain a secret shared only between the two.

II. SPOUSAL IMMUNITY

This is the right of a witness-spouse to refuse to testify against their current spouse in a criminal case. For example, if a person is on trial for bank robbery, their spouse can take the stand and *completely refuse* to testify about anything they saw the defendant do, and the judge cannot hold the witness-spouse in contempt for declining.

Note, this privilege only exists while the marriage is legally intact. Once a couple is divorced, the immunity ends, and the spouse can be compelled to testify or held in contempt.

Note, “spousal immunity” protects the witness-spouse if they choose NOT to testify. If they DO choose to testify, they cannot be prevented by the defendant-spouse. For example, suppose Spouse A is on trial for running an illegal gambling ring. In one scenario, let’s say Spouse B refuses to testify; Spouse B is protected by “spousal immunity” and cannot be held in contempt by the court. Conversely, if Spouse B decides to testify against them, Spouse A cannot invoke the privilege to stop Spouse B from talking.

EXCEPTIONS TO BOTH RULES

Neither protection applies if the spouses are suing one another (civil litigation), or if one spouse is charged with a crime against the other spouse or their children. For example:

- If one spouse sues the other for breach of contract over a disputed business partnership, neither partner can invoke spousal privileges to refuse to testify or to block confidential marital communications from being introduced at the trial.
- If a parent is prosecuted for assaulting their child, the other parent can be forced to testify against them by the prosecution, and neither spouse can use spousal immunity or marital communications to block that testimony.

Property Law

TYPES OF FREEHOLD ESTATES

Freehold estates are categorized by duration and conditions attached.

A. FEE SIMPLE ABSOLUTE

This is the greatest interest in real estate (subordinate to the state's sovereign authority, that is). The owner has the exclusive right to use, possess, dispose of, and alter the property. Unless the owner specifically conveys it to someone else, this ownership lasts forever and passes to the owner's heirs upon death. Note that one can have a Fee Simple Absolute even with a mortgage; the bank simply holds a security interest that can only be enforced via foreclosure. One may still transfer the property to their heirs upon death, though they will inherit the property subject to the remaining mortgage debt. The language will be very simple: "To John Doe and his heirs."

If you look at the real estate market today, 95% of the transactions you will ever encounter involve a simple Fee Simple Absolute. It is the standard, boring, and stable form of ownership. Defeasible fees and Life Estates are relics of an older era; they are statistically rare and usually only appear in specialized contexts, like historical land grants, complex family trusts, or specific non-profit arrangements. In the modern world, they are the exception, not the rule.

B. FEE SIMPLE DEFEASIBLE

This category is interest in land that can be terminated or “defeated” based on the occurrence (or non-occurrence) of specific condition(s). There are three main types:

I. Fee Simple *Determinable*

Here, ownership automatically terminates upon the occurrence of a specified condition, causing the title to revert to the grantor instantly. Look for durational language such as “*so long as*,” “*until*,” or “*while*.” For example: “To the local library, so long as the property is used as a reading room.”

The future interest held by the grantor is called the “Possibility of Reverter,” (shorthand is “Reverter”) because the title would *revert automatically* back to the grantor upon the breach of the condition. Therefore, the grantor’s potential interest often makes the grantee’s title “unmarketable.” Attorneys, banks, and title companies use the term “unmarketable title” as a formal legal status to describe a property with a defect that would cause a reasonable, prudent buyer to refuse the deal.

“Unmarketable” does not mean “impossible to sell or transfer”; it is a term of art used by attorneys, banks, and title companies as a formal legal status to describe property that has “defects that would cause a reasonable, prudent buyer to refuse the deal,” or in simpler terms, “conditions” that might scare away a bank or a prospective buyer.

II. Fee Simple *Subject to Condition Subsequent*

Here, when or if a condition occurs, ownership does not end and revert *automatically* like with Fee Simple Determinable. Instead, the grantor *has the option* to exercise a “Right of Entry” (also called a “Power of Termination”) to take the property back. Look for conditional language like “*but if*,” “*on the condition that*,” or “*provided that*.” For example: “To the local library, but if the property is used for anything other than a reading room, the grantor shall have the right to re-enter and retake the premises.”

III. Fee Simple *Subject to Executory Limitation or Interest*

Here, ownership ends upon the happening of an event, and the future interest automatically vests *in a third party* rather than back to the grantor. Remember this as the only one where a third party gets the land, rather than it going back to the grantor.

A. Fee Simple Subject to Executory Limitation

“To John Doe, provided that the land remains a residential lot, then to Jane Smith if it is ever rezoned for business.” This focuses on the specific event that cuts off the interest (The “Triggering Event”).

B. Fee Simple Subject to Executory Interest

“To John Doe, so long as the land is used as a garden, then to Jane Smith” (Shifting Executory Interest).

“To Jane Smith, provided she graduates from law school” (Springing Executory Interest: the interest “springs” out of the grantor at a later date, triggered by a condition).

I’m witchu fam. It all sounds very similar. So how do we slice with precision? The bottom line is simple: If a property grant names a third person to get the land instead of the grantor, it’s an executory interest. If the main person breaks the rules, the property does not go back to the original owner but rather goes straight to that third person.

- “Limitation”: This is just the rule you have to follow (the “if... then...” part).
- “Interest”: This is the actual right that the third person has to take the land (the Plan B person).

The limitation is the rule written in the deed; the interest is the power the third person gets to take the land once that rule is broken. Sometimes, a lawyer will add both, essentially defining the rule (Limitation) and the consequence (Interest) in the same breath. “To John Doe, so long as the property is used as a residence (Limitation), and if it ceases to be so used, then to Jane Smith (Interest).”

Real-World Note: You will never see a real-world deed explicitly label the interest as “Fee Simple Subject to Executory Limitation,” or “Interest; Shifting or Springing,”

because those are purely academic labels used by law professors and bar examiners to categorize the effect of the language. In practice, a deed simply uses the “if... then...” logic, and it is up to the lawyer to translate that text into those specific categories based on who gets the property and when. I don’t think that’s proper; it creates potential ambiguity, but it is what it is. If you are a lawyer, I suggest drafting it explicitly if permissible.

C. LIFE ESTATE

This is created where a deed gives the property to a person “for life” and identifies what should happen to it *after that person dies*.

For example: A deed stating that land goes “to John Doe for life, then to Jane Doe.” John Doe has a valid *life estate*. He may use the land during his lifetime and even sell his interest to a third party. He is considered a “Life Tenant.” The remainder interest belongs to Jane. Even if John sold his interest to a third party, that party’s rights end the moment John dies, and they must surrender the property to Jane.

PRESENT VS. FUTURE INTERESTS

In property law, ownership is often split across time. A person can own a right to the land today, or they may own a guaranteed right to the land in the future.

Possessory Estate Holder. This individual holds the *present* right to possess and use the property. They are the person currently “on the land.”

Future Interest Holder. This person holds a *presently owned right* to possess the property in the future. It is a future interest presently owned. While they cannot move in *yet*, their interest is merely a legally protected piece of “property” they own now. They can sell, gift, or devise this “future interest” now, before they have the right to step foot on the acreage.

TYPES OF FUTURE INTERESTS

INTERESTS RETAINED BY THE GRANTOR

If the grantor (the original owner) transfers the property but keeps a “future interest,” the property is destined to return to them (or their heirs). There are three primary ways the grantor retains an interest:

Reversion. In a *Life Estate* transfer, the grantor transfers an estate of lesser duration than what they have. Same with an estate transfer for a term of years (called a lease). When the life estate ends or the lease expires, the property “reverts” back to the grantor automatically.

Possibility of Reverter. In a *Fee Simple Determinable*, if the specific condition is met, then the ownership terminates and the property automatically *reverts* to the grantor.

Right of Entry (Power of Termination). In a *Fee Simple Subject to Condition Subsequent*, if the condition is broken, the grantor then has the option to retake the property. Note: just like with most other legal principles, this right does not authorize self-help. The grantor must invoke the court system to formally regain possession. Attempting to retake the property through self-help can lead to significant civil liability or, in cases involving a breach of the peace, potential criminal charges.

INTERESTS HELD BY THIRD PARTIES

If the grantor arranges for the property to go to someone else after the present estate ends, that third party holds one of two interests:

Remainder interest (Life Estate, or term of years/lease): A future interest that becomes possessory immediately upon the “natural” expiration of the prior estate (like the death of a life tenant). “To John for life, then to Jane.” Jane holds the *remainder* interest, which becomes possessory immediately upon John’s death. Note that Jane can sell, gift, or devise her “present interest” (also called a “vested future interest”) before her “possessory right” comes into effect (when John dies).

Executory interest (Fee Simple Subject to Executory Limitation/Interest): A future interest that “cuts short” the prior estate before its natural end because a condition was triggered. “To X, provided that the land is used for a park, then to Y if it stops being used for a park.” In this case, Y holds the executory interest.

