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THE TRANSFORMATION OF AMERICAN LANDLORD-TENANT LAW†

MARY ANN GLENDON*

INTRODUCTION

It is generally acknowledged that the 1960's and 1970's saw a revolution of sorts in American landlord-tenant law,[1] but the nature of that revolution is disputed. To many, the essence of the change has seemed to be a shift of the basis of lease law from principles of property to principles of contract. This view is particularly noticeable in the opinions of judges who have been instrumental in bringing about fundamental alterations in the common law of landlord-tenant,[2] and it also seems to have been central to the thinking of the draftsmen of the Uniform Residential Landlord and Tenant Act (URLTA).[3]

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[1] Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1, 2 (1976) [hereinafter cited as Abbott]; Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 6 (1979) [hereinafter cited as Cunningham].

[2] *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074, 1075 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) ("Since, in traditional analysis, a lease was the conveyance of an interest in land, courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases . . . . Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract.") (footnote omitted); Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 324, 391 N.E.2d 1288, 1292, 418 N.Y.S.2d 310, 314 (1979) ("Since a lease is more akin to a purchase of shelter and services rather than a conveyance of an estate, the law of sales . . . provides a ready analogy that is better suited than the outdated law of property to determine the respective obligations of landlord and tenant.") (citation omitted). *See also* Green v. Superior Court, 10 Cal. 3d 616, 622-25, 637, 517 P.2d 1168, 1171-74, 1182, 111 Cal. Rptr. 704, 707-10, 718 (1974); Mease v. Fox, 200 N.W.2d 791, 793 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 333, 521 P.2d 304, 308 (1974); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 197, 293 N.E.2d 831, 842 (1973); Pugh v. Holmes, 486 Pa. 272, 282, 405 A.2d 897, 902 (1979); Kamarath v. Bennett, 568 S.W.2d 658, 659-60 (Tex. 1978).

[3] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS,

In fact, however, landlord-tenant case law was already deeply pervaded by contract notions by the end of the nineteenth century.[4] Awareness of this earlier contractualization of lease law has led one writer to interpret the recent changes as primarily involving a movement from traditional contract law to modern commercial law.[5] Where leases of dwellings are concerned, some scholars have seen in recent developments a transition from contract to status.[6] Another scholar has identified the motive force of change in residential lease law as neither property nor contract, but "the moral principle of redistribution of wealth from landlord to tenant."[7]

This article proposes to show that what has been called a revolution appears, in historical perspective, to have been no more or less than the culmination, in one area of the law, of certain long-standing trends that have transformed not only landlord-tenant law, but private law generally over the past century. Lease law was never pure property law.[8] By the turn of the century, and up to the 1960's, it was an amalgam of real and personal property principles and of property and contract notions.[9] It consisted mostly of case law, but even in the nineteenth century it had acquired an overlay of statutory regulation. Over the twentieth century, the elimination of certain anomalies within lease law brought it into closer harmony with modern principles of contract, tort, civil procedure and commercial law.[10]

What is new, if not revolutionary, in the past twenty years, is that residential and commercial landlord-tenant law have gradually diverged, the former more influenced by developments in consumer law,[11] the latter by commercial law.[12] The decisive element in the transformation of the residential landlord-

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UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (Nat'l Conf. of Comm'rs on Uniform State Laws 1972) (amended 1974), 7A Unif. Laws Ann. 499 (1978) [hereinafter cited as URLTA]. "Existing landlord-tenant law in the United States, save as modified by statute or judicial interpretation, is a product of English common law developed within an agricultural society at a time when doctrines of promissory contract were unrecognized." URLTA, § 1.102 comment. *See also* Brakel & McIntyre, *URLTA in Operation: An Introduction,* 1980 AM. B. FOUND. RESEARCH J. 559, 560-61 [hereinafter cited as Brakel & McIntyre]; Brakel, *URLTA in Operation: The Oregon Experience,* 1980 AM. B. FOUND. RESEARCH J. 565, 567 [hereinafter cited as Brakel].

[4] *See* 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1], especially at 181, 187 (P. Rohan ed. 1977); Hicks, *The Contractual Nature of Real Property Leases,* 24 BAYLOR L. REV. 443 (1972); Siegel, *Is the Modern Lease a Contract or a Conveyance? — A Historical Inquiry,* 52 J. URB. L. 649 (1975); and Weinberg, *From Contract to Conveyance: The Law of Landlord and Tenant, 1800-1920 (Part I),* 1980 S. ILL. U.L.J. 29.

[5] Siegel, *supra* note 4, at 685-86.

[6] Cunningham, *supra* note 1, at 3; Donahue, *Change in the American Law of Landlord and Tenant,* 37 MOD. L. REV. 242, 258 (1974); Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?* 9 U. KAN. L. REV. 369 (1961).

[7] Meyers, *The Convenant of Habitability and the American Law Institute,* 27 STAN. L. REV. 879, 882 (1975) (criticizing the Restatement (2d) of Property's adoption of the implied warranty of habitability, even though it reflected the trend of decisions) [hereinafter cited as Meyers]. *See also* Berger, *The New Residential Tenancy Law — Are Landlords Public Utilities?* 60 NEB. L. REV. 707 (1981) [hereinafter cited as Berger, *New Residential*].

[8] See text and notes at notes 19-40 *infra.*

[9] See text and notes at notes 41-59 *infra.*

[10] See text and notes at notes 60-119 *infra.*

[11] See text and notes at notes 120-269 *infra.*

[12] See text and notes at notes 362-75 *infra.*

tenant relationship has been its subjection to pervasive, mostly statutory, regulation of its incidents. Contrary to a widespread belief among jurists, this process has been less the product of highly publicized court decisions establishing implied warranties of habitability in residential leases, than of steadily proliferating legislation.[13] Together, legislative and judicial treatment of leases of dwellings now make it plain that the movement in residential lease law has been not from one area of private law to another, but from private ordering to public regulation.[14] In this process of transition from private to public law, the habitability issue, which has dominated residential landlord-tenant law for the past two decades, is now yielding center stage to developments even more far-reaching in their implications: rent regulation, security of tenure for the tenant, and the qualification of the landlord's traditional rights to alienate the freehold or to convert it to another use.

The present article examines these fundamental shifts in the technical foundations of commercial and residential landlord-tenant law,[15] and traces the accompanying alteration in conceptions of the respective proprietary rights of residential landlord and tenant.[16] Underlying these latter changes is the idea that shelter is a basic human necessity, and that public regulation of the terms and conditions on which it is offered and held is therefore appropriate. Increasing acceptance of this implicit premise has made legislative and judicial regulation of the residential rent contract as inevitable as it was of the employment contract.[17] Yet the relation of regulatory landlord-tenant law to the supply and quality of rented housing is problematic,[18] raising serious questions for future housing policy.

I. THE HYBRID NATURE OF LEASEHOLD ESTATES AND THEIR EVOLUTION

The notion that American landlord-tenant law has evolved from property to contract ignores the long and variegated history of the leasehold estates. This history is that of a hybrid legal institution, neither entirely contractual nor entirely proprietary. The earliest leases of which we know in the common law systems were not considered real property. That rights under these leases were treated as more contractual than proprietary was only natural since the purpose of the early term of years typically had nothing to do with subsistence or shelter.[19] During the thirteenth century, when the legal characteristics of the

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[13] See text and notes at notes 120-75 *infra*.

[14] See text and notes at notes 270-361 *infra*.

[15] See text and notes at notes 176-361 *infra*. The law review articles by Abbott and Cunningham, *supra* note 1, survey and analyze with a wealth of detail the present state of residential landlord-tenant law. The present article draws on the work of Professors Abbott and Cunningham to support some of the general statements made here concerning trends in current law. The reader interested in an extensive treatment of particular issues is referred to those excellent articles.

[16] See text and notes at notes 426-77 *infra*.

[17] See generally M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 143-205 (1981) for a discussion of the judicial and legislative treatment of the employment contract over the past century, with a brief comparison between it and the lease agreement.

[18] See text and notes at notes 376-425 *infra*.

[19] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 36, 111, 113 (2d ed. 1923).

term for years began to take shape, the term was primarily used as "a common part of the machinery whereby land was gaged for money lent."[20] Leaseholds at that time thus had a merely formal resemblance to the freehold estates, which normally served as the continuing economic basis of a family. Probably because of this background of use as a security device, the term of years was classified as a non-freehold estate and as personal, rather than real, property.[21] But with the rise of farming leases in the fourteenth and fifteenth centuries, the tenant's situation became similar to that of other landholders. The law recognized this at the end of the fifteenth century by according tenants the right to bring the "real action" of ejectment to recover the possession of land.[22] Despite its assimilation over time to interests in real property, however, the interest of the lessee has never completely outgrown its early classification as personal property.[23]

Gradually, as the term of years came to be used primarily for agricultural purposes, the termor's interest was treated as in many ways analogous to the rights of owners of freehold estates. In Blackstone's eighteenth century scheme, it was, if not real property, an estate *in* real property. Blackstone classified the leasehold estates (which he listed as estates for years, estates at will and estates at sufferance) in his Book II *(The Rights of Things)* under "Things Real."[24] There, these "estates less than freehold" were grouped with freehold estates in real property, rather than with personal property or contracts. The distinguishing feature of the *estate for years* in Blackstone's time, and now, is that it must end at or before a fixed date.[25] Normally, a term for years ends at the expiration of the period fixed, no other notice being required.[26] A *tenancy at will* at common law was a tenancy which could be terminated by either party at any time, without formal notice.[27] The *tenancy at sufferance* merely denotes the situation of a person who lawfully gained possession of land and retains it after his right to possess the land has ceased.[28]

By the end of the nineteenth century it was usual to add to Blackstone's list a fourth type of leasehold estate, the *periodic tenancy*. These tenancies became important particularly when multi-unit apartment buildings arose to meet the

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[20] *Id.* at 112.

[21] *Id.* at 113, 115-16. Its special connection with land was, nevertheless, recognized by calling it a chattel real. *Id.* at 116.

[22] T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 574 (5th ed. 1956).

[23] 2 POWELL, *supra* note 4, ¶ 221[2] at 187-91; C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 64 (1962). *See also* Parker v. Superior Court, 9 Cal. App. 3d 397, 400, 88 Cal. Rptr. 352, 354 (1970).

[24] 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140.

[25] *Id.* at *140, *143. *See also* MOYNIHAN, *supra* note 23, at 65-69. Despite its name, the term for years may be for a period less than a year. *See id.* at 67. Thus, a lease "to T, for one week" creates a term for years in T because the term has a fixed duration.

[26] *See* MOYNIHAN, *supra* note 23, at 78. Such leases may also come to an end upon the happening of an event specified in the lease, surrender by the tenant and acceptance thereof by the landlord, and upon the exercise by either party of a power to terminate reserved in the lease. *Id.*

[27] 2 BLACKSTONE, *supra* note 24, at *145; 1 H. TIFFANY, TREATISE ON THE LAW OF LANDLORD AND TENANT § 13 at 111 (1912); MOYNIHAN, *supra* note 23, at 84.

[28] 2 BLACKSTONE, *supra* note 24, at *150; MOYNIHAN, *supra* note 23, at 85.

housing needs of a mobile working population. A periodic tenancy is one which runs continuously from period to period, until one party terminates it by giving proper notice, usually equivalent to the length of the measuring period, or, if the measuring period is a year or more, to half that period.[29] Commonly such tenancies are from month-to-month, or year-to-year. They can be created by lease, but more often they arise by implication of law.[30] Blackstone knew of the periodic tenancy, but had treated it as a form of the tenancy at will.[31] At common law, when T entered on L's land with L's permission, but without any specific agreement as to the duration of the tenancy, the arrangement was presumed to be terminable at will. Because of the hardship a sudden termination could cause in such situations, however, Blackstone, writing in the latter half of the eighteenth century, said:

> [C]ourts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other.[32]

Thus, even in the eighteenth century, courts were hesitant to subject a tenant to immediate dispossession unless it was clear that both parties had agreed to such an arrangement.

Over the nineteenth century, the importance of the periodic tenancy increased while that of the tenancy at will diminished. While the prevailing American rule was said to be that a general letting (a lease for an indefinite period), without more, gave rise to a tenancy at will,[33] this rule was practically swallowed by exceptions. A periodic tenancy arose by implication if a periodic rent was reserved in the lease, or if T entered on L's land without specification of term or rent, but then paid rent, which L accepted, on a periodic basis.[34] Rules such as these must have converted most tenancies at will into periodic tenancies. The harshness of the at-will termination rule was also mitigated by statutes in several states which provided that even a tenancy-at-will could not be terminated without some specified period of notice.[35] Like the courts in Blackstone's day, state legislatures were concerned about the effects an abrupt termination could have upon a tenant.

Both the uses of the leasehold estates and the form of leases changed substantially in the century after Blackstone's *Commentaries* were written.

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[29] MOYNIHAN, *supra* note 23, at 79-83.

[30] See text and note at note 34 *infra*.

[31] 2 BLACKSTONE, *supra* note 24, at *147.

[32] *Id.*

[33] 1 TIFFANY, *supra* note 27, § 13 at 105 and § 14 at 129-32.

[34] 1 TIFFANY, *supra* note 27, § 14 at 125, 129. MOYNIHAN, *supra* note 23, at 81. Payment and acceptance of rent under a lease which is invalid, for example, because of the writing requirements of the Statute of Frauds, will create a periodic tenancy, *id.* at 82, except in Maine and Massachusetts where, by statute, such tenancies remain at will. *Id.* at 82 n.10. A tenant who holds over with the landlord's permission at the expiration of his lease term also becomes a periodic tenant if the landlord recognizes him as a tenant, for example, by accepting rent. *Id.*

[35] 1 TIFFANY, *supra* note 27, § 13 at 112; MOYNIHAN, *supra* note 23, at 84-85.

Leases were still being used in agricultural settings, but, with the advance of urbanization, they were also becoming common arrangements through which tenants secured business premises and shelter. In these two latter situations, the structures on the land were often at least as important a part of the transaction as the land itself. The written lease, especially in commercial contexts, became longer. It began to look less like a conveyance of land, and more like a contract with its sets of mutual promises in which the parties provided for contingencies and otherwise worked out the details of what was to be a continuing relationship. Increasingly, the rights and obligations of landlord and tenant came to be fixed, less by the common law, and more by the covenants of the lease.[36] In business leases, such covenants are often the product of a bargaining process; in written residential leases, they are apt to be contained in standardized forms which are presented to the tenant on a take-it-or-leave-it basis.[37] The common law of the landlord-tenant relationship, a compound of property and contract,[38] was increasingly displaced by the parties' contract, and in such cases became a kind of stop-gap law that applied if the parties had not agreed otherwise.

While the development of the written lease increased the contractual elements of the landlord-tenant relationship, in urban residential tenancies, especially among low-income groups, the periodic tenancy without a written lease became common. As Powell described these arrangements,

> [The tenants] "rent" a space in which to live, agreeing to pay so much every week or every month, out of the periodically received pay check or pay envelope. Duration of the occupancy is undiscussed. The tenant's ability to pay is so dependent on the unpredictable regularity of earnings, and his desire to remain is so dependent upon possible changes in his place of employment, that an agreement obligating him to an estate for years is not commonly made. From the lessor's angle, no useful end is likely to be served by a more definitive arrangement. Few of these tenants have assets sufficient to make a judgment collectible. The uncertainties of life which beset our mobile industrial and white-collar population are suited by the fluidity of arrangement implicit in this type of nonfreehold estate. Two results flow from the foregoing. This type of estate is tremendously important sociologically in that occupancy thereunder conditions the home life of a very substantial fraction of the population. On the other hand, the financial smallness of the involved rights results in a great dearth of reported decisions from the courts concerning them. Their legal consequences are chiefly fixed in the "over the counter" mass handling of "landlord and tenant" cases of the local courts. So this type of estate, judged sociologically, is of great importance, but judged on the basis of its jurisprudential content, is almost negligible.[39]

The economic circumstances of urban residential tenants thus militated against

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[36] 2 POWELL, *supra* note 4 ¶ 221[1] at 180-81.

[37] Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?* 71 NW. U.L. REV. 204, 232 (1976).

[38] Weinberg, *supra* note 4, at 31.

[39] 2 POWELL, *supra* note 4, ¶ 253 (footnote omitted).

the use of written leases. The periodic tenancy was barely visible in the case law and legal literature.

The increasingly contractual content of leases and the special circumstances of residential leases and leases of parts of multiple-unit buildings were already influencing landlord-tenant law as it stood at the turn of the century, that law which is described in the following section as "classical." When Powell summarized the situation in his great treatise on property, first published in 1949, the contractual aspects of leases were often controlling:

> [T]he background of the lease as a conveyance, built solidly by 1500, has a tremendous foreground, evolved largely since 1800, which is purely contractual in character. The modern law is the synthesis of these two historical factors. Sometimes the background peeks through and controls. Sometimes the foreground alone is considered determinative.[40]

Thus, the lease has long been a hybrid of many strains: contract and conveyance, personal and real property, promise and covenant. All these elements, together with the beginnings of statutory regulation, were mingled in the classical law of landlord and tenant.

II. Classical Landlord-Tenant Law

A. *The Basic System*

American commercial and residential landlord-tenant law assumed the form that it had on the eve of the landlord-tenant "revolution" over the course of the nineteenth century in an era when property was losing, and contract was gaining, predominance in private law.[41] Notions of freedom of contract and laissez-faire were at their zenith. Three leading ideas, one from property and two from contract, met and intertwined in the fundamental rules which governed the landlord-tenant relationship. The first notion was the conception of the lease as a sale of possession for rent.[42] The second was the idea that contracts should be held sacred: *pacta sunt servanda.*[43] This second idea was contained within the third, which is the broad notion of freedom of contract, which

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[40] *Id.* ¶ 221(1) at 181 (footnote omitted).

[41] J. W. Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States 12 (1956).

[42] Moynihan, *supra* note 23, at 71.

[43] One of the leading decisions is an early landlord and tenant case, Paradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (K.B. 1647). There the court refused to release the tenant from his obligation to pay rent even though, during civil war, the tenant had been ousted from possession by the army of "an enemy to the King." *Id.* The court said: "[W]hen the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Id.* at 27, 82 Eng. Rep. at 897. With the rise of capitalism, it became one of the main functions of contract law to assure "that bargains would be kept and that legitimate expectations created by contractual promises would be honored." F. Kessler & M. Sharp, Contracts: Cases and Materials 2 (1953). The idea that contracts should be held sacred found repeated expression in the 19th century case law. *Id.* at 4-5.

meant that, subject to narrow limits, the legal system would enforce the bargains of private parties as written in the same way that it would enforce legislation.[44] Courts rarely disturbed contractual clauses of the type which today would be called onerous.

There was very little public control over the quality, type and location of housing, rented or otherwise, in the nineteenth century, except in certain of the nation's largest cities where conditions in the tenements that had appeared with industrial expansion and immigrations were believed to be a menace to public health.[45] The activity of the federal government in the housing area was sporadic and small-scale until the Depression years of the 1930's, and, with few exceptions, that of state governments was practically nil until the 1960's.

The contours of classical landlord-tenant law can be delineated by describing a few of its basic rules. Most of these rules, from their inception, were subject to qualifications, exceptions, and to judicial avoidance through characterization of the facts of individual cases. But until the late 1960's, they still constituted the starting points for any legal analysis of landlord-tenant relations. A gradual process of erosion culminated in the demise of many of these rules in the 1960's and 1970's and in the substitution of new and often opposite starting points, especially where residential tenancies are concerned.[46] The legal treatment of leases of dwellings has become differentiated from that of business tenancies where there is more apt to be bargaining between the parties, and from farming or mineral leases where structures are either not involved or are incidental to the main purpose of the transaction. Before discussing such developments, however, it is necessary to outline the classical landlord-tenant relationship.

In the classical scheme, the landlord's principal obligations related to possession and the tenant's to rent. Thus, the landlord was obliged to give the tenant at least good title and a clear right to possession at the commencement of the term.[47] During the term, the tenant had the right to expect that his possession would not be materially disturbed by the landlord, anyone acting under the landlord's authority, or anyone with a title paramount to that of the landlord. This right, inherent in the tenant's estate, came to be expressed as the implied covenant for quiet enjoyment.[48] The landlord had no obligation to deliver the premises in any particular physical condition or state of repair,[49]

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[44] P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 634 (1979); KESSLER & SHARP, *supra* note 43, at 3.

[45] L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION 26-29 (1968).

[46] See text and notes at notes 176-269 *infra*. The parallels between the legal transformation of the landlord-tenant relationship and the earlier reworking of the law governing the individual employment contract are striking. *See* GLENDON, *supra* note 17, at 143-205.

[47] 1 TIFFANY, *supra* note 27, § 182 at 1147-54, 1156-67. In England, and a number of American states, he had to deliver actual possession; *see* the discussion in Teitlebaum v. Direct Realty Co., 172 Misc. 48, 49, 13 N.Y.S.2d 886, 887-88 (Sup. Ct. 1939).

[48] *See* 1 TIFFANY, *supra* note 27, § 79 at 522-23.

[49] *Id.* § 86(a) at 556.

and, *a fortiori,* no duty to maintain or repair them during the term.[50] The lessee was expected to examine the premises and decide for himself whether they were fit for his purposes.[51] After the lease was entered, as after a sale, the risk of loss or deterioration belonged to the lessee. Thus, even if the premises were destroyed or rendered unfit for the tenant's purposes during the lease term, the tenant's obligation to pay rent in principle continued unaffected.[52] The tenant's obligations towards the landlord with respect to the premises were defined by the law of waste, that is, by the same body of rules that governed a life tenant's duties towards remaindermen or reversioners.[53] Hence, the tenant was obliged to make such ordinary repairs as were necessary to prevent waste and deterioration, but not to make substantial, lasting and general repairs.[54]

The tenant's obligation to pay rent was grounded both in the property law notion that the rent "issued from the land" as a tenurial service of the tenant's estate,[55] and (where the tenant had expressly covenanted to pay rent) in the idea of absolute contractual obligation.[56] This made it doubly difficult for a tenant to defend a rent action. Furthermore, the contract doctrine of mutual dependence of promises, developed by Lord Mansfield in the late eighteenth century, was not imported into the law of leases.[57] Thus, even a breach by the landlord of an express covenant, such as a covenant to repair, did not relieve the tenant of any part of his obligation to pay rent; and the breach by the tenant of his rent covenant did not give the landlord the right to retake possession.[58] The aggrieved party was limited to suing for contractual relief (plus, in the case of the landlord, to seizing and holding chattels on the land as security for rent) unless a statute or the lease itself gave him additional rights.[59] This last, all-important, qualification, however, leads to a consideration of the extent to which, even at the turn of the century, exceptions to these and other common law rules had appeared: through commonly used lease provisions, statutory developments and the case law.

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[50] *Id.* § 87(a) at 574.

[51] The following statement in Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126 (1889), is typical:

> It is uniformly held in this state that the lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor covering that subject. As was said by the learned General Term when deciding this case: 'The tenant hires at his peril and a rule similar to that of *caveat emptor* applies, and throws on the lessee the responsibility of examining as to the existence of defects in the premises, and of providing against their ill effects.'

Id. at 115, 23 N.E. at 127.

[52] 1 TIFFANY, *supra* note 27, § 87(g) at 617. *See also id.* § 182 at 1191.

[53] *Id.* § 109 at 706.

[54] *E.g.*, Suydam v. Jackson, 54 N.Y. 450, 453-55 (1873).

[55] 1 TIFFANY, *supra* note 27, § 165 at 1009.

[56] See note 43 *supra. See also* Siegel, *supra* note 4, at 651-58.

[57] MOYNIHAN, *supra* note 23, at 70; A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 366 (2d ed. 1969).

[58] *E.g.*, Brown's Adm'r v. Bragg, 22 Ind. 122, 123 (1864). MOYNIHAN, *supra* note 23, at 70.

[59] *Id.* at 70-71.

B. *Erosion of the Classical System*

1. Remedies

Not surprisingly, breach of the two most important obligations in a lease—the tenant's duty to pay rent and the landlord's duty to protect the tenant's possession—gave rise to more extensive remedies than the bare statement of the classical common law rules of landlord-tenant law would suggest. Lease provisions, and often statutes, in the nineteenth century made it virtually certain that a landlord could terminate a lease upon the tenant's default in rent.[60] Indeed, leases ordinarily contained (frequently-litigated) provisions, of a type still familiar, attempting to authorize the landlord to terminate upon the tenant's breach of any of his other obligations.[61] The nineteenth century also saw the proliferation of "summary process" statutes which established expeditious judicial procedures for enforcing a landlord's rights against tenants in default or holding over after the expiration of their term. Summary process statutes, to the extent they were construed as displacing commonly used self-help remedies, protected tenants from forcible eviction by landlords.[62] Primarily, however, they benefited landlords by giving them an alternative to the time-consuming and expensive action of ejectment. When leases routinely came to involve buildings, especially those with services and areas that remained under the control of the landlord, the lessor was apt to have substantial continuing expenses with respect to the leased property even when the flow of rent was interrupted. In summary proceedings, the right to possession could be tried in a much simpler and speedier manner than in an ordinary civil action.

So far as the tenant's rights were concerned, there was an expansion in the nineteenth century of the common law doctrine that if the landlord ousted the tenant from the leased premises during the term, the landlord was not only liable on the covenant for quiet enjoyment, but his right to rent was suspended or extinguished in whole or in part, depending on the circumstances.[63] Gradually, it began to be accepted that an eviction could be constructive as well as actual.[64] The doctrine of constructive eviction seems to have first appeared in the 1826 New York case of *Dyett v. Pendleton,*[65] where the tenant was permitted to defend a rent action by showing that he was compelled to leave the premises because of the landlord's loud and "indecent . . . practices and proceedings" in another part of the building where the tenant's rooms were located.[66] The rationale of the case illustrates how closely intertwined property

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[60] *Id.* at 70 n.3; 2 TIFFANY, *supra* note 27, § 274(d) at 1764.

[61] See the cases cited in 2 TIFFANY, *supra* note 27, § 274(e) at 1765.

[62] Lindsey v. Normet, 405 U.S. 56, 71-72 (1972). *See also* Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961) where such a statute was used by a tenant against a landlord who had retaken possession without resort to the courts.

[63] 2 TIFFANY, *supra* note 27, § 184 at 1258.

[64] *Id.* § 185(a) at 1258-59.

[65] 8 Cow. 726 (N.Y. 1826).

[66] *Id.* at 737.

and contract notions were in lease law at the time. The court repeatedly grounded its conclusions in both areas. On the central issue, it found the evidence "tended to prove a disturbance of . . . quiet possession, *and* a failure of the consideration on which only the tenant was obliged to pay rent. . . ."[67]

Although the doctrine of constructive eviction was not widely applied in the nineteenth century, its details were worked out in a small number of cases. Constructively evicted tenants were permitted to treat their leases as terminated, not merely to treat the rent as suspended; the category of acts by the landlord which, though falling short of actual physical ouster, were held materially to deprive the tenant of the beneficial enjoyment of his lease, was enlarged; and the requirement that the tenant must leave the premises as a condition to asserting the defense was established.[68] In some of these cases, the landlord's failure to act where he had a duty to act was held to constitute a constructive eviction.[69] Cases giving tenants relief for breaches of covenants to provide heat, electricity, plumbing or other important services became common in the twentieth century. As courts began routinely to permit "constructive eviction" to serve as a remedy for a landlord's breach of covenants in the lease, the legal fiction became a functional substitute for the missing doctrine of mutually dependent covenants.[70]

Constructive eviction proved to be a flexible tool for dealing with a variety of landlord-tenant problems over the first half of the twentieth century. Though it did not create any new duties, the remedy did indirectly alleviate some of the harsh effects of the rule that a landlord had no duty to deliver or maintain the premises in a fit, safe or habitable condition.[71] It did not serve to permit termination in all cases where the premises were seriously deficient, however, since it was necessary for the tenant to show that the landlord could somehow be charged with responsibility for the condition that deprived the tenant of the enjoyment of the leased premises.[72] Furthermore, the requirement that the tenant must vacate the leased premises in order to show they had really become "uninhabitable" was, though logical, increasingly felt to be burdensome. In the case of low-income urban tenants, there was often no better alternative housing available at rents they could afford. In addition, any tenant who did vacate his dwelling took the risk that the court might not agree that the conditions had justified his departure. This risk must have been reduced, however, in the case of low-income tenants by the probability that landlords would often not consider it worthwhile to seek a money judgment against them.

On the eve of the landlord-tenant revolution, some courts were developing doctrines that, under certain circumstances, would permit a tenant to claim

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[67] *Id.* at 732 (emphasis added).

[68] MOYNIHAN, *supra* note 23, at 71-72.

[69] 2 TIFFANY, *supra* note 27, § 185 at 1271-73.

[70] MOYNIHAN, *supra* note 23, at 72-73.

[71] 1 TIFFANY, *supra* note 27, § 87 at 577.

[72] *See* Tallman v. Murphy, 120 N.Y. 345, 351, 24 N.E. 716, 718 (1890).

constructive eviction while remaining in possession. For example, the Massachusetts Supreme Judicial Court in 1959 employed the notion of equitable constructive eviction, according to which a tenant would not have to leave the premises in order to qualify for equitable relief.[73] In the early 1960's, some lower courts in New York invoked the theory of partial eviction (which at common law had permitted a tenant who was physically evicted from a part of the premises to remain in possession without paying any rent)[74] to support a doctrine of partial constructive eviction. This doctrine would have obviated the necessity for tenants to vacate the leased premises before claiming the rent was suspended.[75] Such further elaboration of the constructive eviction idea, however, became increasingly unnecessary because, as demonstrated below,[76] the entire legal relationship of residential landlord and tenant by then was being fundamentally restructured through legislative and judicial action in most jurisdictions.

2. Condition of the Premises at the Time of Leasing

So long as structures on the land did not often figure importantly in leasing arrangements, the analogy between the lease and the sale of real estate probably accorded more or less with the way the parties to leases viewed their transactions. But with urbanization and with leases of multi-unit buildings, especially for residential purposes, the issue of the fitness of the premises for the use contemplated by the parties moved to the foreground. Issues of title and right to possession, all-important in the early law, and even the existence of indecent activities nearby (noisy enjoyment being a recurring subject in nineteenth century quiet enjoyment cases), were probably of less pressing concern to urban residential tenants than were vermin infestation, defective plumbing or extreme disrepair.

By the late nineteenth century, the general rule that the landlord had no duty to deliver the premises in a fit condition was subject to certain exceptions. The oldest and best established of these was the time-honored *exceptio dolis,* the exception for fraudulent misrepresentation of the condition of the premises.[77] In the classical law, fraud was hard to prove, but this exception gradually expanded with the law of misrepresentation generally.[78] Another exception, originating in certain nineteenth century English cases, gained a precarious foothold in the American case law. This was the rule that, in a short-term lease

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[73] Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 129-30, 163 N.E.2d 4, 7-8 (1959).

[74] 1 TIFFANY, *supra* note 27, § 182 at 1160.

[75] *E.g.*, Gombo v. Martise, 41 Misc. 2d 475, 480, 246 N.Y.S.2d 750, 754-55 (Civ. Ct.),*rev'd*, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (Sup. Ct. App. Term 1964).

[76] See text at notes 120-269 *infra*.

[77] 1 TIFFANY, *supra* note 27, § 86 at 561-62.

[78] *E.g.*, Scudder v. Marsh, 224 Ill. App. 355, 358 (1922). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 106 at 696-98 (4th ed. 1971), and 51C C.J.S. *Landlord & Tenant* § 223(1) (1968).

of furnished premises, the landlord was obligated to deliver the premises in a condition fit for the purposes of the lease.[79]

Finally, a few states quite early established limited statutory exceptions to the rule of caveat emptor. The great codification movements of the nineteenth century had had their partisans not only in England, where Jeremy Bentham tried unsuccessfully to convince his countrymen of the superiority of codification to the common law, but also in the United States where David Dudley Field actually did succeed in persuading a handful of state legislatures to adopt the Civil Code he and others had drafted.[80] One provision of this code required the lessor of a building intended for human occupation to put it into condition fit for such use, and the following section required the lessor to repair all subsequent dilapidations not occasioned by the lessee's negligence.[81] If the landlord violated these duties, the tenant was permitted either to leave the premises or to apply one month's rent toward making the repairs.[82] In the Louisiana Civil Code, where, in accordance with civil law tradition, the lease was regarded as belonging to the field of contractual obligations, the lessor was also obliged to deliver and maintain the premises in a condition fit for the purpose for which they were rented.[83] All of these statutory duties, however, could be, and presumably frequently were, excluded by contract. Thus their main effect in practice was probably to cause the inclusion of waiver clauses in written leases. These early statutes were forerunners of what was to become the dominant mode of change in residential landlord-tenant law.

3. Conditions Arising During the Lease Term

Apart from the statutes just mentioned, there were few exceptions to the common law rule that the landlord had no duty to make repairs or to otherwise

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[79] *E.g.*, Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). *See generally* 1 TIFFANY, *supra* note 27, § 86 at 570-74. Tiffany, in criticizing this exception, unintentionally forecast what would eventually become the rule, half a century later, for most residential leases:

> If this peculiar doctrine were to be applied to every case of a short term lease in which immediate occupation is intended, the well established rule of the common law, that the lessee must make his objections to the condition of the premises before taking the lease, would be to a great extent nullified, and in every case of a short term lease a dissatisfied lessee would assert that he took the premises for immediate occupation.

Id. § 86 at 572-73.

[80] The five states were California (1866), Georgia (1863), Montana (1872), and North and South Dakota (1872). Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 17, 48 (A. Reppy ed. 1949).

[81] *E.g.*, CAL. CIV. CODE ANN. §§ 1941, 1942 (West 1954). Sections 1941.1, 1941.2, 1942.1 and 1942.5 were added in 1970 and amended in 1979. CAL. CIV. CODE ANN. §§ 1941.1-.5 (West Supp. 1981).

[82] *See* 1 TIFFANY, *supra* note 27, § 87 at 578-79. The Dakotas originally did not so limit the amount of rent that could be applied for repairs to one month's rent. Cunningham, *supra* note 1, at 57.

[83] LA. CIV. CODE ANN. art. 2692 (West 1952), is similar to Art. 1719 of the French Civil Code.

maintain the leased premises after the exclusive right to possession had been transferred, or, to put it another way, after the risk of condition had passed to the tenant. This rule followed logically from the fact that the landlord had no duty to deliver the premises in a fit condition, and accorded with the notion that transfer of possession of the land itself was the essence of the transaction.

When leases of improved land became common, the application of this rule came to appear especially harsh in one situation—where the leased premises were destroyed or made unsuitable for the tenant's purpose by some calamity, such as fire or flood, during the lease term. The common law dictated in these circumstances that the tenant's liability for the rent continued unabated, because contracts should be enforced as written[84] and because so long as the land remained there was something from which the rent could "issue."[85] This result was much criticized and some courts either did not apply it in such situations, or avoided it when possible by creative construction of the lease. For example, by finding that a building or part of a building was leased but the land it stood on was not, the court could excuse a tenant from liability for rent when the building was destroyed because there was nothing left for the rent to "issue from."[86]

By the end of the nineteenth century, many jurisdictions had adopted statutes which provided that if a leased building were destroyed or so injured during the lease term as to make it "untenantable," the tenant would be permitted to leave the premises and be relieved from his liability to pay rent.[87] An indirect effect of these statutes, in certain situations, was to encourage the landlord to repair or rebuild if he wanted to keep his tenant.[88] Furthermore, while these statutes were sometimes narrowly construed to relieve the tenant only in cases of sudden, fortuitous and total destruction, they were also on occasion more broadly interpreted to permit the tenant to terminate the lease if the premises gradually became unsuitable.[89]

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[84] Siegel, *supra* note 4, at 656.

[85] 1 TIFFANY, *supra* note 27, § 87 at 617-19, 1196.

[86] *Id.* § 87 at 1193, 1196.

[87] *E.g.*, the 1860 New York statute, quoted in Suydam v. Jackson, 54 N.Y. 450 (1873), which provided

> 'that the lessees or occupants of any building, which shall, without any fault or neglect on their part, be destroyed or be so injured by the elements or any other cause as to be untenantable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises, and of the land so leased or occupied.'

Id. at 453.

[88] 1 TIFFANY, *supra* note 27, § 87 at 577.

[89] *Compare* Suydam v. Jackson, 54 N.Y. 450, 453-57 (1873) (narrow construction) *with* Meserole v. Hoyt, 161 N.Y. 59, 61-62, 55 N.E. 274, 274-75 (1899); Tallman v. Murphy, 120 N.Y. 345, 350-53, 24 N.E. 716, 718-19 (1890); and Vann v. Rouse, 94 N.Y. 401, 405-06 (1884) (broad construction).

Where the statutes based on the Field Civil Code were in force, the no-duty-to-maintain rule was, of course, displaced. Under these laws, however, the tenant's only remedy if the landlord failed to maintain the leased premises in habitable condition was to move out, unless the problem was a relatively minor one that could be corrected by the application of rent. This placed the tenant at much the same disadvantage as did the common law doctrine of constructive eviction.

A significant breach in the no-duty-to-maintain rule appeared in most states with the advent of multi-unit buldings. In cases involving such buildings, the courts generally held that the landlord had the duty to maintain areas open to use by the tenant or facilities over which the landlord retained control.[90] Constructive eviction and tort remedies were gradually made available to tenants whose beneficial enjoyment was disturbed by,[91] or who were injured by,[92] conditions in such areas. Since leased premises in multiple-unit buildings can be seriously affected by heating, wiring and plumbing systems over which the landlord has control, this exception became of major importance.

4. Tort Liability

It followed also from the general rule that the landlord had no duties regarding the condition of the leasehold that he was in principle not liable in tort to the tenant or to third parties for injuries to person or property owing to defects in the leased premises.[93] The tenant, as the person in possession and control, had primary responsibility. However, courts and juries often strained to avoid the effects of this rule and to bring individual cases within its ever-widening exceptions. Thus, at the turn of the century, a landlord could be held liable if at the time of leasing he had actual knowledge of a hidden dangerous condition on the premises and had reason to believe the tenant would not discover the condition, and did not disclose his information to the tenant.[94] Likewise if the landlord negligently failed to keep in repair common areas or, under certain circumstances, other areas which were under his control;[95] or if he had made voluntary repairs negligently, he could be liable in tort for resulting injuries.[96] Similarly, if the landlord knew at the time of the lease of a dangerous condition on premises leased for use by the public, he might also incur tort liability.[97]

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[90] 1 TIFFANY, *supra* note 27, § 89 at 628-40 and § 91 at 641-44.

[91] *E.g.*, Phyfe v. Dale, 72 Misc. 383, 130 N.Y.S. 231 (Sup. Ct. App. Term 1911).

[92] 1 TIFFANY, *supra* note 27, § 89 at 628-40 and § 91 at 641-44.

[93] *Id.* § 87 at 575, 649. The tenant, as the person in possession and control, was primarily liable to third parties injured by dangerous conditions on the premises. 52 C.J.S. *Landlord and Tenant* § 435 at 206-12 (1968). *See, e.g.*, King v. Cooney-Eckstein Co., 66 Fla. 246, 249, 63 So. 659, 660 (1913).

[94] 1 TIFFANY, *supra* note 27, § 86 at 562-70.

[95] *Id.* § 89 at 628-40 and § 91 at 641-44.

[96] *Id.* § 87 at 608.

[97] *Id.* § 89 at 655.