STUDY GUIDE FOR FUTURE INTEREST

On the NextGen Bar Exam, it is very unlikely you will be asked to define these terms in the abstract. Instead, you will be given a fact pattern, usually a deed or a will, and asked: “Who holds the present interest?” or “What is the nature of the interest held by X?” This might appear in a multiple-choice question with more than four options, or as part of an integrated question set where you must apply the law to a specific, messy family or business dispute. The following outlines the “magic” or “trigger” words you should know so that you can identify it quickly.

FEE SIMPLE ABSOLUTE

“To John Doe and his heirs.”

“And his heirs” is “standardized” (and arguably sexist) legal shorthand commonly understood to mean a Fee Simple Absolute transfer. In practice, real-world transfer documents *do not* explicitly label the interest as a “Fee Simple Absolute.” This to me is concerning. It seems it would be logical to identify the document based on the transfer type, to avoid any possible ambiguity. But the tradition in law is to use these “words of limitations.” Why risk it? Throw in a verbal biscuit. Take your words and twist it before I fix it. With your chick that I’m quick wit.

I believe in clarity over “tradition” any day. Today, almost every U.S. state has passed “presumption of fee simple” statutes. These laws state that if a deed is silent on the duration, it is automatically assumed to be a fee simple absolute. Consequently, modern drafters often just say “to John Doe,” and the law fills in the “absolute” part. I’d rather not let the law “fill in” and “hope” people “know.” If you want to join me, then be explicit. It can’t hurt to be crystal clear, but it does hurt to smoke crystal meth.

FEE SIMPLE DEFEASIBLES (Determinable, Condition Subsequent, and Executory Interest)

FEE SIMPLE DETERMINABLE

“To John Doe, *so long* as the property is used as a library.”

“To John Doe, *until* the property is used for commercial purposes.”

“To John Doe, *while* the property is maintained as a public park.”

The future interest held by the grantor is Possibility of Reverter (also called “Reverter” as shorthand). Another critic: I feel like such language *should be required to* explicitly say who has the future interest, to avoid any ambiguity or misunderstanding. If I was the lawyer drafting, I would be sure to explicitly state this intent.

FEE SIMPLE SUBJECT TO CONDITION SUBSEQUENT

“To John Doe, *but if* the property is used for non-residential purposes, the grantor shall have the right to re-enter and re-possess the premises.”

“To John Doe, *on the condition* that no alcohol is sold on the premises; if alcohol is sold, the grantor reserves the right to re-enter.”

“To John Doe, *provided that* the land remains a nature preserve; if it does not, the grantor retains the right of re-entry.”

The grantor has the option to exercise a “Right of Entry” (also called a “Power of Termination”). Again, if I was the lawyer drafting, I would be sure to explicitly state this intent.

FEE SIMPLE SUBJECT TO EXECUTORY INTEREST OR LIMITATION

“To John Doe, but if the land is ever used for commercial purposes, then to Jane Smith.”

This is the only “defeasible” fee that bypasses the grantor entirely. If John Doe breaches the condition, the interest in Jane Smith “divests” John Doe’s interest automatically.

LIFE ESTATE

“To John Doe for life.”

In this construction, because no further interest is specified, the property will automatically revert to the grantor (or the grantor’s estate) upon the death of John Doe. When the life tenant dies, the property must go somewhere. If it goes back to the grantor, it is a Reversion. If the grantor specifies that it goes to a third party upon the tenant’s death, that third party holds a Remainder. Again, rather than being silent on who it goes back to, I think lawyers should be explicit as to the future interest. We shouldn’t “hope” it gets understood.

THE RULE AGAINST PERPETUITIES (RAP)

RAP is perhaps the most famous, and most feared, rule in property law. It is designed to ensure that land remains alienable (sellable) and to prevent “dead hand control,” where a grantor attempts to control the ownership of property for centuries after their death.

THE RULE: “No interest in land is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”

WHAT DOES “VESTING” MEAN?

A right or interest in property “vests” when it becomes certain to happen and the person who will receive it is identified. It is not just about having a name in a document; it is about the moment the interest is no longer speculative.

UNDERSTANDING THE “LIFE IN BEING”

The term “life in being” refers to any person who is alive at the very moment the interest is created (the moment the deed is delivered or the person who wrote the will dies). This can be the grantor, the grantee, or even a “measuring life,” someone mentioned in the document who has an impact on when the property vests.

Think of a “life in being” as a human stopwatch. The law uses these living people to tether property control to a single generation. Once the last person alive at the time of the grant dies, the 21-year countdown begins.

LIFE IN BEING + 21 YEARS

Under the Rule, specific future interests (specifically Remainders and Executory Interests) are valid only if they must vest or fail by the end of a “life in being” (someone alive at the time the interest was created) plus 21 years. If there is any mathematical possibility, no matter how unlikely, that the interest could vest after that period, the interest is void from the start.

EXAMPLE A

A 19th century business tycoon drafts a deed that grants his sprawling estate “to my great-great-great-grandchildren, but only if they are still practicing the pipe organ.”

Without RAP, this “Dead Hand” could reach out from the 19th century to freeze the property’s title for two hundred years, preventing anyone from selling the land, developing it, or using it as collateral for a loan. RAP was created to put a stop (life in being, plus 21 years) to scenarios where a long-deceased person could dictate the specific hobbies or life choices of descendants he never met.

EXAMPLE B

Damion, a wealthy landowner, drafts a deed conveying their family estate “to my grandchildren who graduate from law school.” At the time of the deed, Damion has two toddler-aged children but no grandchildren.

The “class” of grandchildren is still “open.” Damion’s children could have a child long after Damion has passed away (say in their 50s or 60s).

The possible grandchild might not graduate from law school until thirty or forty years after everyone alive at the time of the deed (all “lives in being”) has died. Because there is a mathematical possibility that the “vesting” (graduating law school) could happen beyond the “life in being plus 21 years” limit, the law strikes down the gift entirely. This prevents Damion from reaching out from the grave to restrict the land’s title for an indefinite, unpredictable length of time.

EXAMPLE C

In the year 2026, Allison conveys Blackacre “to Benjamin for life, then to Benjamin’s children for their lives, then to Catherine 20 years after the death of the last survivor of Benjamin’s children.” At the time of the grant in 2026, Benjamin has one child, David (age 5). However, in 2030, Benjamin has another child, Eve. Eve was not “in being” in 2026.

All the “measuring lives” (Benjamin, and David) eventually die. The last one to die is Benjamin in 2060.

Because Eve was born after the grant (2030), she is not a “life in being.” If Eve lives to be 90, she will die in 2120. The interest to Catherine is set to vest 20 years after her death, in 2140.

The year 2140 is far more than 21 years after the deaths of the “measuring lives in being” (Benjamin, and David). Because it is mathematically possible for this to happen, the interest to Catherine is void from the start. Because it violates the “life in being plus 21 years” limit, RAP will strike it down.

EXAMPLE D

In 2026, A conveys Blackacre “to B for life, then to the first male descendant of B, then to C.” At this time, B is 30 years old. B dies in 2066. A and C are also deceased by this time.

B’s daughter, born in 2030 and does not have her own son until 2100 (using a frozen egg). That son (B’s grandson) is the “first male descendant.” Therefore, the interest will vest in 2100. This is 34 years after the death of B (the last “life in being” in this scenario), which exceeds the 21-year limit allowed by the Rule.

HOW A LEASE ENDS

Automatic termination. As per the contract, the lease dies on its end date. This is called a “term of years” lease.¹¹ No notice is technically required unless specified in the contract.

Surrender. The tenant offers to leave early, the landlord agrees to take the keys back, and the obligation to pay future rent ends. This is a “mutual breakup.”

Notice to Quit. This is Step One of a formal eviction process through the courts. You can’t start a legal eviction without first doing this. It gives the tenant 30 days to leave, “or else a formal eviction proceeding will commence against them.”¹²

The time between serving a Notice to Quit and being legally authorized to file a Complaint for Possession depends on the jurisdiction and the nature of the violation. In severe cases (criminal activity, intentional damage to the property, or creating a serious threat to the health and safety of others)¹³ this window may be as short as three

11 “Term of years” is a legal *term of art* that describes an estate with a fixed duration, regardless of whether that duration is one month, six months, or ten years.

12 Does a holdover eviction have long-term ramifications? Yes. When an eviction lawsuit is filed, it becomes a public civil court record. Most property management companies and landlords utilize tenant-screening services that automatically flag any past eviction filings. Even if a tenant eventually wins or settles, the mere existence of a “filing” on their record can make it significantly more difficult to secure future housing. Further, if the court awards the landlord a money judgment for unpaid rent or damages, that judgment can be reported to credit bureaus, thus impacting one’s credit score.