5. The Eve of the Landlord-Tenant Revolution

Until the mid-1960's, movement in residential and commercial landlord-tenant law took place mainly along three well-defined channels, with precedents in both areas being used interchangeably. The first of these was through the exceptions to the rules described above. New exceptions were developed from time to time[98] and the old ones were expanded,[99] as the common law adapted in its characteristic way to changed social and economic conditions. The second avenue of change in landlord-tenant law was through contractual clauses in leases. Judicial activity regarding these clauses was particularly pronounced with respect to business leases. Even where residential leases were concerned, however, contractual clauses often formed the basis for developments in the law. For example, courts began to permit the breach of a covenant to repair to serve as the basis for a tort action,[100] and more and more courts made the constructive eviction defense available where the landlord had violated material covenants in the lease.[101] Lease law also began to show some of the effects of the liberalization of contract law that was taking place generally. Tenants who had accepted harsh terms benefited from policies against forfeitures,[102] and from the courts' growing willingness to strictly construe or even invalidate clauses providing for rent acceleration,[103] penalties or liquidated damages,[104] or self-help repossession.[105]

The third path, which eventually became the high road of change in landlord-tenant law, was associated with the rise in the twentieth century of the administrative state in the United States. In the preceding century, as already mentioned, only a handful of states had statutes imposing on landlords a duty to put and keep leased premises in repair. Besides these, New York and Massachusetts had public health and safety legislation setting publicly enforced minimum standards for multiple dwellings in their largest cities, but laws of

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[98] For example, the exception for buildings under construction at the time of the lease was based on the idea that the tenant's obligation to inspect could not be effectively carried out in such circumstances. *See* J.D. Young Corp. v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App. 1930), *rev'd on other grounds*, 66 S.W.2d 676 (Tex. Comm'n App. 1933).

[99] For example, it began to be held that a landlord could be liable for injuries resulting from a dangerous condition at the time of leasing even if he had no actual knowledge of the condition, so long as he had reason to know of its existence. *See, e.g.*, Johnson v. O'Brien, 258 Minn. 502, 504-07, 105 N.W.2d 244, 246-47 (1960).

[100] *E.g.*, Faber v. Creswick, 31 N.J. 234, 239, 241, 156 A.2d 252, 254-55 (1959) (abandoning the requirement of privity and holding that breach of a covenant to repair could give rise not only to contractual remedies, but also to an action for injuries proximately caused by a negligent failure to perform the covenant).

[101] *E.g.*, Automotive Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 200-02, 172 N.E. 35, 37 (1930). *See also* 2 TIFFANY, *supra* note 27, § 185 (f) at 1271-73.

[102] *E.g.*, Jamaica Builders Supply Corp. v. Buttelman, 25 Misc. 2d 326, 205 N.Y.S.2d 303 (N.Y. Mun. Ct. 1960).

[103] *E.g.*, Ricker v. Rombough, 120 Cal App. 2d 912, 261 P.2d 328 (1953).

[104] *E.g.*, *id.*

[105] *E.g.*, Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961).

this type remained rare.[106] New York pioneered in devising legislative methods to make the enforcement of these standards more effective: first, in 1929, by barring actions for rent or eviction for non-payment of rent so long as the landlord had not obtained a certificate of compliance with the state housing law; then, in 1939, by permitting a stay of an action for rent or eviction for non-payment of rent if serious code violations existed, provided that the tenants deposited all rent due with the court.[107] These statutes, at the time, inspired few imitators outside New York.

After World War II, however, public interest and intervention in the housing area increased. This was partly due to the state of affairs described by Professor Abbott as follows:

> By 1949, the effect of little new construction during the Depression and World War II had created considerable obsolescence in the center city housing stock. Most of the available land within cities had been developed. The middle class exodus to the suburbs gathered momentum as the insurance benefits provided by the Veterans Administration and the Federal Housing Administration brought mortgage financing of new home purchases within the financial reach of an upwardly mobile urban middle and lower-middle class. The migration to the cities of lower income blacks and whites from rural America, increasing during the war years, continued unabated.[108]

In this atmosphere, Congress passed the Housing Act of 1949[109] which committed the United States to a national policy of achieving "as soon as feasible" the goal of "a decent home and suitable living environment for every American family."[110]

In 1954, the existence of housing codes began to be an important part of a local government's showing of eligibility to receive federal urban renewal funds and other forms of federal assistance. The detailed health and safety standards of the old Massachusetts and New York tenement house legislation were the prototypes for the more elaborate modern housing codes that began to be widely adopted.[111] Within a few years, most American cities of over 50,000 people had passed codes in basically similar form in order to qualify for federal urban renewal funds.[112] Eventually, some states passed state-wide housing codes.[113] Legislation establishing new obligations for landlords and new rights and remedies for tenants also began to appear at the state level.[114] The proliferation of state and local housing codes raised questions for the courts of whether viola-

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[106] Cunningham, *supra* note 1, at 11; Abbott, *supra* note 1, at 41-42.
[107] Cunningham, *supra* note 1, at 23-24.
[108] Abbott, *supra* note 1, at 43 (footnote omitted).
[109] Housing Act of 1949, 42 U.S.C. §§ 1441-1490(g) (1976).
[110] *Id.* § 1441.
[111] Cunningham, *supra* note 1, at 11.
[112] Abbott, *supra* note 1, at 44.
[113] Abbott, *supra* note 1, at 44 n.255, lists six states as having done so.
[114] See text and notes at notes 120-269 *infra*.

tion of statutory duties would be treated as giving rise to private rights of action. In accordance with the general direction of the development of tort law, the courts increasingly held that a landlord's violation of statutory safety requirements was evidence of negligence, thus opening up a major exception to the landlord's traditional limited immunity from tort liability.[115] These post-World War II housing codes and state statutes eventually were to provide the basis for some of the most fundamental judicial reforms of the classical landlord-tenant law.

Nevertheless, with variations among the jurisdictions, the rules of classical landlord-tenant tenant law still furnished the starting points for analysis of most legal problems arising out of all types of leases until that period of accelerated change which has been called a revolution in this body of law. Rules essentially similar to those found in Tiffany's turn-of-the-century treatise were still set forth as the "black letter law" in widely-used works.[116] During the process of erosion that has been described here, there were still frequent instances where despite, or perhaps because of, the hybrid nature of the lease, the force of accepted doctrine seemed to prevent modern developments in other fields from being imported into lease law. For example, the doctrines of anticipatory breach and mitigation of damages were often unavailable in the common situation where the tenant unjustifiably abandoned the premises before the expiration of the lease term.[117] In addition, the doctrine of independence of covenants survived in a great many states.[118] The landlord still had no common law duty in principle to put and keep the leased premises in a safe and habitable condition. Such duties as he undertook by covenant were in general enforceable only in contract, and such duties as were imposed on him by statute were backed up, with a few exceptions, only by administrative sanctions and criminal penalties, neither of which, it is generally acknowledged, was very effective.[119] Thus, until the 1960's, the development of landlord-tenant law in the various states displayed a variety of phenomena, some undermining the classical law, others revealing its continued vigor.

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[115] Breach of duties imposed by a housing code was held to be a basis for tort liability in Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 950-51 (D.C. Cir. 1960). *See generally* PROSSER, *supra* note 78, § 63 at 400.

[116] *See* W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY §§ 10-15 (3d ed. 1965); CASNER & LEACH, *supra* note 57, Ch. 17 and 18. In Casner and Leach's property casebook, the then emerging new residential landlord-tenant law was put in a separate chapter entitled *The Indigent Tenant. Id.* at 499.

[117] *E.g.*, Heckel v. Griese, 12 N.J. Misc. 211, 171 A. 148 (1934). *See also* Hicks, *supra* note 4, at 515-24. Siegel, *supra* note 4, at 663, 671-72, has usefully pointed out that classical contract law did not treat *all* promises as dependent and that the mitigation principle applied to damage actions, not to situations where the seller sued for the contract price. *Id.* Thus, so long as rent and possession were viewed as the only central obligations in leases, landlord-tenant law was not so inconsistent with classical contract law as it is with modern commercial law. Hicks, *supra* note 4, at 454-60, has shown that a number of courts in the early 20th century had in fact begun to treat several other important lease terms as mutually dependent.

[118] MOYNIHAN, *supra* note 23, at 70.

[119] Abbott, *supra* note 1, at 49-56.

III. The Demise of Classical Landlord-Tenant Law in Residential Tenancies

A. *Court-Legislature Interaction*

A trilogy of District of Columbia Circuit Court of Appeals cases, decided between 1960 and 1970, in which housing codes played an important role, symbolized the decisive stages in the disintegration of classical landlord-tenant law in America as it affected residential tenancies. In *Whetzel v. Jess Fisher Management Co.*,[120] the court allowed a tenant's tort suit to be based on a landlord's code violation.[121] In *Edwards v. Habib*,[122] a tenant was permitted to defend an eviction action on the grounds that the landlord had terminated her month-to-month tenancy in retaliation against the tenant for having reported code violations.[123] Finally, in *Javins v. First National Realty Corp.*,[124] the court discarded several common law rules at once: the landlord's lack of duties with respect to the physical condition of premises; the independence of the tenant's obligation to pay rent from the landlord's obligations with respect to the premises; and the constructive eviction requirement that a tenant must vacate the leased premises before asserting defenses to rent based on the condition of the premises.

The crumbling of the classical rules in the case law of the late 1960's is traceable in no small degree to the fact that, under the Johnson administration's "Great Society" programs, legal assistance was made much more accessible to indigent persons than it had been in the past.[125] In the atmosphere of that time, expanding legal services bureaus began to attract lawyers who were interested not only in aiding individual poor clients, but in bringing about change in the legal and social systems. Thus, "ordinary" residential landlord-tenant cases often became test cases which could be financed, staffed and appealed, even though the amounts actually in controversy might be quite small.

Legal aid bureaus all over the country were active in landlord-tenant matters in the 1960's, but it is probably not a mere accident that the most far-reaching judicial changes were initially accomplished in the District of Columbia. In the first place, housing conditions in Washington, D.C., were such as

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[120] 282 F.2d 943 (D.C. Cir. 1960).

[121] *Id.* at 949-51.

[122] 397 F.2d 687 (D.C. Cir. 1968).

[123] *Id.* at 699-701.

[124] 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). One might also mention here Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968), where the District of Columbia Court of Appeals, using contract principles, held void a lease entered in violation of the housing code. *Id.* at 837. Unlike the decisions of the United States Court of Appeals for the District of Columbia Circuit, this case and its novel approach have had little influence outside the District of Columbia. *See* Cunningham, *supra* note 1, at 81.

[125] *See* Economic Opportunity Act of 1964, 42 U.S.C. § 2809(a)(3) (1970). Section 2809(a)(3) was repealed in 1974 by Pub. L. 93-355, § 3(d)(2), 88 Stat. 390 which established the Legal Services Corporation, 42 U.S.C. § 2996. *See also* Abbott, *supra* note 1, at 5.

to arouse public concern.[126] But unlike several other jurisdictions, such as California[127] and New York,[128] with similar problems in their metropolitan areas, the District had not responded with legislation affording private remedies.[129] The circumstances thus favored a judicial response of some sort. It is also significant that a federal court, the United States Court of Appeals for the District of Columbia Circuit, then sat as, in effect, the Supreme Court of the District.[130] The judges on this court were immersed on a day-to-day basis in public and administrative law, and turned naturally to it for analogies. They also were ready to see a public law dimension in seemingly private litigation. Furthermore, two of the judges on that bench, Bazelon and Wright, were already well known for their willingness to innovate in other areas.[131] The stage was thus set for a judicial overthrow of classical landlord-tenant law in its application to residential leases.

In retrospect, it can be seen that the District of Columbia cases were only the flagships of a movement that had been long building. The way for change had been prepared by the gradual proliferation of exceptions to the classical rules. As the current of change began to accelerate in the social climate of the 1960's, it was swelled by a case-law stream building on the housing codes adopted to obtain federal aid, and by a less remarked, but in the end stronger,

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[126] *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970): ("Innumerable studies have documented the desperate condition of rental housing in the District of Columbia . . . ."). In 1977, Washington, D.C., had over a 16 percent incidence of inadequate housing units. President's Commission on Housing, *Interim Report* 18 (Oct. 30, 1981). See also note 414 *infra*.

[127] *See* CAL. CIV. CODE ANN. §§ 1941, 1942 (West 1954).

[128] *See* N.Y. REAL PROP. ACTS LAW, § 755 (McKinney 1979) (which legitimated a form of rent withholding in 1939); N.Y. REAL PROP. ACTS LAW, Art. 7A § 770 (McKinney 1979) (which authorized another form of rent withholding in 1965).

[129] This may have been due to some extent to the District of Columbia's unique constitutional status. As the political entity containing the nation's capital, its legislature is the United States Congress. It does, however, have a measure of home rule and a City Council. *See* Gerwin, *A Study of The Evolution and Potential of Landlord-Tenant Law and Judicial Dispute Settlement Mechanism in the District of Columbia. Part I: The Substantive Law and the Nature of the Private Relationship*, 26 CATH. U.L. REV. 457, 460 n.10 (1977). In 1955, like many other American municipalities, the District of Columbia adopted a housing code in order to become eligible for federal development funds. *Id.* at 460-61.

[130] This federal appellate court heard appeals from the District's local trial courts and from the District of Columbia Court of Appeals until a 1970 Court Reform Act went into effect making the District of Columbia Court of Appeals the highest court of the District. *See* Pub. L. No. 91-358 § 5 11-721-722, 11-921-23, 84 Stat. 473 (1970). *See* the discussion in Pernell v. Southall Realty, 416 U.S. 363, 367 (1974). Since then, the District of Columbia Court of Appeals has rather consistently given the influential Circuit Court of Appeals' landlord-tenant cases a restrictive interpretation. *E.g.*, Winchester Management Corp. v. Staten, 361 A.2d 187, 190-91 (D.C. 1976). *See* Chused, *Contemporary Dilemmas of the* Javins *Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L.J. 1385, 1388-93 (1979).

[131] Judge Bazelon was probably best known for his opinion in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), in which he substituted the "product of a mental disease or defect" test of criminal responsibility for the old M'Naghten rule (ability to tell right from wrong). *Id.* at 869-74. Judge Wright early distinguished himself through his pioneering decisions in civil rights cases. *See* J. BASS, UNLIKELY HEROES 112-36 (1981).

statutory stream, until at last the classical law was submerged and relegated to an undertow, tempering and qualifying the new doctrines of residential landlord-tenant law.

Since the 1960's, a great variety of statutes displacing the common law of residential landlord-tenant relations have been enacted at the state level. In many jurisdictions, statutory change preceded and often precipitated major case-law changes; in others, statutes followed case-law innovations, sometimes qualifying them, sometimes codifying them. Several states enacted a number of different kinds of landlord-tenant legislation. Some of these statutes concentrated merely on establishing new, tenant-initiated remedies for the landlord's failure to comply with housing regulations;[132] others limited themselves to setting out new rights and obligations between landlord and tenant, but left it to the courts to work out remedies.[133] Most emblematic of the degree to which the field has become statutory, however, is the fact that some nineteen jurisdictions have enacted comprehensive residential landlord-tenant codes, nearly all of them variants of the Uniform Residential Landlord and Tenant Act (URLTA) or its predecessor, the American Law Institute's Model Landlord Tenant Act.[134] Besides these states, at least nineteen other jurisdictions have implied warranties imposed by statute, or statutory remedies for violation of housing code habitability requirements, or both.[135] Thus, altogether, of at least forty

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[132] *E.g.*, MASS. GEN. LAWS ANN. ch. 111, § 127C, and ch. 239, § 8A (West Supp. 1981). Both sections were enacted in 1965. *Id. See generally* Cunningham, *supra* note 1, at 23-51.

[133] *E.g.*, N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981-82). This statute, adopted in 1975, codified the implied warranty of habitability that was emerging in New York lower court decisions, but did not set forth remedies available to the tenant. *See generally* Cunningham, *supra* note 1, at 59-65.

[134] ALASKA STAT. §§ 34.03.010 to 34.03.380 (Michie 1977 & Supp. 1979); ARIZ. REV. STAT. ANN. §§ 33-1301 to 33-1381 (West 1974 & Supp. 1981-82); CONN. GEN. STAT. ANN. §§ 47a-1 to 47a-20 (West 1978 & Supp. 1981); DEL. CODE ANN. tit. 25, §§ 5101 to 5112 (Michie 1975 & Supp. 1978); FLA. STAT. ANN. §§ 83.40 to 83.63 (West Supp. 1982); HAWAII REV. STAT. §§ 521-1 to 521-77 (1976 & Supp. 1981); IOWA CODE ANN. §§ 562A.1 to 562A.37 (West Supp. 1981-1982); KAN. STAT. ANN. §§ 58-2540 to 58-2573 (1976 & Supp. 1981); KY. REV. STAT. ANN. §§ 383.505 to 383.715 (Bobbs Merrill Supp. 1980); MONT. CODE ANN. §§ 70-24-101 to 70-24-442 (1981); NEB. REV. STAT. §§ 76-1401 to 76-1449 (1976); NEV. REV. STAT. §§ 118A.010 to 118A.530 (1979); N.M. STAT. ANN. §§ 47-8-1 to 47-8-51 (Supp. 1981); OHIO REV. CODE ANN. §§ 5321.01 to 5321.19 (Baldwin 1980); OKLA. STAT. ANN. tit. 41, §§ 101 to 135 (West Supp. 1981-82); OR. REV. STAT. §§ 91.700 to 91.865 (1979); TENN. CODE ANN. §§ 64-2801 to 64-2864 (1976); VA. CODE §§ 55.248.2 to 55.248.40 (1981); WASH. REV. CODE ANN. §§ 59.18.010 to 59.18.900 (Supp. 1981). The Uniform Law Commissioners converted the American Law Institute's 1969 Model Residential Landlord and Tenant Code into the URLTA. Brakel, *The Operational Impact of the Uniform Residential Landlord and Tenant Act*, 15 AM. B. FOUND. RESEARCH REP. 1,1 (Winter 1980).

[135] CAL. CIV. CODE ANN. §§ 1941, 1941.1, 1941.2, 1942, 1942.1, 1942.5 (West 1954 & Supp. 1981); IDAHO CODE § 6-320 (1979); ME. REV. STAT. ANN. tit. 14 § 6021 (1980 Supp. 1981-1982); MD. REAL PROP. CODE ANN. § 8-211 (Michie 1981 & Supp. 1981); MASS. GEN. LAWS ANN., ch. 111, §§ 127C to 127N (West Supp. 1981), and ch. 239, § 8A (West Supp. 1981); MICH. COMP. LAWS § 554.139 (MICH. STAT. ANN. § 26.1109 (Callaghan 1970)); MINN. STAT. ANN. § 504.18 (West Supp. 1981); MO. ANN. STAT. §§ 441.500 to 441.640 (Vernon Supp. 1981); N.J. STAT. ANN. §§ 2A:42-85 to 42-97 (West Supp. 1981); N.Y. MULT. DWELL. LAW. §§ 302(1)(b), 302-a (McKinney 1974); N.Y. MULT. RESID. LAW. § 305-a (McKinney

jurisdictions that have accorded new private rights and remedies to tenants whose dwellings do not meet minimum standards of habitability, thirty-eight have now done so by statute.[136] In addition, two other jurisdictions still have nineteenth century code provisions requiring landlords to deliver and maintain premises in habitable condition.[137]

Although the common law rule of caveat emptor and its corollary of no duty to maintain have been displaced in the majority of these forty-two jurisdictions by legislation, it has been the case law establishment or elaboration of an implied warranty of habitability by the highest courts in some fourteen jurisdictions that has attracted the most attention.[138] These well-known decisions of the 1960's and subsequent years were in fact anticipated by a 1931 Minnesota Supreme Court decision, *Delameter v. Foreman.*[139] But *Delameter v.*

Supp. 1981-1982); N.Y. REAL PROP. ACTS LAW §§ 755, 769-782 (McKinney 1979 & Supp. 1981-1982); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981); N.C. GEN. STAT. §§ 42-42 (Supp. 1981); N.D. CENT. CODE § 47-16-13.1 (1978); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977); R.I. GEN. LAWS §§ 34-18-16 and 45-24.2-11 (1980); S.D. CODIFIED LAWS ANN. §§ 43-32-8 and 43-32-9 (Supp. 1981); TEX. REV. CIV. STAT. ANN. art. 5236f (Vernon Supp. 1981); W. VA. CODE § 37-6-30 (Supp. 1981); WIS. STAT. ANN. § 704.07 (West 1981); D.C. R. & REGS. tit. 5G, §§ 2902.1, 2902.2 (1970).

[136] These jurisdictions include the 19 states with comprehensive landlord-tenant codes, *supra* note 134; the 19 states with other forms of legislative reallocation of the traditional rights and duties of landlord and tenant, *supra* note 135; and Illinois and Indiana, where the courts have recognized an implied warranty of habitability. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 356-67, 280 N.E.2d 208, 212-18 (1972); Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 764-94 (Ind. App. 1976). In 14 jurisdictions, the courts at the highest level *and* the legislatures, have reworked the residential landlord-tenant relationship. *See* cases cited in note 138 *infra*. See also notes 134 and 135 *supra*.

[137] GA. CODE ANN. § 61-111 (1979); LA. CIV. CODE art. 2692 (West 1952).

[138] Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.) *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 627-40, 517 P.2d 1168, 1175-84, 111 Cal. Rptr. 704, 711-20 (1974); Lemle v. Breeden, 51 Haw. 426, 433-36, 462 P.2d 470, 474-76 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 356-67, 280 N.E.2d 208, 212-18 (1972); Mease v. Fox, 200 N.W.2d 791, 796-98 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 333-36, 521 P.2d 304, 308-10 (1974); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 190-203, 293 N.E.2d 831, 838-45 (1973); Kline v. Burns, 111 N.H. 87, 92-94, 276 A.2d 248, 251-52 (1971); Marini v. Ireland, 56 N.J. 130, 140-47, 265 A.2d 526, 531-35 (1970); Pugh v. Holmes, 486 Pa. 272, 279-97, 405 A.2d 897, 900-10 (1979); Kamarath v. Bennett, 568 S.W.2d 658, 659-61 (Tex. 1978); Foisy v. Wyman, 83 Wash. 2d 22, 24-33, 515 P.2d 160, 162-67 (1973); Teller v. McCoy,253 S.E.2d 114, 123-31 (W. Va. 1978); Pines v. Perssion, 14 Wis. 2d 590, 595-97, 111 N.W.2d 409, 412-13 (1961). But see in connection with Pines v. Perssion, notes 159 and 160 *infra*.

Lower courts in four other states have adopted implied warranty theories. Old Town Dev. Co. v. Langford, 349 N.E.2d 744, 764 (Ind. App. 1976); King v. Moorehead, 495 S.W.2d 65, 75 (Mo. App. 1973); Tonetti v. Penati, 48 A.D.2d 25, 28-30, 367 N.Y.S.2d 804, 806-08 (1975); Glyco v. Schultz, 62 Ohio Op. 2d 459, 463-64, 289 N.E.2d 919, 925-26 (Mun. Ct. 1972). Of these, only Indiana has no recent landlord-tenant legislation. See notes 134 and 135 *supra*.

The highest courts in two states have recently declined to imply a warranty in residential leases. Osborn v. Brown, 361 So. 2d 82, 90 (Ala. 1978); Blackwell v. Del Bosco, 191 Colo. 344, 348, 558 P.2d 563, 565-66 (1976).

[139] 239 N.W. 148, 149 (Minn. 1931). The court in *Delameter*, a vermin infestation case, held that the old common law rules had to be adapted to the circumstances of modern apartment buildings, and that, in such cases, the landlord should be held to an "implied covenant that the premises . . . will be habitable." *Id.*

Foreman remained an isolated case until 1961 when it, together with *Ingalls v. Hobbs,*[140] an 1892 Massachusetts decision adopting the short-term furnished lease exception,[141] was cited in a Wisconsin case, *Pines v. Perssion,*[142] holding that there was an implied warranty of habitability in a one-year residential lease, and that the "covenant to pay rent and [the] covenant to provide a habitable house were mutually dependent."[143]

The case that has been the most widely cited in those jurisdictions that have judicially adopted implied warranties or covenants of habitability is the District of Columbia Circuit Court of Appeals' decision in *Javins v. First National Realty Corp.*[144] In that case, it was held that "a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations,"[145] and that breach of the implied warranty gave rise to "the usual remedies for breach of contract"[146] and could be used as a defense in a rent action or eviction action for non-payment of rent.[147] The frequently quoted opinion by Judge J. Skelly Wright in *Javins* stated, before setting out the common law and statutory underpinnings for an implied warranty of habitability, that the holding in *Javins* reflected "a belief that leases of urban dwelling units should be interpreted and construed like any other contract."[148] In an aside, Judge Wright (who had been trained in the civil law in Louisiana) noted, "The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law."[149] Still, it was clear that legislative activity in the housing area was highly important to the way he viewed the case. He stated that "the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code"[150] and that the old rule must therefore give way to a warranty measured by the standards set out in the District of Columbia Housing Regulations which are deemed a part of every lease.[151]

Judge Wright argued, alternatively, that common law grounds alone sustained the implied obligation to keep leased premises in a habitable condition. He supported his common law argument by pointing out that the old rules had rested on factual assumptions which were no longer valid in the modern urban

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[140] 156 Mass. 348, 31 N.E. 286 (1892).

[141] *Id.* at 350, 31 N.E. at 286-87.

[142] 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[143] *Id.* at 596, 111 N.W.2d at 413. But see notes 159 and 160 *infra.*

[144] 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970). See notes 154 and 280 *infra.*

[145] 428 F.2d at 1072-73.

[146] *Id.* at 1073.

[147] *Id.* at 1082.

[148] *Id.* at 1075 (footnote omitted).

[149] *Id.* at 1075 n.13. Even in *Javins,* however, it was recognized that a lease could not be treated as a contract for *all* purposes: "We contemplate only that contract law is to determine the rights and obligations of the parties to the lease agreement, as between themselves." *Id.*

[150] *Id.* at 1076-77.

[151] *Id.* at 1077, 1081-82.

housing market, and by drawing analogies to evolving consumer protection doctrines in other areas, such as the implied warranties of quality which, he said, had appeared in the sale or rental of personal property.[152] Commentators have pointed out flaws in Judge Wright's reasoning and have questioned the soundness of some of his factual assumptions,[153] but no one can doubt the profound influence the *Javins* case has had upon later implied warranty decisions.[154]

Javins and its progeny attracted national attention in legal circles, while legislative reforms of the landlord-tenant relationship have tended to be the subject of comment mainly as a local matter in the legal periodicals of the states involved. Regardless of which legal institution took the initiative in effecting change in landlord-tenant law, however, its further development has been the product of court-legislature interaction, with legislation increasingly dominating the field. Since in most states it was the legislature that acted first to create new rights and obligations or to provide new remedies,[155] the question naturally arose whether the legislature had so occupied the field that further judicial expansion and innovation were impliedly precluded. To the Wisconsin Supreme Court deciding *Pines v. Perssion*[156] in 1961, the existence of some state legislation in the area not only did not prevent the court from developing an implied warranty, but was seen as a green light signalling the court to consider further changes in the common law rules:

> Legislation and administrative rules, such as the safeplace statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases, would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.[157]

Legislation had thus changed the "frame of reference in which the old common-law rule operated. . . ."[158]

More extensive, and not entirely pro-tenant, legislation, was adopted in Wisconsin in 1969, effective in 1971.[159] Then, ten years after *Pines,* the

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[152] *Id.* at 1077-79. But see note 291 *infra.*

[153] *See especially* Abbott, *supra* note 1, at 25-40. *See also* Cunningham, *supra* note 1, at 91-92, 115-18; Casenote, *New Power for Tenants: The Lessee's Right to a Livable Dwelling* Javins v. First National Realty Corp., 6 HARV. C.R.-C.L. L. REV. 193, 194-202 (1970).

[154] Cunningham, *supra* note 1, at 77. *See especially* Green v. Superior Court, 10 Cal. 3d 616, 627-40, 517 P.2d 1168, 1175-84, 111 Cal. Rptr. 704, 711-20 (1974); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 356-67, 280 N.E.2d 208, 212-18 (1972); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 190-203, 293 N.E.2d 831, 838-45 (1973); Foisy v. Wyman, 83 Wash. 2d 22, 24-33, 315 P.2d 160, 162-67 (1973).

[155] Cunningham, *supra* note 1, at 6.

[156] 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[157] *Id.* at 595, 111 N.W.2d at 412.

[158] *Id.*

[159] WIS. STAT. ANN. § 704.07 (West 1981).

Wisconsin Supreme Court, without even citing its famous earlier decision, held in *Posnanski v. Hood*[160] that the Milwaukee Housing Code did *not* give rise to an implied covenant in a residential lease and that violations of the Code arising during the term of the lease could not be used as a defense to a rent action.[161] This holding in *Posnanski* was based on the court's inferences about legislative intent. The court took the structure of the Milwaukee Code to mean that it contemplated administrative enforcement only, since its rather vague and general language left so much to the discretion of officials.[162] The enumeration in the Code of official sanctions and penalties for violations was construed as impliedly excluding private remedies.[163] The court was influenced, too, by the fact that other states which had recognized rent-withholding until then typically had done so by legislation setting out clear standards, terms and conditions.[164] Ironically, the Wisconsin Supreme Court in *Posnanski*[165] drew most of these arguments from a District of Columbia Court of Appeals case, *Saunders v. First National Realty Corp.*,[166] which was none other than the famous *Javins* case about to make history when it was reversed only a few months later under the name of *Javins v. First National Realty Corp.*[167]

A different aspect of the court-legislature problem troubled the Colorado Supreme Court in *Blackwell v. Del Bosco.*[168] Acknowledging the strength of many of the arguments in favor of abandoning the common law landlord-tenant rules, the Colorado court in 1976 nevertheless declined to follow the trend toward adopting the implied warranty of habitability. It took the position that the issue involved such extensive finding of social and economic facts and so much weighing and balancing of competing social interests, that its resolution lay more properly with the elected legislature than with the judiciary.[169] The court also noted the need for clear and generalized rule-making in connection with the scope and application of, as well as remedies for, implied warranties.[170] Again, in the court's view, this activity lay peculiarly within the competence of the legislature.[171]

Not all courts in jurisdictions with substantial landlord-tenant legislation felt that their roles were restricted by the presence of statutes regulating leases.

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[160] 46 Wis. 2d 172, 174 N.W.2d 528 (1970). While *Pines v. Perssion* is distinguishable as involving defects present at the beginning of the term and tenants who promptly vacated, *Pines*, 14 Wis. 2d at 591-93, 111 N.W.2d at 410-11, it is clear that its scope has been at least severely limited by *Posnanski*.

[161] 46 Wis. 2d at 181-83, 174 N.W.2d at 532-33.

[162] *Id.* at 182, 174 N.W.2d at 533.

[163] *Id.*

[164] *Id.* at 182-83, 174 N.W.2d at 533.

[165] *Id.* at 179, 180, 182, 174 N.W.2d at 531, 532, 533.

[166] 245 A.2d 836 (D.C. 1968), *rev'd sub nom.* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

[167] *Id.*.

[168] 191 Colo. 344, 558 P.2d 563 (1976).

[169] *Id.* at 348, 558 P.2d at 565.

[170] *Id.*

[171] *Id.*, 558 P.2d at 565-66.

The most powerful argument for a court's taking up the development of an implied warranty in spite of these difficulties and despite the existence of a great variety of legislatively created tenant remedies, was developed by the Massachusetts Supreme Judicial Court in 1973 in *Boston Housing Authority v. Hemingway*.[172] It might have seemed that Massachusetts was an unlikely place for a judicially developed implied warranty of habitability since few states offered more tenant remedies by legislation. But the Massachusetts court made it appear that this very legislation required it to act. The court quoted a passage from the path-breaking article by Dean James Landis entitled *Statutes and the Sources of Law:*

> Doctrines of common law dealing with the relationship between individuals will often be seen to hinge upon a conception as to the positon that one party is to occupy in our social structure. This becomes solidified into a concept of status. But obviously status has no meaning apart from its incidents. These incidents, often so numerous as to escape description, have a varying importance in shaping the nucleus of a status. The alteration of some of them possesses no importance beyond the change itself; the alteration of others, however, may call for a radical revision of the privileges or disabilities that have generally been attached to a particular status. . . .
>
> Changes of this nature are commonly the product of legislation. The statutes that express them rarely directly make or alter a status as such; nor do the statutes often see the seamlessness of the pattern that they seek to change.[173]

Applying this line of thought to the landlord-tenant relationship, the court suggested that it would be irrational for the courts to continue to operate on one set of assumptions when the legislature had shifted to another.[174] In fact, legislation had altered the incidents of the landlord-tenant relationship to the point where that relationship had been, at first imperceptibly, then decisively, transformed. As a result, the court was now obliged to mold the common law to the contours of the new relationship.

Now that legislation has become the principal mode of regulation in the field, after nearly twenty years of innovation, the practical importance of these institutional questions has diminished. Because of the dominance of legislation in the area, and because the Uniform Residential Landlord and Tenant Act is fairly typical of the trends in the various state courts and legislatures,[175] the URLTA provisions will be referred to frequently below to illustrate the presently prevailing treatment of major landlord-tenant issues, of which the implied warranty is, of course, only one.

B. *The Current Position*

This section will outline the present state of landlord-tenant law in five major areas where the departure from classical principles is most pronounced:

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[172] 363 Mass. 184, 293 N.E.2d 831 (1973).

[173] *Id.* at 195, 293 N.E.2d at 840-41 (quoting Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS 222-23 (1934)).

[174] 363 Mass. at 196-97, 293 N.E.2d at 841-42.

[175] Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 3 (1976); Brakel, *Operational Impact, supra* note 134, at 1.

obligations of the landlord with respect to the condition of the premises; the remedies available upon breach of such obligations; landlord's tort liability; procedure in summary process cases; and termination of the lease. In the first three areas, there has been fundamental change in the majority of jurisdictions in the past twenty years, resulting in the abandonment of the classical rules and their replacement with new starting points for legal reasoning. In the last two areas, changes presently occurring have profoundly altered the traditional law, but it is too soon to say what will become the predominant position.

1. Condition of the Premises

The majority of American jurisdictions, by statute or case law or both, impose a duty on the landlord to deliver and maintain leased residential premises in a fit, safe and habitable condition.[176] The traditional law of waste has perhaps been displaced as the standard for the residential tenant's duties with respect to the physical condition of the premises by housing codes, statutes and the newer case law. But the tenant is still generally required under the newer law to refrain from injuring the leased premises and to observe certain standards of cleanliness and appropriate use. The Uniform Residential Landlord and Tenant Act provisions are illustrative.

In the section of the URLTA which the draftsmen describe as "follow[ing] the warranty of habitability doctrine now recognized" in several jurisdictions,[177] the landlord's duties are set forth as follows:

> Section 2.104 [*Landlord to Maintain Premises*]
>
> (a) A landlord shall
>
> (1) comply with the requirements of applicable building and housing codes materially affecting health and safety;
>
> (2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;
>
> (3) keep all common areas of the premises in a clean and safe condition;
>
> (4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators, supplied or required to be supplied by him;
>
> (5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and
>
> (6) supply running water and reasonable amounts of hot water at all times and reasonable heat [between [October 1] and [May 1]] except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.
>
> (b) If the duty imposed by paragraph (1) of subsection (a) is greater than any duty imposed by any other paragraph of that subsection, the landlord's duty shall be determined by reference to paragraph (1) of subsection (a).[178]

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[176] The best up-to-date general survey of this aspect of landlord-tenant law is found in Cunningham, *supra* note 1.

[177] URLTA, *supra* note 3, § 2.104 comment.

[178] *Id.* § 2.104 (brackets in original).

The minimum duties of tenants are set forth in section 3.101 of URLTA:

> Section 3.101. [*Tenant to Maintain Dwelling Unit.*] A tenant shall
>
> (1) comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety;
>
> (2) keep that part of the premises that he occupies and uses as clean and safe as the condition of the premises permit;
>
> (3) dispose from his dwelling unit all ashes, garbage, rubbish, and other waste in a clean and safe manner;
>
> (4) keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;
>
> (5) use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances including elevators in the premises;
>
> (6) not deliberately or negligently destroy, deface, damage, impair, or remove any part of the premises or knowingly permit any person to do so; and
>
> (7) conduct himself or herself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises.[179]

Comparison of the duties imposed upon landlords and tenants by the URLTA with those imposed by the classical law reveals how fundamental the change has been in this part of landlord-tenant law. While the foregoing provisions of the URLTA are typical, there is considerable variation in the law of the various jurisdictions of the United States on the respective rights and responsibilities of landlords and tenants regarding the condition of leased premises.[180] Not all state legislatures have struck the same balance between the interests of landlord and tenant. The ULRTA, for example, described by American Bar Foundation researchers as "decidedly pro-tenant legislation,"[181] more often than not, has been modified in the process of gaining approval by state legislatures, or by later amendment.[182] The quantity of landlord-tenant legislation to be found in the annual supplements to state statutes is mute testimony to a continuing process of legislative adjustments in reaction to lobbying efforts and judicial innovations in the various states.

Among those states that have abandoned classical landlord-tenant law in the residential context, there exist significant differences with respect to the types of dwellings covered, the determination of what constitutes habitability, and whether or to what extent the implied warranty imposes responsibility on the landlord for latent defects or for conditions which are outside his control.[183] It seems clear everywhere that the landlord is not responsible for conditions caused by the deliberate or negligent act or omission of the tenant or persons

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[179] *Id.* § 3.101.

[180] Cunningham, *supra* note 1, at 51-74, 81-86.

[181] Brakel, *supra* note 3, at 567.

[182] *See* the authorities collected in Cunningham, *supra* note 1, at 66 n.285. *See also* Brakel & McIntyre, *supra* note 3, at 576.

[183] Cunningham, *supra* note 1, at 81-95.

for whose conduct the tenant is responsible, but it is less certain whether the landlord's obligations are breached when the premises are affected by such events as blackouts, brownouts or strikes.[184] There is also great variation among jurisdictions concerning the remedies available when landlords' or tenants' new duties are breached.[185]

Local public housing authorities would seem to be subject to the implied warranty in jurisdictions where the warranty applies to all residential leases.[186] The Massachusetts Supreme Judicial Court in fact chose to recognize the implied warranty of habitability in a suit brought against the Boston Housing Authority.[187] But at least one state, Washington, in adopting comprehensive landlord-tenant legislation, has expressly excluded public housing from its coverage.[188]

As a matter of federal law, however, where the landlord is an agency of the federal government, federal courts have not been receptive to tenants' attempts to derive private rights of action from federal housing statutes.[189] The courts seem to be concerned about the financial impact that imposing new duties regarding the condition of the premises would have upon already beleaguered public housing programs. The Seventh Circuit Court of Appeals, for example, in *Alexander v. U.S. Department of Housing and Urban Development*,[190] did not view the national housing legislation as impliedly authorizing the judiciary to afford private rights and remedies to tenants in a project operated by HUD.[191] On the contrary, the programmatic character of the federal housing legislation seemed to the court to make the adoption of an implied warranty unwise, at least before Congress had appropriated funds for the purpose. Noting that, unlike privately owned housing, public housing is designed to remedy unsafe and unsanitary conditions and to increase the supply of suitable housing for low-income

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[184] See text and notes at notes 316-29 *infra*.

[185] Cunningham, *supra* note 1, at 23-51; 98-126. See also text and notes at notes 194-214 *infra*.