13 In assessing a “serious threat,” courts analyze whether an incident was genuine danger or mere frustration. For instance, a tenant throwing a bag of bread in anger is a trivial act of “mere frustration” that does not meet the legal threshold for an emergency eviction. Citing such an action would likely lead to a prompt dismissal of the landlord’s case.

“Serious threats” include direct violence (physical assault or brandishing a weapon), biological or physical hazards (tampering with electrical wiring, hoarding hazardous materials, or intentionally flooding a unit), and dangerous illegal activity (manufacturing controlled substances on the premises).

The landlord must first contact law enforcement to document the incident and, if necessary, seek a Temporary Restraining Order (TRO) to legally mandate the individual’s

days. In a standard month-to-month tenancy where there is no “serious threat,” a Complaint for Possession typically requires a 30-day notice. In some jurisdictions, periods of 60 to 90 days are mandated for tenants with significant tenure or those residing in protected housing categories. If you consult with an attorney, they will be able to assess the numbers here.

If the tenant remains after the notice expires, they become a “holdover tenant,” and you must then file a Verified Complaint for Possession in the Special Civil Part of the Superior Court in the county where the property is located. A self-taught, meticulous landlord can technically navigate the eviction process alone, but it is strongly recommend to hire experienced counsel. Eviction law can be complex, and strict compliance is necessary. If it’s dismissed due to procedural errors, you would have to start over from scratch. Common procedural errors include using the wrong version of a notice form, failing to include a mandatory line of text, miscalculating a deadline by a single day, or failing to serve the document in the specific manner required by law.

This court process generally takes several weeks to months, depending on court scheduling and potential delays. A hearing will occur where the occupant has the right to defend themselves. They may succeed in staying if they can prove: the landlord failed to follow proper procedural notice requirements; if the eviction is retaliatory or

immediate departure. Note, a TRO provides an urgent, court-ordered mechanism to remove a person for safety reasons, but it is a criminal or domestic violence intervention, not a landlord-tenant eviction. Once the immediate emergency is addressed and the threat is mitigated, the landlord still has to go through the formal “three-day notice” process to officially terminate the tenancy through the civil court system.

If the occupant has vacated or is unreachable following the emergency, you may satisfy notice requirements by serving the document via “methods reasonably calculated to provide actual notice,” such as certified mail to their most recent known address and, if permitted by local court rules or your specific case history, electronically via email. You must retain proof of delivery and timestamp to demonstrate to the court that you made a diligent, good-faith effort to inform the tenant of the termination.

The landlord must be prepared to prove the *objective* severity of the conduct. Using trivial examples would damage a landlord’s credibility and lead to the summary dismissal of the entire complaint.

discriminatory; or if they successfully cure any underlying lease violations. For example, in a familial “tenancy at will” where no written lease or specific house rules exist, an owner cannot simply evict a resident because of a personal falling-out or a desire to have them leave without cause. If the occupant has violated no rules and the owner lacks a statutory “good cause” to terminate the tenancy, a court may deny the request for possession, effectively forcing the parties to remain in the arrangement. Legal grounds for eviction must be established.

Where there are legal grounds, many cases resolve through settlements or dismissals (due to procedural errors in the landlord’s filing). Tenants who do not settle and lack legal representation frequently lose by default or through an inability to articulate a valid legal defense. For example, a landlord seeks eviction for “non-payment of rent”; the tenant shows up to court only to emotionally plead that they have been a good neighbor and shouldn’t be evicted for being broke, an argument that holds no legal weight. They will almost certainly lose. Had they presented evidence that the landlord failed to provide the mandatory pre-filing notices, or that the unit was uninhabitable, they may have won.

Once a landlord obtains a Judgment for Possession, they must then request a Warrant of Removal from the court, which takes at least three business days to issue. Once served, the sheriff typically has to wait a few more days before physically removing the occupant, usually providing a notice of eviction date. Only a court officer (a sheriff or court-authorized constable) can physically remove the individual and their belongings.

Self-help (changing locks or throwing furniture on the lawn) is *totally illegal* in all 50 states when directed at a residential tenant. One **MUST** go through the judicial system. The consequences are severe: illegal lockouts are classified as misdemeanors, where penalties include fines (ranging from \$25 to thousands of dollars) and potential jail time (typically up to 6 months). If a landlord locks a tenant out, the police may treat it as a crime and order the landlord to restore access immediately. Tenants can also sue for “actual damages” (the cost of a hotel, moving expenses, or damaged property). Many states allow for statutory damages, such as three months’ rent or a

daily penalty of \$100–\$500 per day of lockout. The landlord is also typically required to pay the tenant’s attorney fees. Do not “self-help.”

Note: When it comes to commercial leases, the rules are significantly more permissive: most jurisdictions allow a landlord to use “peaceful” self-help to repossess property, such as locking out a delinquent tenant, *provided the lease explicitly authorizes it and the action does not result in a breach of the peace.*

Rent abatement?

I’m takin my landlord and smashin him into the pavement

That’s the arrangement

I’m an expert, you’re a layman

Goin Super Saiyan

Half-animal, half-caveman

Before I eat, you know I say Amen

Higher than a Jamaican

Eyein your land like Cayman

If you get married, don’t send me no invitation.

Back and forth pacing, like a daemon

or demon

Hotter than elephant semen

I’m beamin

Never agreein, like a bunch of European

Jerusalem I’m freein or fleein

It’s only God and Jesus I be seein

—MC Elia

EVICTION HYPOTHETICAL

Let's say a grandmother owns a home and allows her grandson to live there. There is no "written lease." Eventually, the relationship sours, and she wants him out. Because her name is on the deed and he pays no rent, she might assume she can simply change the lock, remove personal property, or shut off utilities to force a person out. Under the law, she is mistaken.

The absence of a written lease or rent payments does not mean a legal relationship does not exist. It does. The legal relationship is *tenancy at will*. Do you remember "tenancy in common, joint tenancy, and tenancy by the entirety"? Those deal with ownership. Tenancy at will specifically governs informal rental arrangements that lack a fixed duration. It exists solely at the "will" of both the landlord and the tenant; meaning either party can end the agreement at any time, provided they give the required notice. The notice to terminate must be in writing and provide 30 days to vacate. Because the grandmother allowed the grandson to occupy the premises, he is an occupant with possessory rights, not a mere "guest" or trespasser. She must go through the "notice" and court process.

TYPES OF LEASEHOLD TENANCIES

The right of possession in leasehold tenancies depend on the specific time duration.

TENANCY FOR YEARS

Tenancy for Years does not have to last for years, not even a year. It can be for a few weeks, months, etc. It simply refers to any lease with a fixed and ascertainable start and end date. Whether the lease is for six months or ten years, the defining characteristic is that it ends automatically upon the expiration of the term. Because the end date is already written into the contract, neither the landlord nor the tenant is technically required to give notice to terminate it; the clock simply runs out.

PERIODIC TENANCY

A *periodic tenancy* is repetitive and ongoing, automatically renewing at the end of each period. It can be “month-to-month” or a “year-to-year.” This can be created through an express agreement (a signed lease) or implied by the conduct of the parties. For example, if a tenant stays past their original lease and the landlord continues to accept monthly rent checks, the tenancy is considered “month-to-month.”

A party must provide proper notice to stop the cycle. To end a month-to-month, the landlord must provide written notice at least one full month in advance. If a tenant refuses to leave after the expiration of this notice, they become a “tenant at sufferance;” essentially staying without legal right. The landlord must follow the strict legal sequence: Notice to Quit, and if they don’t leave by expiration of the notice period, filing a Verified Complaint for Possession.

TENANCY AT WILL

An informal, casual arrangement created by the agreement of both parties, without a fixed duration or a defined “period.” It lasts as long as both parties want it to. Either the landlord or the tenant can terminate the relationship at any time with a “Notice to Quit.” Of course not everything has to end up “legal.” If the parties can resolve a

breakup on their own, that is always less tension than going through the court process.

TENANCY AT SUFFERANCE

Such is not created by mutual agreement, but by the tenant's own action of "holding over." It occurs when a tenant who was once rightfully in possession remains on the property after their lease or right of occupancy has legally expired. Because this is against the landlord's wishes, the occupant is technically staying without permission.

The tenant here is called a "holdover tenant." The landlord essentially has two choices: they can treat the person as a trespasser and sue for eviction, or they can "accept" the situation by accepting rent. If the landlord chooses to accept rent, they essentially waive their right to treat the tenant as a holdover, which usually converts the arrangement back into a Periodic Tenancy.

NOTE

Among these, the Periodic Tenancy, specifically the "month-to-month," is the most common, followed closely by the Tenancy for Years. Tenancies at Will and Tenancies at Sufferance are generally less common and often arise from informal situations or the breakdown of existing agreements.