[186] *E.g.*, Green v. Superior Court, 10 Cal. 3d 616, 629, 517 P.2d 1168, 1176, 111 Cal. Rptr. 704, 712 (1974); Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 199, 293 N.E.2d 831, 843 (1973); Berzito v. Gambino, 63 N.J. 460, 466, 308 A.2d 17 (1973). The Comment to § 1.202 of the URLTA states: "This Act is intended to apply to government or public agencies acting as landlords." URLTA, *supra* note 3, § 1.202 comment (citation omitted).

[187] Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 190-203, 293 N.E.2d 831, 838-45 (1973). *See also* Coleman v. United States, 311 A.2d 496 (D.C. 1973) which extended the benefits of Brown v. Southall Realty Co., 237 A.2d 834 (D.C. 1968) and Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), to public housing tenants.

[188] WASH. REV. CODE ANN. § 59.18.040 (Supp. 1981).

[189] Perry v. Housing Auth. of Charleston, 664 F.2d 1210, 1213-18 (4th Cir. 1981); Falzarano v. United States, 607 F.2d 506, 509-11 (1st Cir. 1979). *But see* Silva v. East Providence Hous. Auth., 423 F. Supp. 453, 464-65 (D.R.I. 1976), *remanded*, 565 F.2d 1217 (1st Cir. 1977).

[190] 555 F.2d 166 (7th Cir. 1977), *aff'd*, 441 U.S. 39, 67 (1979). The tenants did not challenge the Seventh Circuit's ruling on the implied warranty issue in their appeal to the United States Supreme Court. 441 U.S. at 45 n.5.

[191] 555 F.2d at 171.

families, the court apparently feared that an implied warranty would amount to a wholly unrealistic representation "that the stated objectives of national policy have been and are being met."[192] The court indicated its awareness of political realities in its discussion of the national housing goals:

> We fail to see how these objectives [a decent home and a suitable living environment for every American family] can be interpreted to impose upon HUD or its agent an absolute, fixed obligation to maintain suitable dwellings. Moreover, like many declarations of Congressional policy, 42 U.S.C. § 1441 sets forth broad future objectives on a grand scale which are to be accomplished over a period of many years.[193]

In view of the special circumstances and character of public housing, federal courts have been chary of importing into federal law private rights analogous to those that many state courts have accepted.

2. Remedies

Court decisions recognizing implied warranties of habitability have generally extended to the tenant all of the usual contract remedies for breach of warranty.[194] The courts also have generally agreed that the implied warranty and the tenant's obligation to pay rent are mutually dependent, and that one consequence of this interdependence is that breach of the warranty entitles the tenant to terminate, or, in contract language, to rescind, the lease.[195] Since termination requires the tenant to vacate the leased premises this remedy alone would represent little advance, from a tenant's point of view, over the traditional doctrine of constructive eviction. Where the defects in the premises are relatively minor, many states, usually by statute, have made available the self-help remedy of rent application, introduced in the nineteenth century Field civil codes. "Repair-and-deduct," as it is commonly known, permits the tenant upon proper notice to correct the problem and deduct the reasonable cost thereof from the rent.[196]

The most dramatic remedial innovation, however, has been the authorization, in most implied warranty jurisdictions, of rent-withholding by a tenant who remains in possession. The extent of this departure from traditional landlord-tenant law is apparent when it is recalled that at common law, the tenant's only remedy for breach of a landlord's covenant, with the exception of the implied covenant for quiet enjoyment, was in contract.[197] Even when the courts began to permit the landlord's failure to perform his obligations with

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[192] *Id.*

[193] *Id.*

[194] *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1073 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

[195] *E.g.*, Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 200, 293 N.E.2d 831, 843 (1973).

[196] *E.g.*, MASS. GEN. LAWS ANN. ch. 111, § 127L (West Supp. 1981). The total amount that can be deducted is usually limited by statute.

[197] See text and notes at notes 58-59 *supra*.

respect to the condition of the premises to be treated as a breach of the covenant for quiet enjoyment, the doctrine of constructive eviction did not allow the tenant to withhold rent while remaining in possession. If the tenant did engage in such a "rent strike," traditional summary process law permitted the landlord to evict him for nonpayment of rent even though the landlord had breached his own obligations.[198] Summary process law did not permit the landlord's breach to be set off or raised by way of defense or counterclaim in actions for possession based on nonpayment of rent.

Today, however, most implied warranty jurisdictions permit the tenant to plead such a breach as a defense in an eviction action, because the breach is considered germane to the question of whether any rent is owing to the landlord by the tenant.[199] But since rent withholding denies the landlord both income and the use of his income-producing asset, the remedy is often carefully circumscribed with preconditions and safeguards, particularly where, as is usually the case, it is regulated by statute.[200] Various jurisdictions have worked out different approaches to the questions of what is to be done with the withheld rent during the pendency of litigation; how the court is to determine whether, or how much, rent is owing to the landlord in cases where the landlord is found to have breached his obligations; and how damages, if any, are to be computed.[201]

The remedial scheme of URLTA is illustrative of all the principal trends just described. New substantive duties like those set forth in section 2.104 of URLTA[202] are the foundation for tenant claims, counterclaims, and defenses when the landlord breaches his obligations with respect to the condition of the premises. Any noncompliance by the landlord with the Act or the lease also may give rise to actions for actual damages and injunctive relief.[203] A material breach of such obligations, or of lease provisions, if it affects health and safety, entitles the tenant, upon proper notice, to terminate the lease if the landlord does not act promptly to remedy the conditions.[204] The tenant's remedies, however, are not limited to those which require him to bring a lawsuit or to vacate the leased premises. Where the defects involved are relatively minor, the tenant has the alternative of correcting the condition himself and deducting the actual and reasonable cost from the rent.[205] Safeguards for the landlord are provided by requiring the tenant to give the landlord notice and a reasonable opportunity to make the repair and by limiting the amount that can be deducted for the reasonable cost of the repair. The suggested maximum in the

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[198] *See, e.g.*, the Oregon statute described in Lindsey v. Normet, 405 U.S. 56, 65-66 (1972).

[199] *E.g.*, Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 358, 280 N.E.2d 208, 213 (1972).

[200] *E.g.*, MASS. GEN. LAWS ANN. ch. 111, §§ 127C-H and ch. 239, § 8A (West Supp. 1981).

[201] Cunningham, *supra* note 1, at 23-51; 100-09; 113-26.

[202] See note 178 *supra*.

[203] URLTA, *supra* note 3, § 4.101(b).

[204] *Id.* § 4.101(a).

[205] *Id.* § 4.103.

Act is $100 or one-half of the periodic rent, whichever is greater. An alternative set of remedies is available if the landlord's breach involves the willful or negligent failure to supply such essential services as water, electricity, or heat where the rental agreement or the Act requires him to do so.[206] In such cases, upon proper notice, the tenant may procure the services himself, deducting their actual and reasonable cost, without limit, from the rent. Alternatively, the Act allows the tenant to recover damages for the diminished rental value of the premises; or he may procure interim substitute housing at the landlord's expense up to the value of the periodic rent without liability for rent during the period of the landlord's breach.

The tenant in possession is also afforded the important option of raising the landlord's breach of obligations under the rental agreement or the Act as a defense to, or counterclaim in, an action for rent or for possession for nonpayment of rent.[207] The Act seeks to protect the landlord's interests, in such cases, by authorizing the court to order the tenant to pay all or part of the accrued rent into court and to award attorney's fees to the landlord where the defense or counterclaim is found to have been frivolous or in bad faith. The Act also makes clear that a tenant's liability for rent does not continue when he vacates premises that are substantially destroyed by fire or other casualty.[208]

Where it is the tenant who breaches his obligations under the rental agreement or the Act, the landlord is given a parallel set of remedies. The landlord is permitted to seek actual damages and injunctive relief for any noncompliance with the rental agreement or the tenant's duties under the Act.[209] Where the tenant's breach is a material one, the landlord may terminate the rental agreement upon proper notice after the tenant has had a reasonable opportunity to correct the situation,[210] the notice period required being shorter if the tenant's breach is a recurring one or if it consists of nonpayment of rent.[211] Where the tenant's breach is one that materially affects health and safety and can be remedied by repair and the tenant has failed to act to do so within a reasonable time, the landlord is permitted upon notice to make the repair himself and to bill the tenant for actual and reasonable cost thereof.[212] In cases where the tenant abandons the leased premises, the landlord is obliged to make reasonable efforts to mitigate damages by renting them at a fair rental.[213]

In addition to remedies for breach of statutory or judicially implied warranties of habitability, state statutes and codes may impose a wide variety of additional duties upon landlords, accompanied by an equally varied set of publicly and privately enforced sanctions.[214] In sum, it can be said that the new

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[206] *Id.* § 4.104.
[207] *Id.* § 4.105.
[208] *Id.* § 4.106.
[209] *Id.* § 4.201(c).
[210] *Id.* § 4.201(a).
[211] *Id.* § 4.201(b).
[212] *Id.* § 4.202.
[213] *Id.* § 4.203(c).
[214] *See id.* § 2.101, regulating the taking and use of security deposits; *id.* § 2.102 requir-

remedial scheme, as expressed in the URLTA, substantially expands the avenues of recourse open to a tenant, and presents the appearance of equilibrium by offering a parallel set of remedies to lessors.

3. Landlord's Tort Liability

The modern proliferation of statutory provisions imposing duties on landlords to maintain leased premises in fit, safe and habitable condition has greatly expanded the landlord's potential tort liability to persons injured because of defective conditions on the premises. Increasingly, as already mentioned, the landlord's violation of a safety statute is treated as evidence of negligence;[215] and in some states it is negligence *per se*.[216] The wide acceptance of the implied covenant or warranty of habitability has still further eroded the landlord's common law immunity from tort suits by persons injured on leased property. Once tort actions based on the violation of an express covenant to repair were permitted and privity requirements were eliminated, the stage was set for the landlord to be liable to suit in tort where the cause of the injury was also the subject of an *implied* convenant.[217]

The natural culmination of all this movement in the exceptions to the common law immunity rule was the abandonment of the rule itself in the 1973 New Hampshire case of *Sargeant v. Ross*.[218] Declining to go through the exercise of torturing the facts of the case to fit them into one of the common law exceptions, the New Hampshire Supreme Court held that the landlord's liability in tort was to be established with reference to the same principle that governed personal injury cases generally, namely, the standard of due care.[219] The landlord's former immunity was abolished, and the traditional exceptions to it became factors to consider in determining whether the landlord had exercised reasonable care under all the circumstances of the case.[220]

A few courts have gone beyond *Sargeant v. Ross*. These courts hold that the landlord's breach of an implied warranty or of statutory duties to maintain leased premises imposes strict liability for resulting injuries.[221] In such jurisdictions, the tenant need neither show that the landlord knew of the defect nor that he was negligent, but merely that a statutory duty or the implied warranty was

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ing disclosure of certain information relating to the ownership and management of the premises; see text and notes at notes 339-61 *infra*.

[215] *See* authorities cited in note 115 *supra*.

[216] *E.g.*, Shroades v. Rental Homes, Inc., 68 Ohio St. 2d 20, 427 N.E.2d 774 (1981).

[217] Trentacost v. Brussel, 82 N.J. 214, 225-31, 412 A.2d 436, 442-45 (1980).

[218] 113 N.H. 388, 308 A.2d 528 (1973).

[219] *Id.* at 398, 308 A.2d at 534.

[220] *Id.* at 398-99, 308 A.2d at 534-35.

[221] *E.g.*, Kaplan v. Coulston, 85 Misc. 2d 745, 751-52, 381 N.Y.S.2d 634, 638-39 (Civ. Ct. N.Y. 1976) (landlord strictly liable for breach of implied warranty); Krennerich v. WCG Inv. Corp., 278 So. 2d 842, 845 (La. 1973) (landlord strictly liable for breach of statutory duty to maintain premises); Hawkins v. Clark, 294 So. 2d 259, 260 (La. 1974) (landlord strictly liable even where defects are latent). *But cf.* Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 52, 301 A.2d 463, 465 (App. Div.), *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973) (per curiam) (landlord is not an insurer; notice and proof of negligence are prerequisite to liability).

breached and that injury resulted. It seems unlikely, however, that a majority of jurisdictions will convert the landlord's traditional immunity into a presumptive liability. *Sargeant v. Ross* seems more likely to appeal to courts in other implied warranty jurisdictions because it not only brings landlord-tenant tort law into harmony with tort law generally, but it also provides a good framework for working out complex multi-party tort problems where both tenant and landlord have breached duties potentially giving rise to liability to third persons injured on the premises.[222] Gradually, in cases involving residential tenancies, in jurisdictions where landlords are subject to duties of repair, the courts seem to be looking to *Sargeant v. Ross* in abolishing the old rule of no-liability and in holding landlords to the duty of acting reasonably under the circumstances.[223]

This trend is likely to continue. The old tort law cannot stand together with the new implied warranty law, any more than the old rule of caveat emptor can coexist with the reallocation of the rights and duties between landlord and tenant under modern landlord-tenant legislation. However, the coverage of implied warranties, as well as that of state laws and codes which have played such a key role in the expansion of landlord tort liability, is usually expressly limited to residential tenancies. Thus it cannot be assumed that landlords' tort liability in commercial, industrial, and agricultural contexts will be altered so profoundly as it has been where human shelter is involved. The due care standard may well come to replace the traditional landlord's partial immunity generally, but what constitutes "due care" will depend very much on what duties have been imposed by law on landlords. In non-residential contexts, those duties are much less extensive than where habitation is involved.

4. Reforms of Summary Process

As the previous three subsections demonstrate, dramatic changes have occurred in residential landlord-tenant law with respect to the landlord's responsibility for the physical condition of the premises, his liability in tort, and the remedies available to tenants for breach of express and implied covenants. The possessory remedy of summary process, or forcible entry and detainer, as it is called in some states, has also undergone profound changes in the process. To the extent that material breach of the landlord's obligations with respect to the condition of leased premises has been made available as a defense in eviction actions, the very basis of traditional summary process law has been undermined. Just as landlord-tenant tort law had become an anomaly within the body of modern tort law, so nineteenth century summary proceedings were islands of anachronism within streamlined modern civil procedure law. They

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[222] *See, e.g.*, Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); Brown v. Pasternak, 92 Misc. 2d 347, 399 N.Y.S.2d 867 (Sup. Ct. 1977).

[223] Brennan v. Cockrell Invs., Inc., 35 Cal. App. 3d 796, 800, 111 Cal. Rptr. 122, 124-25 (1973); Young v. Garwacki, 1980 Mass. Adv. Sh. 729, 735-38, 402 N.E.2d 1045, 1049-51; Pagelsdorff v. Safeco Ins. Co. of America, 91 Wis. 2d 734, 742-45, 284 N.W.2d 55, 59-61 (1979).

were constitutional, however, as the United States Supreme Court made clear in its 1972 decision, *Lindsey v. Normet*.[224] The Court there upheld Oregon's traditional summary procedure law, even though the statute limited the issues that could be litigated in a possession action to whether the tenant had paid the rent, had held over wrongfully or had honored his covenants.[225] According to the majority opinion, a state can validly single out possessory actions by landlords against tenants for especially expedited judicial settlement because of the "unique factual and legal characteristics of the landlord-tenant relationship."[226] These features were described by the Court as follows:

> The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harrassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property.[227]

The practical effect of *Lindsey* in an implied warranty state which has not modernized its summary process law would be that a tenant in default in his rental obligation could be permitted to raise a habitability defense in an action for rent but denied this opportunity in an action for possession only. Landlords of low-income tenants could be expected to forego bringing actions for probably uncollectible past-due rent, and to content themselves with regaining possession. Thus, there would be few occasions for litigating habitability issues.

That a state is not constitutionally *required* to permit a tenant to raise habitability issues in an eviction action for nonpayment for rent, however, has not prevented most implied warranty states, including Oregon one year after the *Lindsey* case, from electing to furnish tenants with this opportunity.[228] The Oregon statute was inspired by the URLTA. The draftsmen's comment to URLTA section 4.105, which permits the habitability defense in possession actions, states that it "is consistent with modern procedure reform in permitting the tenant to file a counterclaim or other appropriate pleading in the summary proceeding to the end that all issues between the parties may be disposed of in one proceeding."[229]

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[224] 405 U.S. 56 (1972).

[225] *Id.* at 64.

[226] *Id.* at 72.

[227] *Id.* at 72-73.

[228] Robbins, *The New Oregon Landlord-Tenant Act and the Uniform Residential Landlord and Tenant Act — A Comparison*, 7 CLEARINGHOUSE REV. 327, 327-28 (1973). *See also* Green v. Superior Court, 10 Cal. 3d 616, 620, 631-37, 517 P.2d 1168, 1170, 1178-82, 111 Cal. Rptr. 704, 706, 714-18 (1974); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972); Marini v. Ireland, 56 N.J. 130, 140, 265 A.2d 526, 531 (1970); Foisy v. Wyman, 83 Wash. 2d 22, 31, 515 P.2d 160, 166 (1973); Teller v. McCoy, 253 S.E.2d 114, 131 (W. Va. 1978).

[229] URLTA, *supra* note 3, § 4.105 comment.

The increased willingness of courts and legislatures to permit the habitability defense in possession actions has focussed attention on the need to strike a proper balance between the tenant's legitimate desire to resolve rent-related disputes before losing possession of his home, and the landlord's legitimate desire to continue to receive the rental income from which debt service, operating expenses and repairs would ordinarily be paid. One solution was suggested by the *Javins* opinion, in which Judge Wright endorsed the practice of requiring the tenant to deposit all or part of the rent money with the court.[230] Statutes authorizing rent-withholding usually provide for such deposits and often prescribe the circumstances under which rent money so deposited may be used for repairs or other expenses relating to the property.[231]

Modernizing the procedure in eviction cases is not, however, an entirely simple matter because of the special features of the landlord-tenant relationship alluded to by the Supreme Court in *Lindsey v. Normet*. The hearing of the tenant's defenses may prolong litigation for a considerable period of time during which the landlord may receive no rent while his expenses continue to accrue. At the end of the lawsuit, the court may find that the tenant owes the entire rent, but the landlord may be unable to collect it if it has not been deposited in court.

Professor Richard Chused, drawing both on the history of summary process and on modern civil procedure law, has outlined what seems to be a promising way to deal with the conflicting legitimate interests of landlord and tenant.[232] Like other elements of classical landlord-tenant law, summary process was, it seems, often tempered in practice by the courts. If a tenant requested a preliminary injunction against dispossession, some courts were willing to use their equitable powers to intervene.[233] Chused's suggestion is that tenants today, in keeping with modern practice, should be allowed routinely to plead a wide variety of defenses and counterclaims in possession actions, but that they should be allowed to delay eviction only when they can make the kind of showing of irreparable harm and likelihood of success that a litigant ordinarily has to make in order to obtain a preliminary injunction.[234] At the hearing on the tenant's motion for delay, the court would have to balance the equities, considering the landlord's need for possession and the tenant's defense. If the court concluded that the eviction should be delayed, it could require the tenant to post security for the delay, by analogy to the requirement of posting a bond for a preliminary injunction.

While Professor Chused's proposal may indicate a way to harmonize procedure in eviction cases with civil procedure law and the new framework of

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[230] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 n.67 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

[231] *E.g.*, MASS. GEN. LAWS ANN. ch. 111, §§ 127C-H (West Supp. 1981).

[232] Chused, *supra* note 130.

[233] *Id.* at 1399.

[234] *Id.* at 1399-1400.

landlord-tenant law, another problem raised by the habitability defense is not so easily resolved. Although defenses relating to the condition of leased premises are raised in only a minority of all eviction cases,[235] they quickly put a considerable strain on the over-burdened judicial system.[236] One reponse to this burden has been the creation of special courts for dealing with housing or landlord-tenant matters.[237] But the nature of landlord-tenant litigation, with its high volume, each case typically involving a small amount of money, has suggested to some observers that alternatives to the judicial method of dispute resolution should be explored in this area.[238] Various experiments with mediation and conciliation are underway, many of them under the auspices of specialized housing courts.[239]

There is yet another aspect of the new defenses to eviction that needs to be explored. Traditionally, there was no question but that when a lease expired by its terms or was properly terminated, the landlord had the right to possession of "his" property. Indeed, one of the concerns of the United States Supreme Court in *Lindsey v. Normet*[240] was that the habitability defense could operate to extend the tenancy beyond its term, thus interfering with property rights of the landlord. The Court stated, "[T]he Constitution does not authorize us to require that the term of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated."[241] Since *Lindsey*, through the action of state courts and legislatures, tenancies now can be extended, often for long periods of time, while issues between landlord and tenant are litigated. This raises the question of whether the principle of "security of tenure" has been indirectly introduced into the law relating to lease termination.