TRANSFERS: ASSIGNMENTS AND SUBLEASES

If a tenant decides to move out before the lease expires, rather than breaking the lease, they can transfer their interest to a third party via an assignment or sublease. There are two types of “privity”¹⁴ to consider:

- *Privity of contract* is the direct legal relationship between the two parties who signed the lease. Look to the names on the contract.
- *Privity of estate* is the legal connection that exists between a landlord and whoever is currently occupying the property, regardless of who originally signed the agreement.

ASSIGNMENT (FULL TRANSFER)

An assignment occurs when a tenant (the assignor) transfers their *entire remaining interest* to a new person (the assignee) for the *remainder of the lease term*. It is a *total* transfer. To be enforceable, it must always be documented in writing. It is highly advisable to involve an attorney to ensure the landlord’s rights are protected. For this transfer to be valid and binding, all three parties (the landlord, the original tenant, and the new assignee) should formally sign an Assignment Agreement.

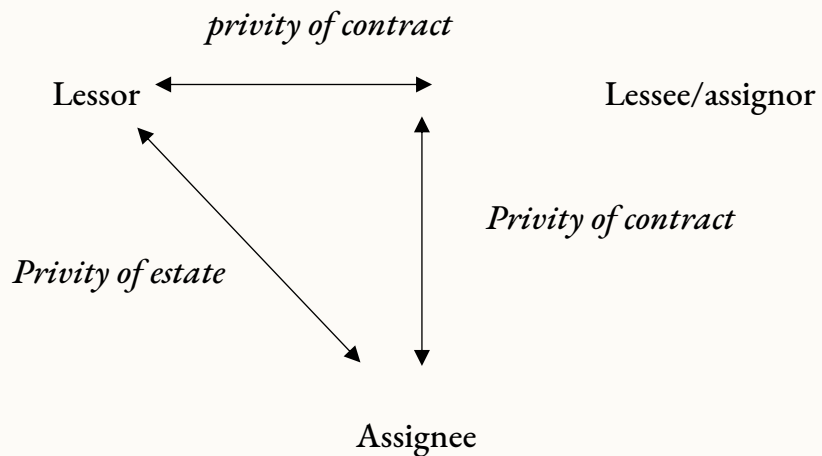
Privity of Contract: The original tenant still has “privity of contract” with the landlord, *unless* the landlord explicitly releases the original tenant from the lease (a process called “novation”). Therefore, if the assignee stops paying, the landlord can still go after the original tenant for the money.

Privity of Estate: Such is created between the landlord and the assignee because the assignee is *occupying* the property. This allows the landlord to sue the assignee directly for rent. This shared interest in the property creates a legal bridge: the landlord can hold the new tenant accountable for rules that “run with the land,” such as paying rent and keeping the property in good repair.

14 Etymology: Initially, the word referred to things kept secret, private life, or intimate knowledge shared between a few people. If you were “privy” to something, you were an “insider” with secret information. This evolved into the modern legal sense of “mutual or successive relationship,” or “legal link,” implying that two parties have a specific, “private” relationship.

Thus, the leasehold is held together by two contract “strings”: between landlord and the assignor, and assignor and assignee. Additionally, it is held by the “estate string” between assignor and assignee.

ASSIGNMENT



SUBLEASE (PARTIAL TRANSFER)

Here, the original tenant (the lessee) transfers *only a portion* of their interest to a third person (the sublessee). This might mean only giving up the space for a few months, or renting out one bedroom in a larger apartment. The sublessee has a contract with the original tenant, not the landlord. Some people rely on informal, oral agreements, but that is highly inadvisable. Both the original tenant and the sublessee should always create a detailed written contract and both sign it to avoid disputes. The sublessee has a contract with the original tenant, not the landlord.

The landlord generally cannot sue the sublessee for rent because there is *neither privity of contract nor estate* between them. The landlord can only go after the sublessor.

This legal reality is defined by the “buffer” rule: because the original tenant retains a “reversionary interest,” they remain the only party in a direct legal relationship with the landlord, effectively insulating the sublessee from direct liability.

Why no privity of contract: If your name isn't on the signature line, you are generally a "stranger" to the contract. In a sublease, the sublessee is a stranger to the landlord's original contract, which is why the original tenant stays on the hook.

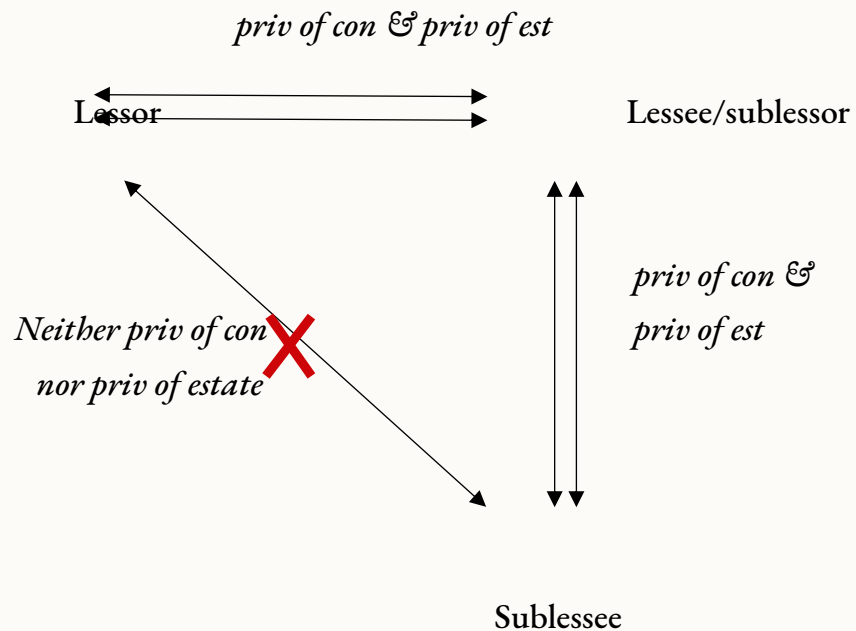
Why no privity of estate: A sublease agreement must have a "reversionary interest" (right to return). This means the original tenant *maintains the right* to move back in at the end of the sublease term, thus keeping them "on the hook." Because of this, the sublessee's occupation does not *fully* and legally displace the original tenant's legal link to the property.¹⁵

In a sublease, when it comes to payment and duties, the landlord looks to the original tenant, and the original tenant looks to the sublessee. This creates a "One-Way Street" for the landlord: because the original tenant acts as a legal buffer, the landlord's field of vision is restricted. The landlord cannot look "through" the original tenant to collect directly from the sublessee; they can only pursue the original tenant, who in turn must initiate their own action against the sublessee to recover losses.

Does the landlord need to be notified or is their consent required for the creation of this arrangement? It depends entirely on the specific language written in the original lease contract.

15 If the agreement goes until the end of the lease, the court will look at that and see "remainder" and determine it as an assignment, not a sublease. An attorney drafting a sublease should know this. If the client still wants a sublease, they should draft it so it ends on the day before the lease ends.

SUBLEASE



SUMMARY

In an assignment, the landlord has two people they can potentially sue for rent (the original tenant and the new one). In a sublease, the landlord can only sue the original tenant. For this reason, landlords almost always prefer an assignment over a sublease; it gives them a “double-barrel” legal approach, ensuring they have two different people they can hold liable if the rent check bounces. In the current U.S. rental market, subleasing is significantly more common than formal assignments, as it is often used for short-term fixes. Many tenants attempt to “wing it” using informal text messages or casual emails, but such are highly risky: the new occupant is most vulnerable to sudden eviction, and both the landlord and the original tenant are at significant risk of financial loss if a dispute arises. It is best to have a comprehensive, written contract signed by all the parties.

FOUR IMPLIED WARRANTIES

There are four implied protections in property law: The two pillars of tenancy are *Habitability* and *Quiet Enjoyment*. The two pillars of ownership and sales are *Housing Merchant Warranty* and *Marketable Title*.

I. IMPLIED WARRANTY OF HABITABILITY (IWH)

A residential landlord must provide a space that meets basic human standards. It covers “vital facilities” such as heat, clean water, electricity, and a structural roof.¹⁶

For centuries, property law operated under the doctrine of *caveat lessee* (“let the tenant beware”). Under this old common law rule, a lease was viewed as a simple conveyance of land, such as buying a farm in the Middle Ages. The law assumed that if a tenant signed a lease, they had inspected the property themselves and accepted it

16 More examples:

- Failure to provide hot water or a functional sanitation system
- Persistent insect or rodent infestations that are not effectively addressed by the landlord.
- Dangerous electrical wiring that poses an immediate fire hazard.
- The presence of toxic mold or hazardous environmental contaminants like lead paint or asbestos that are not properly contained.
- Inadequate ventilation or air quality issues caused by blocked or broken exhaust systems.
- Structural instability, such as crumbling foundations, sagging floors, or stairs that are unsafe to navigate.
- Broken windows or exterior doors that fail to lock, compromising the security of the dwelling.
- Gas leaks or malfunctioning carbon monoxide detection systems.
- Accumulation of standing water or raw sewage resulting from plumbing failures.
- Extreme temperature conditions caused by the total failure of HVAC or insulation systems during severe weather.

“as is.” Because the landlord was merely handing over possession of the soil, they had no ongoing service obligation to fix broken infrastructure. If the roof leaked, it was the tenant’s problem, not the landlord’s.

Beginning in the mid-20th century (culminating in landmark cases like *Javins v. First National Realty Corp.* in 1970), courts recognized that renting a modern apartment is *not* the same as renting a medieval farm. Today, a lease is viewed as a contract for housing services. Because a tenant cannot realistically inspect the wiring behind walls or the plumbing under a foundation, the law shifted the burden of safety onto the landlord.

Why is this warranty is “implied” rather than just written into every lease? The answer is public policy. Because the Implied Warranty of Habitability exists “by operation of law,”¹⁷ it is “baked in” to every residential rental agreement automatically.

Even if a landlord includes an “As-Is” clause or explicitly states they are not responsible for repairs, those provisions are generally void and unenforceable. Courts hold that health and safety standards are non-negotiable. If the unit becomes “unfit for residential purposes,” the landlord has breached this warranty regardless of what the lease says.

Note: IWH generally does not apply to commercial leases.

17 This describes a legal outcome that occurs automatically as a result of established rules, rather than through the specific intent or active negotiation of the parties involved. For example, when a person dies without a will, their property is distributed to their heirs according to state statutes by operation of law.

II. COVENANT OF QUIET ENJOYMENT¹⁸

Every lease (both residential and commercial) contains the *implied covenant* (covenant means “promise”) that the tenant will have the *right to possess the premises in peace and without disturbance from the landlord or anyone with superior legal title*. A breach occurs through *actual eviction*¹⁹ or *constructive eviction* (when the landlord’s actions, or failure to act, so substantially interferes with the tenant’s use and enjoyment of the property that the premises become effectively unusable and the tenant vacates).²⁰ To claim constructive eviction, the tenant must prove: Substantial Interference, Notice (giving the landlord a chance to fix it), and Getting out (the tenant must vacate the premises within a reasonable time). You can remember this with the acronym SING.

18 You will frequently see “Implied Warranty of Quiet Enjoyment” because the two concepts—Habitability and Quiet Enjoyment—are now so often grouped together as the “two pillars” of a tenant’s rights that the terminology has blurred. In formal property law, “Covenant” is the correct term. A covenant is a promise contained within a deed or lease. Since this promise relates to the tenant’s right to occupy the property without interference, it is historically and legally classified as a covenant. “Warranty” usually refers to the quality of a product or a state of being (like Habitability). “Covenant” refers to a promise of conduct (the landlord promising not to disturb you).

19 “Actual eviction” is a legal term of art, not a synonym for “illegal.” It describes the result (being physically removed from the premises), not the process by which that result was achieved. Thus, it can be lawful or unlawful (self-help). When legal scholars refer to *actual eviction* in the context of the covenant of quiet enjoyment, they are referring to unauthorized, illegal self-help.

20 For example, the landlord may fail to provide essential services like heat, water, or electricity during extreme weather; they may permit persistent, egregious pest infestations that render rooms uninhabitable; they may tolerate or encourage harassment that prevents the tenant from accessing the premises; they may perform unauthorized and disruptive construction that restricts the tenant’s entry; they may neglect critical structural repairs that pose an immediate threat to the tenant’s safety and health; and last but not least, they might masturbate in your backyard every new moon, also exposing them to an Indecent Exposure, Public Lewdness, or Public Indecency charge.

III. HOUSING MERCHANT IMPLIED WARRANTY (HMIW)²¹

Remember that the *Implied Warranty of Habitability* is strictly a landlord-tenant doctrine. It ensures the rental property is fit for human life (safe, clean, and functional). It doesn't matter if the apartment is in a building from 1920 or 2026; if you are paying rent, the landlord has a legal duty to provide a living space that meets basic health and safety codes. This warranty is about *possession* and *use*; it's a promise that your landlord isn't preventing you from living in the home you are paying to occupy.

21 Before we get any more complex, here is a bird's-eye view to keep these similar-sounding terms separate:

The *Implied Warranty of Habitability* is for landlord-tenant law. A non-waivable duty that requires a landlord to provide and maintain a residential property that meets basic health and safety codes, such as access to heat, water, and electricity. This is strictly a rental doctrine, focusing on the tenant's right to live in a safe, functional space for the duration of the lease.

The *Housing Merchant Implied Warranty*—also known as the *Implied Warranty of Workmanlike Construction*—is specifically for new construction. Unlike the residential rental warranty, this protection is triggered by a sale. Because the buyer cannot see what is inside the walls or under the foundation, the law holds the “builder-vendor” to a standard of “adequate workmanship,” guaranteeing that the home is free from significant structural or functional defects.

The *Implied Warranty of Merchantability* (UCC § 2-314) arises from the Uniform Commercial Code (UCC) and applies to the sale of goods. This is the legal ancestor of the *Housing Merchant Implied Warranty*. It requires that products sold by a merchant be fit for their “ordinary purpose.” In the context of a new home, courts treat the house as a “good” or “product.”

The *Implied Warranty of Fitness for a Particular Purpose* (IWFPP) (UCC § 2-315) is also a UCC sales doctrine, but it is distinct from merchantability. This warranty applies only when a seller knows that a buyer is relying on their special skill to select a product for a unique, non-standard task. For example, a customer tells a paint store employee they need a specific coating capable of withstanding constant exposure to industrial chemicals. The employee recommends a product that fails to perform in that specific, non-standard environment. IWFPP is rarely applicable to residential real estate because homes are designed for the universal, ordinary purpose of habitation, not for specialized, niche functions.

The *Housing Merchant Implied Warranty* (HMIW), or the *Implied Warranty of Fitness of Workmanlike Construction* (IWFWC), or *for New Construction* (IWFNC) is strictly for buyers of new homes. IWFWC is the exact same thing as IWFNC, and overall courts are evolving towards using exclusively HMIW.

HMIW is a sales-of-goods doctrine, not a landlord-tenant one. When a builder sells a brand-new house to a consumer, acting as a “merchant” of that home (builder-vendor), this warranty guarantees that the builder constructed the house in a “workmanlike manner” and that it is free from major structural and functional defects. The buyer cannot “see” what is hidden behind the drywall or under the foundation.²² Unlike the rental warranty, which is about daily livability, this is about the quality of construction, protecting a buyer from a poorly built house or one built with inferior materials. For example, if a homeowner later discovers that the roof framing was improperly braced or that the foundation was poured on unstable soil, the builder remains liable for the resulting damage.

HMIW and IWFWC/IWFNC are different names for the exact same legal theory. The courts interpret them identically. You will never find a situation where a court says, “This case qualifies for HMIW, but it fails the IWFWC.” They are different ways of describing the same remedy for a defectively built home. In a lawsuit against a builder for a cracked foundation, a plaintiff will almost always plead both terms: “The defendant breached the HMIW by failing to deliver a home constructed in a *workmanlike manner*.” They are treated as synonymous because they are trying to prove the same injury: that the house is a “lemon” due to poor construction. They are

22 A pre-closing home inspection does not waive HMIW. Instead, it serves as a baseline for the home’s condition. The law generally expects a buyer to address “patent” defects (those visible upon reasonable inspection) before closing. Because the HMIW is designed to cover “latent” defects—those hidden behind walls or beneath the foundation—the warranty remains a vital safety net for structural issues that even a professional inspector cannot uncover. A clean inspection report helps the homeowner prove that a later structural failure, such as a shifting foundation or improper framing, existed at the time of sale. Most jurisdictions require the homeowner to provide the builder with an “opportunity to cure” (formal notice and a chance to repair) before pursuing a legal claim. Thus, an inspection is not a waiver of protection, but rather a tool to help distinguish between original construction flaws and later maintenance issues.

used in separate instances solely due to jurisdictional preference. Some states (Texas or New Jersey) heavily lean into the HMIW label because it links the claim to the state's consumer protection statutes. Other states (Maryland or Colorado) prefer IWWFC because it sounds more like a traditional common-law contract claim. If you are in a jurisdiction that prefers HMIW, the judge is looking for the same “workmanlike” evidence; if you are in a jurisdiction that prefers IWWFC, the judge is still evaluating the builder's “merchant” status. Legal scholars prefer HMIW because it is categorically precise. It correctly identifies the identity of the defendant (a “merchant,” as defined by the Uniform Commercial Code) and the legal origin of the claim (an “implied warranty,” derived from the sale of goods). “Workmanlike Construction” is descriptive—it tells us how the house was built—but it is arguably too narrow. A builder can be “workmanlike” in their physical labor but still be a bad merchant who failed to provide a house fit for its ordinary purpose. We will stick here with HMIW.