5. Security of Tenure

Traditionally, continuity of tenure has been a characteristic that set freehold ownership apart from mere leasing. In the classical scheme, it was unquestioned that the landlord had the right to possession of the leased premises upon the expiration of a term of years or upon the proper termination of a tenancy at will or a periodic tenancy. The right was absolute in principle

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[235] Abbott, *supra* note 1, at 63-64; Brakel, *supra* note 3, at 586.

[236] Greene, *A Proposal for the Establishment of a District of Columbia Landlord-Tenant Agency*, 38 D.C.B.J. 25, 26 (1971); Gerwin, *supra* note 129, at 642.

[237] *See* the articles on housing courts in 17 URB. L. ANN. 3-227 (1979).

[238] Gerwin, *supra* note 129, at 722-51; the articles on housing courts in 17 URB. L. ANN. 227-371 (1979); McIntyre, *URLTA in Operation: The Ohio Experience*, 1980 AM. B. FOUND. RESEARCH J. 587, 606; Stanley, *President's Page*, 62 A.B.A. J. 1071, 1071, 1190 (1976). Landlord-tenant disputes are specifically mentioned as in need of more adequate dispute resolution mechanisms in the preamble to the Dispute Resolution Act, Feb. 12, 1980, Pub. L. No. 96-190, 94 Stat. 17, *reprinted in* 28 U.S.C.A. App. § 2 (West Supp. 1981).

[239] *See, e.g.*, the description of the operation of the Boston Housing Court in Garrity, *The Boston Housing Court: An Encouraging Response to Complex Issues*, 17 URB. L. ANN. 15 (1979).

[240] 405 U.S. 56 (1972).

[241] *Id.* at 68.

because the landlord could thus terminate or refuse to renew a leasehold estate for any reason or for no reason; evidence concerning his motives was inadmissible.[242]

As with other classical rules, however, one must be aware that the common law rules on termination of leases could be and often were relaxed in practice. The courts could use their equitable powers, as well as techniques of construing lease provisions, to mitigate the harshest effects.[243] Furthermore, summary process statutes typically contain provisions for waiting periods and for judicial discretion to stay eviction[244] which can and often do substantially increase the time and expense required to remove a tenant. In recent years, outright exceptions to the termination rules have begun to appear as otherwise lawful terminations of leases have been forbidden under various circumstances. The landlord's right to possession upon termination of the lease gradually has begun to be qualified by the idea that landlords cannot evict or terminate for certain "bad," or proscribed reasons. Thus, for example, a landlord cannot terminate or refuse to rent in violation of federal and state civil rights laws that protect tenants against discrimination based on race, color, sex, religion, national origin,[245] and, in some places, marital status or the presence of children in the household.[246]

Many of the new rights acquired by tenants as landlord-tenant law was transformed in the 1960's and 1970's could have been virtually nullified if landlords could terminate or refuse to renew the leases of tenants who exercised them. Month-to-month tenants, who tend to be found mainly in low-rental units, were especially vulnerable, since their leases in principle can be ended upon 30 days' notice for any or no reason. So, largely as a byproduct of the development of the implied warranty, statutory and case law began to inhibit landlords from using their prerogatives to terminate tenancies, or to raise rents, or to refuse to renew leases, in reprisal for the exercise of the tenant's right to participate in tenants' unions or to assert defenses based on the landlord's failure to maintain the premises.[247] In the leading case of *Edwards v. Habib*,[248] Judge Wright held unlawful a landlord's termination of a month-to-month tenancy in retaliation for a tenant's reporting code violations on the premises.[249]

The creation of the retaliatory eviction exception to the common law termination rules generated a new set of legal problems. What kind of evidence

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[242] 1 TIFFANY, *supra* note 27, § 13(b) at 111, § 14(e) at 139-40; CASNER & LEACH, *supra* note 57, at 533.

[243] 1 H. TIFFANY, THE LAW OF REAL PROPERTY § 88 at 135-36 (2d ed. 1939).

[244] *E.g.*, MASS. GEN. LAWS ANN. ch. 186, § 12, ch. 238, § 9 (West Supp. 1981); N.J. STAT. ANN. § 2A:42-10.6 (West Supp. 1981).

[245] *E.g.*, 42 U.S.C. §§ 1982, 3601-3619, 3631 (1976 & Supp. III 1979).

[246] MASS. GEN. LAWS ANN. ch. 151B, § 4(6), (11) (West Supp. 1981).

[247] Cunningham, *supra* note 1, at 126-38.

[248] 397 F.2d 687 (D.C. Cir. 1968).

[249] *Id.* at 699-701.

would satisfy the tenant's burden of proof on the issue of retaliatory motive? What if the evidence suggested mixed motives, including some legitimate reason, such as nonpayment of rent? If the eviction was found to be retaliatory, how long would the landlord have to wait before regaining possession of the premises? In resolving these issues, legislatures and courts have generally resorted to the use of presumptions. The following section of URLTA is typical:

> Section 5.101. [*Retaliatory Conduct Prohibited.*]
>
> (a) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after:
>
> (1) the tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health and safety; or
>
> (2) the tenant has complained to the landlord of a violation [of the landlord's obligations to maintain the premises]; or
>
> (3) the tenant has organized or become a member of a tenant's union or similar organization.
>
> (b) If the landlord acts in violation of subsection (1), the tenant . . . has a defense in any retaliatory action against him for possession. In an action by or against the tenant, evidence of a complaint within [1] a year before the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation. The presumption does not arise if the tenant made the complaint after notice of a proposed rent increase or diminution of services. "Presumption" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.
>
> (c) Notwithstanding subsections (a) and (b), a landlord may bring an action for possession if:
>
> (1) the violation of the applicable building or housing code was caused primarily by lack of reasonable care by the tenant, a member of his family, or other person on the premises with his consent; or
>
> (2) the tenant is in default in rent; or
>
> (3) compliance with the applicable building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of use of the dwelling unit.[250]

Thus, under the URLTA, if the tenant engaged in a protected activity within one year of the alleged retaliatory act, a presumption of retaliation arises unless the tenant's complaint was itself preceded by a notice of a rent increase or a service cut-back. The landlord is protected if the tenant is chargeable with responsibility for the code violation complained of or is in default on, as distinct from lawfully withholding, his rent, or if required repairs would displace the tenant in any event.

In general, as under the URLTA, states that have modernized their landlord-tenant law now permit tenants who get notices of eviction after report-

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[250] URLTA, *supra* note 3, § 5.101.

ing housing code violations, joining a tenant's union, or exercising their rights to withhold rent or to repair and deduct, to remain on the premises unless the eviction was primarily motivated by some other "good" cause, such as willful damage to the premises or unjustifiable nonpayment of rent.[251] Legislation, rather than judicial decisions, predominates in this area. Some of this legislation is more solicitous of the landlord's interest in regaining possession of the leased premises; some, like the URLTA, is more tenant oriented.

Recently, in several states and municipalities, further limitations have been placed on evictions. Reacting to the loss of rental units caused by their conversion into cooperatives or condominiums, a number of legislatures have severely curtailed the ability of landlords to terminate or refuse to renew existing tenancies for this purpose.[252] Even without legislation, the case law developments could go quite far in the direction of limiting the landlord's ability to terminate tenancies. The increasing disposition of courts to carry new and old principles of contract law over into residential lease law, together with the "good faith" clause in URLTA section 1.302,[253] modelled on the Uniform Commercial Code's section 1-203,[254] might well result in holding landlords to a standard of good faith that would be much broader in scope than the retaliatory eviction concept.

All of the foregoing exceptions to common law lease termination rules have involved an increase in security of tenure arising from the prohibition of evictions, or refusals to renew, for forbidden reasons. In the absence of such proscribed reasons, landlords remain in principle free to evict or refuse to renew for any reason they wish. Certain other developments, however, at present rather limited in scope, would prevent landlords from terminating or refusing to renew leases unless they affirmatively can show "good reasons" for so doing. "Good cause" eviction is not an *exception* to the landlord's common law right to repossess at the end of a term. It constitutes rather the introduction of an opposite principle, that of the tenant's presumptive right to continue in possession.

A "good cause" requirement for eviction exists already where the dwellings involved are in public housing programs, in most rent-controlled tenancies, and applies to virtually all rental housing in two jurisdictions. Tenants in conventional public housing or federally subsidized rental housing are protected against eviction by administrative rules and regulations affording them the right, not only to security of tenure, but to a hearing on the reasons for evic-

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[251] *See generally* Cunningham, *supra* note 1, at 126-38.

[252] See text at notes 339-54 *infra*. Typically, such legislation is at the municipal rather than the state level. For a description of various types of statutes and ordinances, see Note, *The Validity of Ordinances Limiting Condominium Conversion*, 78 MICH. L. REV. 124 (1979).

[253] "Every duty under this Act and every act which must be performed as a condition precedent to the exercise of a right or remedy under this Act imposes an obligation of good faith in its performance or enforcement." URLTA § 1.302.

[254] "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1978).

tion before they are deprived of possession.[255] Some courts have suggested that the rights of such tenants to such a hearing may be of constitutional dimension,[256] analogous to a welfare recipient's right to a hearing before losing public assistance benefits.[257] Private landlords participating in federal rent subsidy programs may also be subject to good cause requirements for terminating leases.[258] In the private, but rent-controlled, sector, local regulations typically provide that a landlord can terminate a controlled tenancy only for "just cause," that is, for one of the statutorily enumerated reasons.[259] New Jersey, since 1974, and the District of Columbia, since 1975, have had highly innovative laws, little noticed outside those jurisdictions, forbidding evictions except for statutorily enumerated reasons. The protection of the District of Columbia act extends to all rental units,[260] and that of the New Jersey statute to all private tenants except those in owner-occupied two-family dwellings.[261] By "emergency" legislation in 1982, the District of Columbia Code was amended to prohibit temporarily evictions on days when the temperature is not predicted to exceed 20 degrees Fahrenheit.[262]

At present the revolution in landlord-tenant law has stopped short of establishing a good cause requirement for lease terminations on a general basis in the United States. The majority of jurisdictions seem to have settled, rather, on a system of forbidding evictions for certain proscribed causes. However, if retaliation is easily presumed and the presumption is difficult to rebut or dispel, the distinction between retaliatory eviction and "good cause" eviction diminishes. Furthermore, if lists of proscribed causes generally expand to include reasons such as the landlord's desire to change the form of his investment from rental housing to some other use, this will effectively nullify a principle that once was at the very heart of landlord-tenant law. Meanwhile, in the District of Columbia and New Jersey, in the public sector, and under most rent control regulations, it can be said that the very nature of a term of years has

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[255] 24 C.F.R. §§ 450.3, 866.4, 866.50-.59 (1981). *See also* Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 274-84 (1969).

[256] *See* Escalera v. New York City Hous. Auth., 425 F.2d 853, 861, 867 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970); Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955).

[257] *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

[258] H.U.D. regulations do not expressly provide for "good cause" eviction in the case of tenants of landlords participating in the Section 8 "existing housing" program, but a good cause standard was applied in Swann v. Gastonia Hous. Auth., 502 F. Supp. 362, 364-67 (W.D.N.C. 1980), *aff'd*, 675 F.2d 1342 (4th Cir. 1982). *See also* Heen, *Due Process Protections for Tenants in Section 8 Assisted Housing: Prospects for a Good Cause Eviction Standard*, 12 CLEARINGHOUSE REV. 1, 11-16 (1978).

[259] C. BERGER, LAND OWNERSHIP AND USE: CASES, STATUTES AND OTHER MATERIALS 173 (2d ed. 1975) [hereinafter cited as BERGER, LAND OWNERSHIP]. *See, e.g.*, Driscoll v. Harrison, 1981 Mass. App. Ct. Adv. Sh. 434, 438, 417 N.E.2d 26, 29. *See also* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, § 7:10 at 528-30 (1980).

[260] D.C. CODE ANN. § 45-156 (1981).

[261] N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1981).

[262] Act 4-143, amending D.C. Code § 45-1561, effective Jan. 20, 1982, expiring April 20, 1982, D.C. Reporter 425-426 (Jan. 29, 1982).

already been changed. It is no longer an estate which must come to an end at or before a fixed or determinable time.

Even now, the retaliatory eviction cases and the condominium conversion control laws show that the "sticks in the bundle of rights" that compose the property interest in a leasehold have been reallocated between landlord and tenant. To the extent that termination by the landlord has become more difficult through case law, legislation, and even through the informal practices of trial judges and constables who in some places are reluctant to put tenants out on the street, the landlord's interest begins to resemble what property lawyers call a bare reversion, while the tenant acquires rights to continuity beyond the present possessory interest. The greater these rights, the more the tenant's interest looks like a new form of determinable life estate, created by operation of law. Thus, one of the principal distinctions between freehold ownership and leasing begins to disappear.

These developments reflect a certain incorporation into the law of the notions that the tenant's interest in his home and the public's interest in maintaining the supply of rental units are more important than the landlord's investment. This was made explicit by Judge Wright in *Robinson v. Diamond Housing,*[263] a retaliatory eviction case: "The right to a decent home is far too vital for us to assume that government has taken away with one hand [with summary process] what it purports to grant with the other [tenants' rights]."[264]

Some courts, like the Supreme Court in *Lindsey v. Normet,*[265] may still refer to the landlord as the "owner" and to the leased dwelling as the landlord's "property."[266] But in conventional property law terms, a leasehold estate always involves at least two proprietary interests: the present possessory estate of the tenant and the reversion of the landlord.[267] What seems to be happening at present is that the traditional emphasis on what the landlord owns is now giving way to an increased emphasis on what the tenant owns. That these developments can go quite far in a common law country is shown by the experience of England where broad legislative schemes of rent regulation and eviction control have been in operation since the post-war period.[268] Although

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[263] Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972).

[264] *Id.* at 862.

[265] 405 U.S. 56 (1972).

[266] *Id.* at 72, 74.

[267] In the takings context, federal courts are well aware of the proprietary nature of a tenant's interest. *E.g.*, Devines v. Maier, 665 F.2d 138, 141 (7th Cir. 1981) ("[L]easehold interests are property interests protected by the Fifth Amendment.").

[268] In England, with certain exceptions, a tenant whose leasehold is protected by the Rent Act cannot be evicted unless a statutory ground (e.g., non-payment of rent) exists *and* the court finds the eviction is "reasonable" under all the circumstances. Rent Act 1977 (1977 c.42), Part VII § 98. Agricultural tenants have secure tenure under the Agricultural Holdings Act, 1948, and Agricultural Holdings (Notices to Quit) Act, 1977.

General rent regulation and statutory protection against eviction without good cause is common throughout Western Europe. *E.g.*: France: Law No. 48-1360 of 1 Sept. 1948; Code de la Construction et de l'Habitation, Article 613-1 *et seq.*, as amended by the Law of 1 December

most English texts treat the "statutory tenancies" created by these laws as consisting of merely personal, not proprietary, rights, the tenant's continuing right to possession is considered by some commentators to be a new kind of property right.[269] In the United States, it is already clear that with respect to lease termination, as with the other areas we have examined, technical change in landlord-tenant law has been accompanied by subtle ideological change. The nature of that change is explored further in the following sections.

IV. The Rise of Regulatory Landlord-Tenant Law

The differences between the legal norms that presently govern a transformed residential landlord-tenant relationship in most American states and those of the classical law are striking. But the essence of the transformation of lease law is not revealed merely by comparing classical and current law or by tracing the evolution and decline of various substantive and procedural rules. From one angle, the twentieth century evolution of landlord-tenant law has involved the absorption into lease law of new principles of contract, sales, tort and civil procedure law as those fields themselves have been modernized. From this point of view, landmark cases removing such anomalies as the independence of covenants, the landlord's tort immunity and the limitation on rent-related defenses and counterclaims in eviction actions have simply made lease law more consistent with other fields of private law. As new doctrines within contract, tort and commercial law began to accord consumers different legal treatment in many respects from that given to merchants, residential landlord-tenant law has diverged from commercial landlord-tenant law to become a kind of "consumer law."[270]

The growing dichotomy between commercial and residential lease law is quite marked in recent decisions of the New York Court of Appeals. In cases involving commercial leases, the court has stressed the dual nature of a lease as contract and conveyance.[271] It asserted in 1979 that "[w]hile . . . a lease is

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1951; the Law of 4 January 1980, and the Decree of 8 January 1980. West Germany: *see generally* Schmidt-Fütterer, Wohnraumschutzgesetz, Kündigung, Mieterhöhung, Mietwucher, Zweckentfremdung, 2nd ed. (Munich: Beck, 1976). The Swedish situation is described in The Swedish Institute, *Housing and Housing Policy in Sweden,* Fact Sheets on Sweden (1978).

[269] Recent cases broadly construing this legislation have been viewed by Dr. Kevin Gray of Cambridge as advancing "the idea that residential tenants may have 'social rights of property' in their homes and that these rights prevail over strict legal entitlements as defined by the orthodox law of property or as fixed by contract between landlord and tenant." Gray, *Lease or License to Evade the Rent Act?,* 38 CAMBRIDGE L.J. 38, 42 (1979). *See generally* K. GRAY & P. SYMES, REAL PROPERTY AND REAL PEOPLE: PRINCIPLES OF LAND LAW 415-59 (1981).

[270] Consumer protection theories figure prominently in several implied warranty cases. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075-76 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 626-27, 517 P.2d 1168, 1174-75, 111 Cal. Rptr. 704, 710-11 (1974). *See also* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 484, 268 A.2d 556, 560 (1970).

[271] Geraci v. Jenrette, 41 N.Y.2d 660, 665, 363 N.E.2d 559, 563, 394 N.Y.S.2d 853, 856-57 (1977); 219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506, 509-11, 387 N.E.2d

often chameleonic in both character and function, its fundamental purpose remains to serve as a vehicle for the conveyance of an interest in real property."[272] The same year, however, echoing *Javins,* the court described a residential lease as "more akin to a purchase of shelter and services rather than a conveyance of an estate. . . ."[273] The URLTA is by its terms applicable only to dwelling units,[274] as are the various state statutes giving tenants new rights and remedies relating to habitability. Although there are few cases on the subject, courts in implied warranty states have signalled to commercial tenants that they cannot count on having the new rules developed in residential lease cases applied to them.[275]

As the new residential landlord-tenant law matures, the analogy between a lease and a sale of goods, so influential in the early development of the implied warranty, has begun to break down. The appearance, establishment, elaboration, and eventual transmutation of the implied warranty could furnish a series of textbook illustrations for Edward Levi's discussion of how new concepts enter the legal system, change the prior law, and are themselves changed. Levi called attention to the importance of finding a "ready word" or phrase for a new legal concept.[276] He notes that, looking back over a line of cases, one can often discern a period when the courts were fumbling for a phrase.[277] In landlord-tenant law, a new characterization of the subject matter of the transaction was needed to enable it to escape from classical legal categories. The lack of such a characterization, in part,[278] explains why the Minnesota Supreme Court's recognition in 1931 of a landlord's "implied covenant that the premises [in modern apartment buildings] will be habitable"[279] attracted little attention at the time. Eventually, when circumstances had changed sufficiently to make a thorough restructuring of landlord-tenant law possible, Judge

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1205, 1206-07, 414 N.Y.S.2d 889, 890-91 (N.Y.C.A. 1979).

[272] 219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506, 511, 387 N.E.2d 1205, 1207, 414 N.Y.S.2d 889, 891 (N.Y.C.A. 1979).

[273] Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 324, 391 N.E.2d 1288, 1292, 418 N.Y.S.2d 310, 314 (1979).

[274] URLTA, *supra* note 3, §§ 1.201, 1.202.

[275] E.P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201, 206 (D.C. Cir. 1974); Schulman v. Vera, 108 Cal. App. 3d 552, 556-57, 166 Cal. Rptr. 620, 624 (1980); Interstate Restaurants, Inc. v. Halsa Corp., 309 A.2d 108, 110 (D.C. 1973); J.B. Stein & Co. v. Sandberg, 95 Ill. App. 3d 19, 26, 419 N.E.2d 652, 658 (1981); City of Chicago v. American Nat'l Bank, 86 Ill. App. 3d 960, 963, 408 N.E.2d 379, 381 (1980); Elizondo v. Perez, 42 Ill. App. 3d 313, 315, 356 N.E.2d 112, 114 (1976); Danis v. Bridge Enters., Inc., 1979 Mass. App. Ct. Adv. Sh. 2311, 2313, 397 N.E.2d 326, 328; Cooley v. Bettigole, 1 Mass. App. Ct. 515, 526 n.13, 301 N.E.2d 872, 879 n.13 (1973); Kruvant v. Sunrise Market, Inc., 58 N.J. 452, 456, 279 A.2d 104, 106 (1971); Olson v. Scholes, 17 Wash. App. 383, 392-93, 563 P.2d 1275, 1281 (1977). *But see* Four Seas Inv. Corp. v. International Hotel Tenants Ass'n, Cal. App. 3d 604, 613, 146 Cal. Rptr. 531, 535 (1978); Demirci v. Burns, 124 N.J. Super. 274, 276, 306 A.2d 468 (1973) (both suggesting that small businesses or individual commercial tenants may be entitled to raise some of the defenses that have been accorded to residential tenants).

[276] E. LEVI, AN INTRODUCTION TO LEGAL REASONING 8 (1949).

[277] *Id.*

[278] See text and notes at notes 120-75 *supra.*

[279] Delameter v. Foreman, 239 N.W.148, 149 (Minn. 1931).

Wright found the phrase that would thereafter be repeatedly invoked to trigger influential, though imperfect, analogies to a changing sales law. The subject matter of the lease was no longer to be called "premises"; it was, rather, a "well known package of goods and services."[280] Implied in the transfer of this package was not a "covenant," the conveyancing word used in *Delameter,* but a "warranty," a word evoking the UCC warranties of merchantability[281] and fitness for a particular purpose.[282]

As Levi noted, legal categories typically undergo change in the course of being applied in the "moving classification system" of the law.[283] This can be illustrated by the transformation of the meaning of "warranty" in the residential lease context. It is clear even from *Javins* that the implied warranty of habitability in residential leases has small resemblance to implied warranties in the sale of goods. The implied warranty of habitability applies even to patent defects obvious to the "buyer" at the time of the "sale," and it obliges the "seller" to maintain the premises during the term of the lease.[284] Under the UCC, the buyer has no warranty protection against defects which he ought to have discovered by inspection,[285] nor is there any continuing duty on the part of the seller to keep goods in repair. Furthermore, the UCC expressly recognized that sales can be made on an "as is" basis and that implied warranties can be excluded or modified in other ways,[286] while the implied warranty of habitability generally either cannot be contracted out at all,[287] or can be affected by contract only in strictly limited ways.[288] When the implied warranty is materially breached, the tenant may be allowed to remain in possession and yet be excused from all or part of his rental obligation.[289] Under the Uniform Commercial Code, however, a buyer of defective goods generally has to choose between rejecting the goods, or keeping them and suing for damages.[290]

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[280] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (footnote ommitted). The phrase was echoed in Green v. Superior Court, 10 Cal. 3d 616, 623, 517 P.2d 1168, 1172, 111 Cal. Rptr. 704, 708 (1974); Steele v. Latimer, 214 Kan. 329, 334, 521 P.2d 304, 308 (1974); Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 324, 391 N.E.2d 1288, 1292, 418 N.Y.S.2d 310, 314 (1979); Pugh v. Holmes, 486 Pa. 272, 282, 405 A.2d 897, 902 (1979); Foisy v. Wyman, 83 Wash. 2d 22, 27, 515 P.2d 160, 164 (1973); Teller v. McCoy, 253 S.E.2d 114, 125 (W. Va. 1978).

[281] U.C.C. § 2-314 (1978).

[282] *Id.* § 2-315.

[283] LEVI, *supra* note 276, at viii.

[284] Cunningham, *supra* note 1, at 86-95.

[285] U.C.C. § 2-316(3)(b) (1978).

[286] *Id.* §§ 2-314, 2-315, 2-316.

[287] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 n.49 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); URLTA, *supra* note 3, § 1.403 (a)(1). *See also* Foisy v. Wyman, 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973).

[288] WASH. REV. CODE ANN. § 59.18.360 (Supp. 1981) now provides that a waiver is permitted only if it does not appear on a standard form, there is no substantial bargaining inequality between the parties, it has been approved by a public official or the tenant's lawyer, and it does not violate the public policy promoting safe and sanitary housing. *Id.* CAL. CIV. CODE ANN. § 1942.1 (West Supp. 1981) permits a waiver for separate consideration.

[289] See text and note at notes 194-214 *supra.*

[290] U.C.C. §§ 2-601, 2-714, 2-715 (1978).

In this last respect, the difference between the lease of real property and an ordinary sale of goods appears crucial. A sale, even on credit, is meant eventually to sever the seller's connection with the goods and to make the buyer the owner. A lease establishes an ongoing relationship between lessor and lessee, which, whether characterized as a property or contractual relation, is meant to be temporary, with all rights to be reunited in the lessor at some future time. The landlord retains an interest in the leased real estate in a way that a seller of tomatoes, sewing machines, or tools, does not. Indeed, it is unclear to what extent, if at all, the UCC warranty provisions are applicable to leases of personal property.[291] This is why the Supreme Court in *Lindsey v. Normet*[292] would not hold that the state of Oregon had acted unconstitutionally in singling out the landlord's possessory action for more expedited treatment than other civil actions.[293] As Levi has noted, however, the misuse or misunderstanding of a concept need not impede its progress in the law.[294]

Thus *Javins,* not *Delameter,* marked the point in the case law where the implied warranty idea was accepted, given definition, and connected to other ideas. But characteristically,[295] as reasoning by analogy proceeded, and cases were classified as within or without its reach, the concept of implied warranty itself changed. As a term implied in nearly every residential lease, regardless of the will of the parties,[296] it does not belong to the domain of contract but to that of regulation. This was made especially clear in *Foisy v. Wyman,*[297] where the tenant of a single-family house with an option to buy was permitted to assert breach of implied warranty as a defense to an unlawful detainer action even though the rent had been fixed at a low rate because of obvious defects on the premises.[298] The Washington Supreme Court swept aside the landlord's contention that bargaining had in fact occurred, saying, "[w]e believe this type of bargaining by the landlord with the tenant is contrary to public policy and the purpose of the doctrine of implied warranty of habitability."[299]

The implied warranty was soon joined by a growing list of other lease terms that are either required or forbidden, or strictly controlled, by court decision or statute. The landlord cannot be exculpated from liability for his own negligence.[300] The lease may not include a confession of judgment by the ten-

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[291] Leake v. Meredith, 221 Va. 14, 17, 267 S.E.2d 93, 95 (1980) has held the provisions of the U.C.C. are not applicable to leases of personal property. The court distinguished cases holding otherwise on the grounds that they have typically involved leases with irrevocable options to buy. *Id.*

[292] 405 U.S. 56 (1972).

[293] *Id.* at 72-73.

[294] "Erroneous ideas, of course, have played an enormous part in shaping the law." LEVI, *supra* note 276, at 6.

[295] *Id.* at 3-6, 9.

[296] Most court decisions imposing an implied warranty have made it nonwaivable. *See* Cunningham, *supra* note 1, at 95-97. Under the URLTA the landlord's duties may not be waived except as specifically provided in § 2.104(c) and (d). URLTA, *supra* note 3, §§ 2.104(c)-(d).

[297] 83 Wash. 2d 22, 515 P.2d 160 (1973).

[298] *Id.* at 28, 515 P.2d at 164.

[299] *Id.*

[300] *E.g.*, McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 447-50, 486 P.2d 1093, 1096-97 (1971); URLTA, *supra* note 3, § 1.403(a)(4).

ant, an agreement to pay attorney's fees, or a waiver of any of his rights and remedies under the Act.[301] The taking and use of the tenant's security deposit is carefully regulated.[302] For public housing, the list is different, but even more extensive.[303]

As the list of required and forbidden terms expands, it begins to resemble a lease implied-in-law. At the same time, a great deal of judicial discretion in dealing with landlord-tenant disputes is authorized by the doctrines of good faith and unconscionability that emerged in contract law, were consolidated in commercial law by the Uniform Commercial Code, and are now included in the URLTA.[304] These innovations might at first appear to be a long-needed response to the problem of the standardized lease.[305] Llewellyn long ago recognized that traditional contract law was not suited to deal with standardized form contracts and proposed that they should be handled within a private law framework by enforcing only those terms "which a sane man might reasonably expect to find" on the form.[306] As Dawson has shown, the West German *Bundesgerichtshof,* using general clauses of the German Civil Code, developed an effective way of dealing with this problem, adopting an approach quite similar to that proposed by Llewellyn: it treated a person as having submitted only to those standardized terms with which he should " 'fairly and justly reckon.' "[307]

Current American residential landlord-tenant law, however, has replaced the standard form lease, not with terms based on the reasonable expectations of the parties, or even of one of them, but with terms usually justified by reference to the public interest.[308] This need not exclude the idea of protecting expecta-

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[301] *E.g.*, URLTA, *supra* note 3, § 1.403(a)(1), (2), (3).

[302] *E.g.*, *id.* § 2.101; MASS. GEN. LAWS ANN. ch. 186, § 18 (West Supp. 1981).

[303] 24 C.F.R. §§ 866.1-866.59 (1981); Fed. Reg. 33,402-408 (1975). *See also* Lefcoe, *HUD's Authority to Mandate Tenants' Rights in Public Housing*, 80 YALE L.J. 463 (1971).

[304] *E.g.*, URLTA, *supra* note 3, § 1.302 (obligation of good faith); § 1.303 (unconscionability). *See generally* Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968). *See also* Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619.

[305] *See generally* Kirby, *supra* note 37.

[306] Llewellyn, Book Review, 52 HARV. L. REV. 700, 704 (1939).

[307] Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1108 (1976).

[308] *E.g.*, URLTA, *supra* note 3, §§ 1.102, 2.104 comments, referring to "vital interests of the parties and the public" in comments to § 1.102 and again in the comment to § 2.104. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079-80 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). Judge Wright stated:

> The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.

Id. (footnotes omitted).

See also Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961) ("The need

tions. But as Charles Reich pointed out in a now famous article, " 'the public interest' is all too often a reassuring platitude that covers up sharp clashes of conflicting values, and hides fundamental choices."[309] In fact, regulatory landlord-tenant law seems to be less concerned with reliance and expectations than are traditional contract law and commercial law.[310] It tends, rather, to reflect ever-changing compromises among, and fluctuating perceptions of, the interests involved, as well as diverse views about the relationship of law to economic and social reality. It is therefore susceptible to more frequent, abrupt and unpredictable changes than are the private law remnants of property and contract. Thus, research in landlord-tenant law no longer involves study of the gradual judicial elaboration and qualification of rules, standards, and principles, so much as it does consultation of the annual legislative deposit in the pocket parts of each state's statute books.

In this respect, the judge-made component of lease law has become similar to its counterparts in the law governing employment contracts, franchise agreements and other relational contracts that are considered to be of great social importance.[311] From this point of view, the forces that have been at work in landlord-tenant law are merely elements of a more general transition in attitudes about the role of the judge in developing private law. At least since Cardozo, it has been accepted that judges have a creative law-making role in the private law areas.[312] However, until the 1960's it was widely believed that such judicial activity should proceed through a process of reasoned elaboration[313] and that it should rest on some rule, principle or standard.[314] Today, as the

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and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, *caveat emptor*.").

Cf. U.C.C. § 2-302, comment 1 (1978) [Unconscionable Contract or Clause] ("The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.") (citation omitted).

[309] Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964).

[310] ATIYAH, *supra* note 44, at 721-22.

[311] The story of how common law countries have massively abridged freedom of contract over the past century is recounted in *id.* at 571-779.

On "relational" contracts, *see generally* Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974); Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978).

[312] The following passage has often been cited in implied warranty decisions: "A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience." B. CARDOZO, THE GROWTH OF THE LAW 136-37 (1924). This statement, however, must be read in the context of the fundamental problem to which Cardozo's lectures were addressed: "the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth." *Id.* at 1. Cardozo's conclusion does not especially favor the exercise of judicial discretion in "the public interest": "I come back in the end to the text with which I started: 'Law must be stable, and yet it cannot stand still.' . . . I can only warn you that those who heed the one [of the two precepts] without honoring the other, will be worshipping false gods and leading their followers astray." *Id.* at 143.

[313] H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 161-71 (Tent. ed. 1958).

[314] *See* Fuller, *The Forms and Limits of Adjudication*, an unpublished paper, excerpts from

former private law fields become more public and administrative, judges express these attitudes less frequently, and engage more openly in speech and activities that would once have been considered legislative.[315]

Several of the most recent residential landlord-tenant cases clearly illustrate the shift from a private-law to a regulatory mode. In *Park West Management Corp. v. Mitchell,*[316] the implied warranty was held breached by service interruptions and unsanitary conditions caused by a 17-day strike of the landlord's maintenance employees and the refusal of public garbage collectors to cross picket lines at the property in order to remove trash.[317] The New York Court of Appeals upheld the trial court's award of a 10 percent abatement in rent for the month when the strike occurred, and rejected the landlord's claim that he should not be absolutely liable, saying: "[A]s the statute places an unqualified obligation on the landlord to keep the premises habitable, conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty as well."[318] The Court did not even discuss the facts, appearing in the decision below, that the apartments were rent-controlled and that the leases had contained *force majeure* clauses.[319]

A 1979 Massachusetts case, also involving the question of strict liability for breach of the implied warranty, sheds more light on the nature of the warranty. In *Berman & Sons, Inc. v. Jefferson,*[320] the tenant withheld part of the rent because she was without heat and hot water from time to time for a period of about two months owing to breaks in underground pipes, which the landlord had acted promptly to repair.[321] The questions before the court were whether the landlord was entitled to a reasonable time to repair the defects before rent abated and whether rent should abate at all in the absence of fault or bad faith on the part of the landlord.[322] The court held that the rent abates as soon as the landlord has notice of the conditions and that his lack of fault and his reasonable efforts to repair do not prolong the duty to pay rent.[323] The landlord had argued, along contractual and commercial law lines, that neither the expectations of the parties nor reasonable trade customs justified imposing strict

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which appear in HART & SACKS, *supra* note 313, at 421-26. A later version was published in 92 HARV. L. REV. 353 (1978). For expressions of similar views in landlord-tenant cases, see Justice Schaeffer's opinion in O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill. 2d 436, 440-41, 155 N.E.2d 545, 597 (1958), and Chief Justice Neely's opinion in Teller v. McCoy, 253 S.E.2d 114, 136 (W. Va. 1978) (Neely, C.J., concurring in part and dissenting in part).

[315] *See* Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1251 (1980) (the reprinted text of Professor Atiyah's inaugural lecture at Oxford University on February 17, 1978).

[316] 47 N.Y.2d 316, 327, 391 N.E.2d 1288, 418 N.Y.S.2d 310 (1979).

[317] *Id.* at 329, 391 N.E.2d at 1295, 418 N.Y.S.2d at 317.

[318] *Id.* at 327, 391 N.E.2d at 1294, 418 N.Y.S.2d at 316 (citation omitted).

[319] See the opinion of the Appellate Division, 62 A.D.2d 291, 294, 296, 404 N.Y.S.2d 115, 117, 118 (1978).

[320] 1979 Mass. Adv. Sh. 2459, 396 N.E.2d 981 (1979).

[321] *Id.*, 396 N.E.2d at 983.

[322] *Id.* at 2460, 396 N.E.2d at 983.

[323] *Id.* at 2460-61, 396 N.E.2d at 983.

liability when a system broke down and the landlord acted promptly to repair it.[324] But the court made it clear that it regarded such arguments as misplaced: "These contentions have no place within the framework established in *Hemingway*. Considerations of fault do not belong in an analysis of warranty."[325] Rejecting a proferred analogy from the UCC, the court explained that the implied warranty was not a private law obligation:

> Here the landlord appears to have proceeded in a responsible manner consistent with landlords' trade usage. However, the State Sanitary Code, not such usage, provides the proper yardstick for measuring the landlord's conduct. *The* Hemingway *court removed the landlord's duties under the Code from the realm of private ordering.* Those duties cannot be waived, bargained away, or qualified by customary practice.[326]

It is now out in the open that legislation, and judicial activity in relation to it, have shifted the residential landlord-tenant relationship from the domain of private to that of public law. The *Berman* opinion also affords a glimpse of the ideology underlying the current shift of residential landlord-tenant law from contract and property law to judicial and legislative regulation: "[W]e note that the landlord's liability without fault is merely an economic burden; the tenant living in an uninhabitable building suffers a loss of shelter, a necessity."[327]

Courts in other jurisdictions also have imposed strict liability for breach of the implied warranty[328] and in landlord-tenant tort cases.[329] But it would be a mistake to interpret these recent case-law developments as themselves constituting the dawn of the era of regulatory landlord-tenant law. They represent only a judicial recognition of the largely accomplished fact of the transition of residential lease law from the private law fields of property and contract to an area in which public regulatory law predominates. The basic rules of residential landlord-tenant law are now, overwhelmingly, to be found in an extensive network of statutes, codes and ordinances. And, although the phrase "implied warranty of habitability" may evoke the names of certain landmark cases to most lawyers, those cases, as we have seen, were themselves dependent on legislation, either by elaborating policy contained in, or by deriving private rights from, anterior housing codes or other safety laws.[330] Furthermore, these

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[324] *Id.* at 2464-65, 396 N.E.2d at 985.

[325] *Id.* at 2462, 396 N.E.2d at 984.

[326] *Id.* at 2465-66 n.11, 396 N.E.2d at 986 n.11. (emphasis added) (citation omitted).

[327] *Id.* at 2463, 396 N.E.2d at 984-85.

[328] The California Supreme Court held in Knight v. Hallsthammar, 29 Cal. 3d 46, 54-55, 623 P.2d 268, 273, 171 Cal. Rptr. 707, 712 (1981) that the implied warranty was breached whether or not the landlord had had a reasonable time to repair.

[329] In Kaplan v. Coulston, 85 Misc. 2d 745, 747-51, 381 N.Y.S.2d 634, 636-38 (Civ. Ct. 1976), the landlord was held strictly liable for a tenant's injuries by an analogy to products liability cases as strained as Judge Wright's analogies to sales of goods. The Court recognized the difficulties with its theory, but said, "[L]ike the typical consumer, the tenant relies upon the landlord's skill, reputation and implied representation of safety." *Id.* at 751, 381 N.Y.S.2d at 638. *Contra*, Segal v. Justice Ct. Mut. Hous. Coop., Inc., 105 Misc. 2d 453, 454-59, 432 N.Y.S.2d 463, 465-67 (Civ. Ct. 1980).

[330] See text and notes at notes 120-75 *supra*.

cases were often followed by legislation codifying or qualifying their results.[331] As we have seen, contrary to what many believe, the implied warranty in most states was established by legislation, not judicial action.[332] At least nineteen states have comprehensive, systematic landlord-tenant legislation,[333] while in many other states, especially the most urbanized ones, the landlord-tenant laws are more varied and voluminous than the Uniform Residential Landlord-Tenant Act.[334] Indeed, the very mass, complexity and changeability of landlord-tenant law in a state like Massachusetts, for example, constitute obstacles to rational codification.