There is a tiered timeline for when a claim can be brought forward.

1 Year. Covers general defects and “workmanship” (sloppy trim, code violations, or peeling paint).

2 Years. Covers the “systems” of the house: plumbing, electrical, and HVAC infrastructure.

6 Years. Covers the “bones” of the house, protecting against structural failures in load-bearing elements like the foundation or roof framing.

IV. IMPLIED COVENANT OF MARKETABLE TITLE

“Marketable title” means a title free and clear from any claims or disputes about the ownership, or from any threat of litigation. It can be referred to as *good* title, *merchantable* title, or *clear* title, but *marketable* is the formal legal standard used in most contracts and court opinions. When a seller sells property to a buyer, there is the implied promise that the seller is delivering marketable title. So long as the title is free from “reasonable doubt,” meaning devoid of defects that would cause a prudent, well-informed purchaser to fear future litigation or claims of ownership, it is considered “marketable.” Note that just because a title is unmarketable, it is still considered “valid” and transferable. The buyer would just be choosing to close on an unmarketable title.

Many properties have “blemishes” that technically constitute encumbrances. For example, utility easements (access for electrical lines or sewage pipes) or minor restrictive covenants (set-back requirements or architectural height limitations). Yet, because these conditions do not substantially interfere with the owner’s use or possession and rarely make it to litigation, they are rarely viewed as creating “reasonable doubt” regarding marketability because that requires “objective risk of litigation.” Note: It is surprisingly common for residential properties to have minor title defects: some estimates suggest that roughly 25% to 35% of residential real estate transactions require some form of curative work (such as clearing old liens or fixing documentation errors) to resolve title issues before closing.²³

If a defect exists that “creates an objective risk of such litigation,” then it is no longer “marketable” and the buyer may use that as a basis to rescind the contract. Example: the pre-purchase title search reveals that a previous owner’s heir never signed off on the deed, or the property has significant zoning violations that could force the buyer into a legal battle with the city. The buyer could also just waive the right to “marketable” title and buy it anyway.

23 “7 Critical Things to Know About Abstract of Title in 2026,” AmeriSave, June 9, 2025, <https://www.amerisave.com/learn/critical-things-to-know-about-abstract-of-title-in-complete-property-history-guide>.

EXAMPLES OF WHAT MAKES A TITLE “UNMARKETABLE”

Encumbrances: Undisclosed mortgages, liens, or restrictive covenants.

Zoning Violations: The property is currently in violation of a zoning ordinance.

Adverse Possession: The seller’s title relies on a claim of adverse possession that hasn’t been legally “quieted” or officially approved in court yet. Acquiring property through adverse possession does not inherently render title unmarketable. However, there is a catch: to provide a “marketable” title, the seller usually has to “quiet” the title in court first. While the title is technically valid the moment the adverse possession statute of limitations expires, most buyers won’t accept it until a judge signs an order confirming it, because without that order, there is still a “threat of litigation” from the record owner.

Threat of Litigation: Any defect that would expose the buyer to a lawsuit from a third party, such as an unrecorded easement, a boundary line dispute with an abutting neighbor, or an outstanding claim of ownership by an heir or former spouse

Unsatisfied Mortgages: An unsatisfied mortgage does not render title unmarketable. In almost every real estate transaction, the seller still has a mortgage. The law assumes the seller will use the proceeds from the sale to pay off that mortgage at the closing table. As long as the mortgage will be satisfied simultaneously with the transfer of the deed, the title is considered marketable.

THE IN-BETWEEN PHASE: EQUITABLE CONVERSION AND RISK OF LOSS (ROL)

The time period between the signing of a binding real estate contract and the final closing of the sale is most commonly referred to as the *executory period* (informally “the in-between” phase). When a person signs a contract to buy a home, they aren’t the owner yet, but they also aren’t “just a browser” either. What happens and who has liability during this phase? If the house burns down, or the buyer dies unexpectedly, who bears the brunt?

Technically there are “two” types of titles. From the moment the contract is signed, the buyer gets “Equitable Title,” and the seller continues to holding “Legal Title,” until the deed is finally delivered at closing. Each one comes with certain rights and limits.

Equitable Title. Although the buyer does not yet have the deed, they are considered the “equitable owner” of the real property. This means if they die before closing, their right to demand the deed passes to their heirs as real estate, not cash. Under the Majority Rule, the ROL is on the buyer the moment the contract is signed, and they must bear the responsibility for any damage during this contract phase (common in jurisdictions such as New York, Florida, and Texas).

Under the Minority Rule, ROL stays with the seller until either legal title is completely transferred, or, the buyer takes possession (this is in jurisdictions that have adopted the *Uniform Vendor and Purchaser Risk Act*, such as Illinois, Michigan, and California).

Legal Title. The seller retains what is called “legal title.” This means they *act as a trustee*, holding only “bare” legal ownership *for the benefit of the buyer*, rather than having beneficial ownership for themselves. Their interest in the property is converted into personal property (the right to receive the purchase price), considering they are *legally obligated* to convey the property to the buyer. Consequently, they do not hold “true” real estate property interest. For example, a seller dies before closing:

their interest is treated as the *right to receive* the purchase money. This passes to their estate as cash (personal property), not as a claim to the house (real property).

A signs a contract to sell their house to B. B gets Equitable Title, and they are treated as the owner of the “real property,” therefore, in a majority rule jurisdiction, they will bear the ROL and must still fulfill their obligation to pay the full contract price. A holds Legal Title merely as a trustee, meaning their interest is limited to the right to receive the purchase money. They do not have an ownership interest in the house itself, only a claim to the proceeds of the sale.

Before the closing date, a wildfire sweeps through and burns the home down. Because the contract was already signed, the doctrine of Equitable Conversion kicks in. B will have to bear the cost of the damage.

To avoid this unfair result, attorneys for buyers try to negotiate an express ROL clause shifting the burden back to the seller until closing. Buyers are also strongly encouraged by their attorneys to ensure their insurance coverage is active the moment the contract is signed. With these safeguards, if the house burns down, the buyer would be either released based on the shifted ROL clause, or, they’ll have insurance to cover the damage.

You might be thinking: if contracts have ROL clauses and buyers are required to carry hazard insurance, what’s the point of even talking about Equitable Conversion? Basically, some contracts are silent as to ROL, or death and creditor claims create unanticipated disputes.²⁴ Thus, Equitable Conversion gives the court a framework to default on.

24 If a buyer dies mid-escrow, the seller needs to know: Do I deal with the buyer’s real estate heirs or their bank account executor? Equitable Conversion gives the court a clear, mechanical answer: “The buyer held Equitable Title (real property), so it goes to the real estate heirs.” Without this doctrine, these estates would be stuck in legal limbo.

Additionally, if a buyer is mid-escrow and has massive personal debts, creditors may want to know if they can attach a lien to that house. Equitable Conversion tells them: “Yes, because the buyer has an equitable interest in that real property.” Creditors aren’t necessarily monitoring real estate deals, but if they conduct a court-ordered asset disclosures or search public filings, they can identify an active purchase contract and take action.

THE INSURANCE CREDIT RULE

Because the majority rule—which defaults to assigning ROL to the buyer during the executory period—can be harsh, the Court of Chancery provides a “safety valve” called the *Insurance Credit Rule*. If the property is damaged and the seller receives insurance proceeds, the seller cannot “double dip” by keeping the insurance money while still demanding the full purchase price from the buyer. They will have to credit the buyer with whatever proceed money they receive, resulting in a reduction of the final purchase price at closing.

ESSENTIAL ELEMENTS OF A VALID DEED

To satisfy the Statute of Frauds, a valid deed for real estate *must be in writing*. Most courts will not recognize a deed unless it contains these four foundational elements:

1. **Identification of the Parties:** The document must clearly name the grantor (the person giving the property) and the grantee (the person receiving it). Both parties must be identifiable to ensure the chain of title remains unbroken.
2. **Property Description:** The deed must describe the land with enough detail that its boundaries can be accurately located. This often includes metes and bounds, coordinates, or references to official plat maps. Property owners must hire a state-licensed Professional Land Surveyor (PLS) to establish these boundaries. Depending on the size and complexity of the parcel, a survey can cost anywhere from \$300 for a standard residential lot to several thousand dollars for larger tracts, with a typical turnaround time of one to two weeks.
3. **Words of Transfer:** Also known as the “granting clause,” the deed must contain specific language demonstrating the grantor’s current intent to transfer the property (“I, Bob, hereby grant and convey...”).
4. **Signature of the Grantor:** A deed only needs to be signed by the person giving up the interest (the grantor). For this reason, a deed is called a unilateral instrument of conveyance. The grantee’s acceptance of the physical deed is usually considered sufficient evidence of their consent to the transfer. But still, attorneys strongly recommend grantee’s signing to ensure the grantee performs or adheres to any “covenants” in the deed, such as paying a certain assessment, or maintaining an easement (a restrictive covenant).

TYPES OF NOTICE

Once a deed is delivered, the buyer (grantee) usually takes it to the local county clerk's office to be recorded in the public land records. A properly conveyed deed is still valid without being recording, but recording is a critical defensive move for the owner.

Recording creates *constructive notice*, a legal fiction where the law treats every member of the public as if they “know” who owns the property simply because the information is available in the public record. This protects the buyer against “wild deeds” or dishonest sellers who might try to sell the same piece of land to multiple unsuspecting people. If a second buyer tries to claim the land, the recorded deed acts as a shield, proving that the first buyer's interest was already a matter of public knowledge.

Think of “notice” as a legal filter. The law wants to reward buyers who act carefully and punish those who ignore obvious warning signs. A Bona Fide Purchaser (BFP) is a two-part “gold standard” buyer: *they paid fair value* and *had zero notice of any prior claims*. If you have notice of a prior claim, you are no longer a BFP, and the law will not protect you if that prior claimant comes forward. Here are the three ways the law decides you “knew” about a problem.

ACTUAL NOTICE

Actual notice is the most straightforward: information is given directly to a party or personally received by them. If a seller looks a buyer in the eye and says, “Just so you know, my neighbor has a right to use the driveway,” the buyer has actual notice (even if it is not true, they have actual notice and should investigate to determine).

CONSTRUCTIVE NOTICE (IT'S THERE AND YOU SHOULD HAVE LOOKED)

Constructive notice is a legal fiction.²⁵ It assumes a person knows something because they *could have known* it *if* they had looked. The law dictates that if a document, such

25 An assertion accepted as true by a court, even if it is factually false. Its purpose is to maintain consistent legal outcomes and to facilitate the application of justice within a complex system. The law says, “For the purpose of this case, we are going to act as if X is true, even though we all know it isn’t.”

1. *Presumption of Innocence*. The law mandates that every defendant be treated as if they are innocent until a verdict is rendered, even if the evidence against them is overwhelming and their guilt is effectively certain to the public. The defendant may have been caught on video committing the crime, yet the “fiction” of innocence must remain for the duration of the trial to ensure its integrity.
2. *The Average Reasonable Person*. In tort law, courts invent a “reasonable person”: an idealized, perfect individual who always acts with appropriate caution, knowledge, and foresight. While people may act this way consistently, no human acts that way all the time. Every human is prone to varying degrees of fatigue, stress, and poor judgment, but we are “held” to this legal fiction to ensure responsibility. In short, just because you are fatigued doesn’t excuse your responsibility.
3. “*Stare Decisis*” (The Doctrine of Precedent). Courts act as if the law is a stable, unchanging set of principles that simply “need to be discovered” by judges in previous cases. The truth however is that the law is constantly evolving, and *stare decisis* is constantly subject to evolution. For example, a judge might rule that a long-standing law regarding “harassment” now includes certain types of persistent digital messages, claiming they are simply “applying” the original definition to new technology, but here they are expanding the law to account for modern social norms regarding online behavior.
4. Corporate personhood. In law, we pretend a corporation as a “legal person” separate from its owners (shareholders). Of course a corporation is not a breathing, living “person”; it is a collection of contracts, assets, and human employees. The purpose of this is to isolate the business’s legal and financial obligations from those of its individual shareholders: we don’t want shareholders (people who invest) to be personally “on the hook” for the entity’s debts or liabilities. At least not directly. They are affected *indirectly* because if a corporation loses money or is successfully sued, the value of their shares (and their potential dividends) decreases.
5. “The King Can Do No Wrong.” The government maintains sovereign immunity, the doctrine that it cannot be sued without its consent. This functions as a means of preserving its authority and shielding public funds. In reality, however, the government and its agents frequently commit torts and cause harm to citizens. Consequently, if a government agent

as a deed, covenant, or easement, is properly recorded and registered in the public land records, it is “open to the public.” Because a reasonable person is expected to perform a title search, they are deemed with having knowledge of everything in that search, regardless of whether they actually visited the clerk’s office.

INQUIRY NOTICE (RED FLAG WAS THERE THAT PROMPTED)

Inquiry notice is another a legal fiction: a purchaser discovers certain “red flag” facts or circumstances that would lead a reasonable person to believe further investigation is warranted. It evokes the “duty to ask” rule. Example: Buyer visits a property and sees a well-worn path leading from the neighbor’s house across the backyard. They cannot later claim they didn’t know about an easement. Even if nothing is recorded (no constructive notice) and no one said a word (no actual notice), that doesn’t mean you are “off the hook.” The physical appearance of this well-worn path puts any buyer on *inquiry notice*. They are legally required to investigate the situation, and they will

injures you, you are generally barred from suing the government directly unless a specific statute, such as the *Federal Tort Claims Act*, provides a waiver of immunity. Otherwise, you would be forced to pursue the agent individually, though recovery is often limited by *qualified immunity* and only to the agent’s own personal assets. *Qualified immunity* is a legal doctrine that protects government officials, such as police officers, teachers, or social workers, from being held personally liable for constitutional violations (like excessive force or illegal searches) *unless the official violated a “clearly established” right that a reasonable person would have known*. For example, if a teacher restricts a student’s speech in a way that is later found to be unconstitutional, they are protected by *qualified immunity* unless a prior court decision in a different case had already clearly established that such specific conduct was illegal, thereby putting the teacher on notice that their action was prohibited.

6. Admiralty/Maritime Law: The “Vessel” as a Party. In certain admiralty cases, the ship is named as the defendant. This legal fiction treats the vessel as a “juridical person” capable of committing a wrong, allowing a plaintiff to sue the ship directly to recover damages. This is known as an *in rem* action (Latin for “against the thing”), where the legal action is directed toward property, such as a ship or land, rather than a specific person, allowing a court to resolve claims or seize the asset to satisfy a judgment regardless of who owns it. A landmark example is *The China* (1868): SCOTUS held that a ship could be held liable for a collision, thus providing a guaranteed source of recovery that cannot hide or flee, even if the actual owner is an unreachable corporation or located in a foreign jurisdiction.

be legally deemed knowledgably of whatever that investigation would have revealed. Simple items that fail this threshold are “common, non-adversarial features that do not inherently signal a formal legal encumbrance or an adverse claim to land,” such as a garden hose crossing a property line, or a neighbor’s tree limb hanging over a fence.

CONFLICTS IN RECORDING: WHO WINS?

When a dishonest or confused grantor conveys the same property to two different people, the law has to decide who actually owns the land. Such disputes are settled according to state jurisdiction type. There are three of them.

RACE JURISDICTION

The first person to record wins the race. It is a pure “race to the courthouse.” The law does not care if a second buyer knew about the first sale (actual notice); if that second buyer received the earlier timestamp at the county clerk’s office, they win.

NOTICE JURISDICTION

Whoever buys with a “clean heart” (no notice) wins. This is irrespective of “racing” to the courthouse.

This system penalizes the first buyer for failing to give “Constructive Notice” by recording. Even if the second buyer is slow to record their own deed, they still win as long as they bought the property with a “clean heart” (no notice).

In simple terms: the last BFP to enter the picture wins.

Example 1: X purchases a house from M but fails to record the deed at the county office, meaning there is no “constructive notice” for the public. Later, M dishonestly sells the same house to Z, who conducts a thorough title search, finds no record of X, and buys the property in good faith. Under a notice jurisdiction, Z wins the property because they are a BFP who took the title without any knowledge or notice of the prior, hidden sale.

Example 2: J sells an apartment complex to G, but the deed is never filed, and the tenants are unaware of the change. J then sells the building to S, who inspects the property, sees no evidence of a transfer, and pays full market value believing they are the new sole owner. Because S had no notice of the transaction with G at the time of purchase, S legally owns the building the moment the deal closes, leaving G with only a personal claim against the seller.

RACE-NOTICE JURISDICTION

This is type combines both elements. The subsequent purchaser must:

1. Have had *no notice* of the prior sale at the time they paid for the property; and
2. They *record* their deed *first*.

If the second buyer knew about the first sale, they lose (Notice rule). If they didn't know but the first buyer beat them to the clerk's office, they also lose. They must be both "innocent" and "fast."

Professional Lesson: Protect your client's "bundle of rights" by recording and registering the deed immediately upon delivery at closing. This effectively cuts off the possibility of a subsequent BFP prevailing.

THE SHELTER RULE

The person who buys from the BFP, even if they have notice, is “sheltered” by the BFP’s status. The doctrine is designed to ensure that the BFP can actually sell their property, and it is available in all three jurisdictional types. Without it, a BFP who discovers a title defect after their purchase would likely be “stuck” with the land because any person they try to sell it to would then have notice of the defect and likely refuse the “unmarketable title” since it comes with a cloud of potential litigation.

Example in Notice Jurisdiction:

1. Anna buys land from Oliver but fails to record.
2. Oliver, either because of immorality or a lack of acuity, sells the same land to Benny. Benny pays *fair value* and had *zero notice* of Anna’s interest. In a Notice jurisdiction, Benny, the BFP, wins automatically the moment he buys, because Anna failed to record.
3. Carter later offers to buy the land from Benny. Even if Benny discloses Anna’s interest to Carter, giving Carter actual notice, Carter still prevails over Anna. Under the Shelter Rule, Carter is “sheltered” by Benny’s BFP status, effectively stepping into Benny’s shoes and acquiring a “good” title.

If the law didn’t protect Carter, it wouldn’t actually be punishing Carter: it would be punishing Benny. If the rule were otherwise, Anna could simply tell everyone in town about her unrecorded deed, then Benny would find that he can’t sell his land to anyone because everyone now has “notice.” To protect Benny’s right to transfer his property, the law allows him to pass his “winning” status to the next buyer, regardless of what that next buyer knows.

There is one major exception to the Shelter Rule: The property cannot circle back to a “bad actor.” If Oliver (the original dishonest seller) tried to buy the land back from Benny, Oliver would not be protected by the Shelter Rule. You cannot “wash” your own bad faith or prior knowledge by selling property to a BFP and then buying

it back to gain good title. The “Shelter” is for the market and for innocent subsequent owners like Carter; not for those who created the conflict in the first place.

Torts

INTENTIONAL TORTS (AGAINST THE PERSON)

ASSAULT

D intentionally puts P in *reasonable apprehension* of an *imminent* harmful or offensive contact.

- *Apprehension*. This is not the same as fear; it is the anticipation that a battery is about to happen.
- *Imminence*. The threat must be immediate. Words alone usually do not constitute assault, unless coupled with a physical act (reaching for a weapon).

Examples of assault: Shaking a fist in someone's face, yelling in their face while lunging, or pointing a gun (even if it is unloaded, as long as P reasonably believes it is loaded). None of these involve actual contact, but provide *reasonable apprehension of imminent harmful or offensive contact*. So winding up the punch is assault, and actually hitting them (landing that sucker) is battery. When battery occurs, it's usually charged in tandem with assault since most batteries are preceded by assault.

BATTERY

The completed act of causing offensive or harmful contact.

- *Intent*. D intends to cause a contact with P, or acts with substantial certainty that contact will occur.
- *Actual Contact*. D makes physical contact.
- *Harmful or Offensive*

Harmful: causing physical injury, impairment, or pain.

Offensive: use the “Objective Test.” Contact is offensive if it would offend a *reasonable person’s sense of personal dignity*. Grabbing someone strongly, or shaking them, is likely battery; a tap on the shoulder is generally not (unless done repeatedly and with forceful and painful pressure).

- *Causation*. The contact must be directly or indirectly caused by D’s voluntary act.
- *Lack of Consent*. P does not consent to the touch.

In a civil tort case, the Plaintiff often has to prove lack of consent as part of their initial claim. They are essentially saying, “I didn’t agree to this, and this person hurt me.”

In a criminal case, the State says, “You hit this person, and you broke the law.” The Defendant might say, “Sure, I hit them, but they *agreed to it*, so it’s not a crime.” Because the defendant would be introducing a *new fact* (agreement_ to excuse their behavior, they are responsible for proving that fact, hence why it is “affirmative.” Example, in an amateur hockey game where a player is charged with battery for a hard check, the prosecutor simply shows “the defendant struck the victim, causing injury.” It is then up to the defendant to affirmatively prove that the victim consented to the physical risks and violent contact inherent in the sport by stepping onto the ice, in gear, ready to play. The court would look to see if the act was so far beyond the rules that it fell outside the scope of any reasonable consent. If so, the defense fails and the defendant is criminally liable.

Extended Personality Rule: Contact with anything closely attached to P (a hat, a cane, or a plate P is holding) constitutes contact with P’s person. *See Fisher v. Carrousel Motor Hotel, Inc.*, 1967.

CIVIL VERSUS CRIMINAL ASSAULT AND BATTERY

Parties: In civil cases, a plaintiff brings the lawsuit. In criminal cases, it is a prosecutor representing the state or government.

Standard of Proof: In civil cases, the burden of proof is *preponderance of the evidence* (more likely than not, or $\geq 50.1\%$). In criminal cases, it is *beyond a reasonable doubt* (not a strict mathematical formula, but most legal scholars agree this represents a certainty level of 90% or greater).

Consequences: In civil, the consequences are limited to financial liability (damages); in criminal, one faces fines, jail time, and/or probation.

I break them down in the following.

CIVIL ASSAULT

Defendant intends to cause reasonable apprehension of imminent harmful or offensive bodily contact. No physical contact is required. The tort is the “mental” harm of the fear itself.

Simplified:

1. Intent (Intent means knowing or being substantially certain that the apprehension will occur)
2. Apprehension of contact

CIVIL BATTERY

Defendant intends to cause harmful or offensive bodily contact, and actual contact occurs.

Simplified:

1. Intent
2. Actual contact made

Civil battery focuses on the subjective intent (*mens rea*, guilty mind/intent) of the defendant to commit a wrong against the plaintiff. In the civil division, the court is trying to determine if the defendant’s state of mind met the “intent” requirement.

CRIMINAL ASSAULT

An attempt to commit a battery or intentionally placing another in reasonable apprehension of imminent bodily harm.

Simplified:

1. Intent
2. Apprehension

In many jurisdictions, “criminal assault” acts as an “incomplete” battery. It is the act of swinging and missing, provided the victim saw it coming and felt the fear of impact.

CRIMINAL BATTERY

The intentional, unlawful application of force to another person that causes bodily harm or constitutes an offensive touching.

Simplified:

1. Intent
2. Actual contact made

Criminal battery focuses on the objective act (the *actus reus*) as a violation of a public statute. Just like in civil battery, the contact does not need to be “bone-breaking.” Any harmful or offensive contact, such as spitting on someone or knocking a phone out of their hand, will satisfy the “unlawful application of force” requirement.

Assault = the mental injury (apprehension/fear).

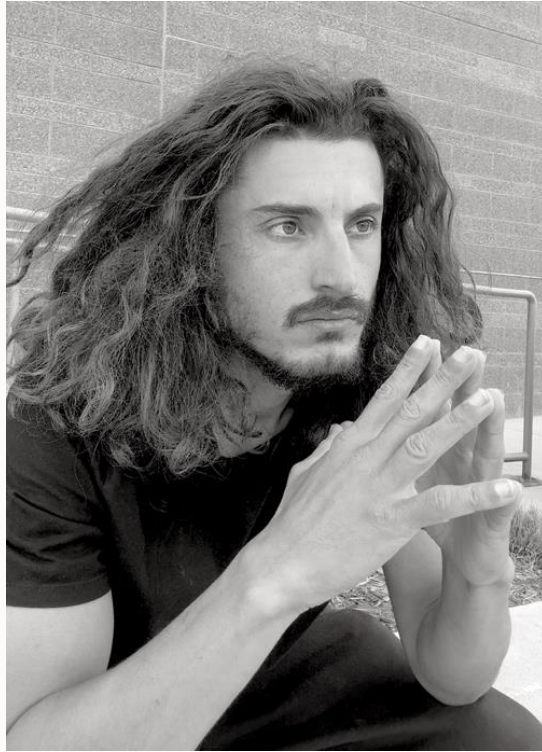
Battery = the physical injury (contact/touching).

“Aggravated assault” is a serious criminal classification that often elevates a simple assault or battery charge by adding specific factors, such as the use of a deadly weapon or the intent to commit a higher-degree felony (murder, rape, robbery).

THE “DOUBLE JEOPARDY” MISCONCEPTION

A verdict of not guilty in a criminal case does not prevent a plaintiff from filing a civil suit for the same action. These are separate divisions of law with separate courts. Prohibition of double jeopardy (a second try for the same cause of action) does *not*

apply when referring to criminal and civil actions of the same incident. A person may be found not guilty criminally but later found liable civilly. Famous example: O.J. Simpson was acquitted of the crime of murder but was later found civilly liable for the wrongful death of the victims.



ABOUT THE AUTHOR

ELIA KAZAN holds a Master of Arts degree in English from Arizona State University and a Juris Doctor from the Elisabeth Haub School of Law. In 2021, he successfully passed the Uniform Bar Exam in the State of New Jersey. He created *Law School Simplified* to empower law students and to ensure those taking the NextGen Bar Exam pass it with significant ease. He believes in the phrase, “I did the hard work, so you don’t have to.” He also believes intelligence is marked by taking the complex and refining it into simplicity for anyone to understand.