That the basis of the typical statutory rearrangement of landlords' and tenants' rights and duties is not contractual is explicitly recognized in the draftsmen's comments to the implied warranty section of the URLTA: "Standards of habitability dealt with in this section are a matter of public police power rather than the contract of the parties or special landlord-tenant legislation."[335] In general, the URLTA is to be construed as legislation of "carefully considered permanent regulative intention."[336] The reason given for such regulation is that "[v]ital interests of the parties and the public under modern urban conditions require the proper maintenance and operation of housing."[337]

Besides URLTA and similar legislation establishing new relationships between landlord and tenant, there are in various states and localities other forms of regulation of leasing which are more far-reaching and more explicitly directed to public goals: condominium-cooperative conversion control, rent regulation, eviction control, and consumer protection laws applicable to residential leasing by persons in the rental housing business. About half of the states, and over half of the central cities in the thirty-seven largest metropolitan areas in the United States, have adopted some form of regulation protecting tenants in buildings about to undergo conversion into condominiums or cooperatives.[338] It has been estimated that as many as one-eighth of all rental units in the United States may be subject to some form of rent regulation.[339]

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[331] *E.g.*, WIS. STAT. ANN. § 704.07 (West 1981); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1981).

[332] Cunningham, *supra* note 1, at 6.

[333] *See* note 134 *supra*.

[334] *See, e.g.*, the New York and Massachusetts statutes cited in note 135 *supra*.

[335] URLTA, *supra* note 3, § 2.104 comment.

[336] *Id.* § 1.104 comment.

[337] *Id.* § 2.104 comment.

[338] U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, THE CONVERSION OF RENTAL HOUSING TO CONDOMINIUMS AND COOPERATIVES: A NATIONAL STUDY OF SCOPE, CAUSES AND IMPACTS X1-4-10, X11-1-20 (Wash. D.C. June 1980) [hereinafter cited as CONVERSION OF RENTAL HOUSING]. For an excellent analysis and critique of the legislation, see BERGER, *New Residential*, *supra* note 7, at 731-42. See Note, *The Validity of Ordinances Limiting Condominium Conversion*, 78 MICH. L. REV. 124 (1979), for a discussion of the constitutionality of various types of conversion regulations.

[339] J. BRENNER & H. FRANKLIN, RENT CONTROL IN NORTH AMERICA AND FOUR EUROPEAN COUNTRIES 46 (1977). Rent regulation tends, however, to be concentrated in certain geographical areas, notably in New York City, the District of Columbia, and in numerous New Jersey cities. CONVERSION OF RENTAL HOUSING, *supra* note 338, at V-16 states that only 7 of the

Like conversion control laws, rent regulation typically includes a complex scheme of eviction controls. Two jurisdictions have general eviction controls.[340] Finally, statewide consumer protection legislation forbidding unfair or deceptive trade practices has been made applicable to leases in a number of states.[341]

Most remarkable among these laws are the 1974 New Jersey statute,[342] already referred to in the eviction context,[343] and two District of Columbia statutes.[344] The New Jersey law, statewide in application, simultaneously regulates evictions and condominium-cooperative conversions, and initiates a form of general rent regulation by providing that a tenant cannot be removed after a valid notice to quit and notice of increase in rent, unless the proposed increase in rent is "not unconscionable."[345] The District of Columbia Rent Control Law[346] imposes eviction controls on all rental units within the District[347] and establishes a system of rent control applicable to all multifamily rental housing, with the exception of most newly constructed buildings.[348] The District of Columbia Rental Housing Conversion and Sale Act of 1980[349] regulates both the sale and conversion of all rental housing within the District. In the case of sales, it requires the landlord to afford individual tenants or tenants' organizations (depending on the type of property) an opportunity to purchase the property before it can be sold.[350] It also provides that occupied rental property may not be converted to condominiums or cooperatives unless a majority of the tenants vote in favor of such a change.[351] Even when a landlord receives authorization to convert, the Act provides that he may not evict for this reason any tenants age sixty-two or over whose household incomes are less than $30,000 a year.[352] Since the statute expires by its own terms in September, 1983,[353] it is uncertain whether these extended interests of elderly

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37 largest metropolitan areas have some form of rent control. *Id. See also* Blumberg, Robbins & Barr, *The Emergence of Second Generation Rent Controls,* 8 CLEARINGHOUSE REV. 240, 241 (1974). Owners of H.U.D. subsidized projects and public housing authorities are, of course, subject to extensive regulation of the rents they can charge. 24 C.F.R. §§ 401.1-401.6, §§ 861.401-861.404 (1981).

[340] The District of Columbia and New Jersey, see text at notes 260-62 *supra.*

[341] Love v. Pressley, 34 N.C. App. 503, 514, 239 S.E.2d 574, 583 (1977); Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 467, 329 A.2d 812, 820 (1974); MASS. GEN. LAWS ANN. ch. 93A (West 1975). *See also* Note, *Consumer Protection Legislation and the Assertion of Tenant Rights: The Massachusetts Paradigm,* 59 B.U.L. REV. 483 (1979).

[342] N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1981).

[343] See text at notes 260-62 *supra.*

[344] Rent Control Law, D.C. CODE § 45-1501—45-1597 (1981); Rental Housing Conversion and Sale Act of 1980, D.C. CODE § 45-1601—45-1657 (1981).

[345] N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1981).

[346] D.C. CODE §§ 45-1501 — 45-1597 (1981).

[347] *Id.* § 45-1561.

[348] *Id.* § 45-1516.

[349] *Id.* § 45-1601—45-1657.

[350] *Id.* § 45-1631—45-1641.

[351] *Id.* § 45-1611—45-1618. Certain conversions to non-profit cooperatives for low and moderate income housing may be exempted from this requirement. *Id.* § 45-1611(b).

[352] *Id.* § 45-1616.

[353] *Id.* § 45-1618.

tenants can endure until they die, move away or give cause for eviction, or whether they can exist no longer than the effective duration of the Act.

With rent and eviction control, regulation moves from the collateral to the core terms of the lease or rental agreement. Typically the only provisions in residential leases that are "bargained for" are the rent and the duration of the lease.[354] When these provisions are regulated by law, the role of the will of the parties tends to be confined to the decision of whether to enter the relationship or not. The landlord is treated as controlling a resource of such central importance in society that it must be regulated, and the courts start borrowing analogies, not from sales law, but from public utility law.[355]

Landlords, now coming under similar kinds of regulation to those long imposed on employers, have fewer options with respect to their increased costs of doing business. In particular, the option of passing all or part of such costs on to the consumer is more problematic since the consumer is the tenant. Furthermore, a rent increase, like an eviction, may be treated as retaliatory, or may be limited by rent control laws. To the extent that landlords have to absorb such increased costs, it has been feared that the effects on the supply of low-income rental housing will be adverse, because some landlords will abandon their buildings and others will convert them to more profitable uses.[356] Predictably, landlords who have sought to change the form of their investment have begun to encounter obstacles to the exercise of their right to alienate or alter their interest, just as employers have in connection with moving or closing down plants.[357]

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[354] Kirby, *supra* note 37, at 232.

[355] *E.g.*, Troy Hills Village v. Township Council, 68 N.J. 604, 622, 350 A.2d 34, 43 (1975), where the New Jersey Supreme Court, in a rent control case, borrowed guidelines from public utility rate setting cases. The approach of the New Jersey Supreme Court is severely criticized from an economic point of view in Berger, *New Residential*, *supra* note 7, at 720-27.

[356] See text and notes at notes 383-403 *infra*.

[357] In 1965, for example, the Supreme Court held in Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263 (1965), that while an employer is free to close its *entire* business for any reason, an employer in control of several plants cannot shut down one of them if its purpose is to "chill" unionism at the remaining operations and if the employer may reasonably have foreseen that the closing would have such an effect. *Id.* at 274-75. In a 1972 landlord-tenant case, Robinson v. Diamond Hous. Corp., 463 F.2d 853 (D.C. Cir. 1972), Judge J. Skelly Wright analogized freely from *Darlington* to hold that a multiple-unit landlord cannot withdraw rental property from the market, if the effect would be to "chill" the exercise by tenants on his remaining properties of their rights with respect to the condition of the premises, unless the landlord could produce some legitimate business reason therefor. *Id.* at 860-61.

Labor law has also encountered the difficulty that a plant relocation or partial closing may not only produce a chilling effect on union activity, but may also contribute to unemployment in the vicinity. In response to this problem, the NLRB long required unionized employers to bargain with the union before any sale or closing. R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 509-23 (1976). This duty could not prevent the employer from ultimately going out of business, but it did represent an effort to avert or at least mitigate the consequences by forcing the parties to explore possible alternatives and to discuss the modalities of the shut-down. In 1981, however, the Supreme Court overruled this long-standing policy of the Board and held that an employer has no duty to bargain with the union concerning the decision to close part of its operations, although it was obliged to bargain about the *effects* of such closing. First Nat'l Maintenance Corp. v. NLRB, 101 S.Ct. 2573, 2585 (1981).

The ongoing transformation of the technical foundations of landlord-tenant law is obviously related to well-known and advanced changes in certain basic assumptions of classical property and contract law. The notions of freedom of contract and private property that once dominated legal thought have given way, as various forms of regulation have become relatively permanent features of the legal landscape. There is more regulation of the landlord-tenant relationship, however, than there is of other consumer-supplier relationships. Although much of the statewide landlord-tenant legislation and the evolving landlord-tenant case law is recognizable as an aspect of the development of "consumer law," rent control and condominium-cooperative conversion controls tend to be established by local ordinances and have no analogues in the law governing the purchase or lease of other goods and services. Professor Berger has usefully pointed out, in the case of rent control, that since markets for housing are local, consumers have more opportunity to secure legislative attention for rising rents than they do in the case of, say, rising food prices which are, for the most part, determined by conditions on a national market.

> . . . [W]here the market is local—in the sense that the thing to be sold cannot be moved in response to higher prices elsewhere—local price regulation is feasible. It is the feasibility of local rent control that explains its rapid growth. Consumers, frustrated by their inability to keep up with the rising cost of living, naturally turn to local government to solve those problems it is capable of solving. Wherever tenants form a large percentage of the local population, local office-holders are subject to pressure for rent control.[358]

Professor Berger's reasoning also seems to provide a convincing explanation for the proliferation of condominium-cooperative conversion controls. Rental housing is one of the few areas within which local government can respond to consumers' concerns.

With increased regulation, the landlord-tenant relationship takes on some characteristics of a status, with its terms and conditions fixed by law.[359] The movement in residential landlord-tenant law turns out not to have been a movement from one field of private law to another, but a movement from private law to public law. One should neither exaggerate or underestimate the distance that current landlord-tenant law has travelled from classical law. As Sir Frederick Pollock wrote towards the end of the nineteenth century:

> The truth is . . . that the law of landlord and tenant has never, at least under any usual conditions, been a law of free contract. It is a law of con-

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[358] Berger, *New Residential*, *supra* note 7, at 730.

[359] Of course the bureaucratic statuses of today are different from the traditional statuses that Sir Henry Maine referred to when he spoke of a movement from status to contract. H. MAINE, ANCIENT LAW 141 (1959) (Orig. Publ. 1861). These modern statuses do involve diminished freedom and mobility, but, depending as they do on law and the vagaries of public policy, they do not offer a corresponding increase in support and security characteristic of traditional societies where the family, not the individual, was the basic unit. *See generally* GLENDON, *supra* note 17, at 205-45.

> tract partly express, partly supplied by judicial interpretation, and partly controlled by legislation and sometimes by local custom. So far as the terms and conditions are express, they are in the vast majority of cases framed by landlords or their advisors. The tendency of judicial interpretation has also been, until lately, to incline the scale of presumption in favor of the landlord on doubtful points; and the same may be said of the ruling tendency of legislation down to the middle of the present century.[360]

Pollock's observation on the practice of his time is but a specific instance of the now widely recognized fact that "freedom of contract" often enabled the economically powerful "to legislate by contract in a substantially authoritarian manner without using the appearance of authoritarian forms."[361] A major change since Pollock's time is that today, in the vast majority of residential leases, important terms and conditions are framed by courts and legislatures rather than by "landlords or their advisors," and that appellate courts have tended to incline toward the residential tenant, rather than the landlord on doubtful points. Power has shifted mainly, however, not to the tenant, but to the state.

V. Commercial Law for Commercial Leases

The rise of regulatory landlord-tenant law in the residential area has accentuated the increasing separation between commercial and residential lease law. In the first place, the bulk of commercial lease litigation today concerns the interpretation, construction and application of language in the parties' rental agreement, while most residential lease litigation consists of summary process cases at the trial level and statutory questions, broadly speaking, at the appellate level. Up to a point, both areas have tracked the modernization of contract law generally and both have become subject to increasing regulation. No area of commercial law in modern nations is entirely unmixed with administrative law, with its requirements for licenses, permits and so on, but the degree and kind of regulation in the "consumer law" branches increasingly sets them apart.

Most of the statutes increasing tenants' rights and landlords' obligations have been made expressly applicable to leases of dwellings only, while, in the case law, precedents from one area are used with declining frequency in the other. As we have seen, courts dealing with residential lease cases will not automatically accept commercial law analogies,[362] and courts in commercial lease cases have frequently signalled that recent developments in residential landlord-tenant law will not be automatically transposed to the commercial context.[363] In New Jersey, where the regulatory trends described in this article perhaps have reached their fullest development, a trial judge recently explained

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[360] F. Pollock, The Land Laws 150 (3d ed. 1896).

[361] Kessler & Sharp, *supra* note 43, at 6. *See generally* M. Weber, Law in Economy and Society 100, 125-40 (M. Rheinstein ed. 1954).

[362] See text and notes at notes 284-93 *supra*.

[363] *See* cases cited in note 275 *supra*.

his refusal to apply commercial lease precedents on liquidated damages to a residential tenancy by saying: "Residential tenancies are governed by a specific body of statutory law and by a body of case law founded on totally different principles than cases involving commercial tenancies."[364]

This divergence trend does not mean, however, that the commercial or industrial landlord-tenant relationship is still ruled by classical principles in the absence of controlling lease provisions. To the contrary, all indications are that commercial landlord-tenant law is evolving new principles by analogy to modern contract and commercial law, with suitable adjustments for the various types of commercial leases, many of which still resemble a sale of real property more than they do a chattel lease or a sale of a "package of goods and services."[365] On the basis of the few cases available, one can hazard the guess that in commercial contexts the doctrine of independence of covenants, which now comes into play only exceptionally when the parties have failed to make their principal obligations mutually dependent in the lease, will increasingly give way to the usual contract rules on the dependence of covenants and on the courses of action open to one party when the other substantially defaults on a material obligation. The rejection of the implied warranty of habitability in commercial leases need not, as some courts have thought,[366] entail the retention of the doctrine of independent covenants. The better view seems to be that, while a commercial tenant may not defend a rent or ejectment action by alleging a breach of an implied covenant of habitability, such a tenant should have the benefit of the contract doctrine of mutuality of covenants, at least where the landlord's promise in issue was "a significant inducement to the making of the lease by the tenant."[367]

In like manner, the absence of implied warranties of habitability should not impede the courts in commercial cases from resorting, where appropriate, to commercial standards of good faith and unconscionability.[368] Nor should it prevent the implication, by analogy to Uniform Commercial Code provisions, of warranties of merchantability or fitness for the purposes of the lease.[369] As under the U.C.C., such implied warranties need not prevent merchants from agreeing to rentals "as is" or from excluding or modifying the warranty in other ways.[370] Nor should they protect the tenant who knew, or should have

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[364] Spialter v. Testa, 162 N.J. Super. 421, 427, 392 A.2d 1265, 1268 (1978), *aff'd per curiam*, 171 N.J. Super. 181, 408 A.2d 444 (App. Div. 1979) (footnote omitted).

[365] *See* Greenfield & Margolies, *An Implied Warranty of Fitness in Nonresidential Leases*, 45 ALB. L. REV. 855 (1981).

[366] *E.g.*, Interstate Restaurants, Inc. v. Halsa Corp., 309 A.2d 108, 110 (D.C. 1973).

[367] Teodori v. Werner, 490 Pa. 58, 65, 415 A.2d 31, 34 (1980). *See also* Pawco, Inc. v. Berman Knitting Mills, Inc., 283 Pa. Super. 443, 446-52, 424 A.2d 891, 893-97 (1980).

[368] *Cf.* U.C.C. § 1-203 (1978) (good faith obligation in performance or enforcement of duties or contracts); § 2-103(1)(b) (1978) "good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"; § 2-302 (1978) (Contracts or clauses unconscionable at time of making).

[369] *See* Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Earl Millikin Inc. v. Allen, 21 Wis.2d 497, 124 N.W.2d 651 (1963). *See* U.C.C. §§ 2-314, 2-315 (1978).

[370] Coulston v. Teliscope Productions Ltd., 85 Misc. 2d 339, 340, 378 N.Y.S.2d 553, 554 (App. Div. 1975). *See* U.C.C. §§ 2-314, 2-315, 2-316 (1978).

known, that the premises were unsuitable.[371] In working out the *remedies* for breach of such warranties, however, neither the residential lease nor the commercial sales analogies are fully transposable to commercial lease situations. In a business context, where shelter from the elements is not at stake, the policies underlying summary process statutes—protecting landlords against the simultaneous loss of rent and detention of their income-producing asset—are apt to be given more weight.[372]

It is probable, too, that the legal treatment of long-term leases of land or entire buildings will diverge somewhat from that of most leases of space in multi-unit buildings or shopping centers, where the commercial tenant, much like the residential tenant, typically depends on the landlord for continuing maintenance and services.[373] Long-term leases under which the tenant acquires control of an entire building, or where buildings are not involved, are more analogous to sales of real property, while short-term commercial leases of small shops or offices are in certain ways similar to residential leases. This fact has begun to be recognized in a few cases suggesting that the latter category of commercial leases may require special treatment.[374] On the whole, it seems likely that modernization of commercial lease law will continue primarily through the application and tailoring of modern contract and commercial law to landlord-tenant problems rather than through direct regulation of the relationship in the public interest.[375]

VI. TOWARDS A RIGHT TO HOUSING?

A. *Law and Reality*

The revolutionized residential landlord-tenant law of the states now stands in approximately the same relation to housing reality as does federal law relating to public housing. It represents a formal legal commitment to an ideal of decent housing, which cannot be met without corresponding financial commitment. The difference is that Congress, when it established national housing goals, was aware of the extent to which they were merely goals.[376] But state courts and legislatures seem not yet to have generally recognized that the

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[371] Reste Realty Corp. v. Cooper, 53 N.J. 444, 455, 251 A.2d 268, 274 (1969); Service Oil Co. v. White, 218 Kan. 87, 95-97, 542 P.2d 652, 660-61 (1975). *See* U.C.C. § 2-316(3)(b) (1978).

[372] *See* Schulman v. Vera, 108 Cal. App. 3d 552, 560-61, 166 Cal. Rptr. 620, 624-25 (1980). *See* U.C.C. §§ 2-601, 2-714, 2-715 (1978). See also text after note 290 *supra*.

[373] See distinctions suggested by Greenfield & Margolies, *supra* note 365, at 869-88.

[374] Demirci v. Burns, 124 N.J. Super. 274, 276, 306 A.2d 468, 469 (1973); Four Seas Investment Corp. v. International Hotel Tenants Ass'n, 81 Cal. App. 3d 608, 613, 146 Cal. Rptr. 531, 535 (1978).

[375] One cannot discount the possibility of an eventual increase in such regulation, however, since federal wage and price controls, if they should reappear, would probably be applicable to commercial leases, as they were briefly in 1970-71. Lev, *Economic Control Regulations: A Descriptive Commentary*, 13 B.C. IND. & COMM. L. REV. 1277, 1294-95 (1972).

[376] The "declaration of national housing policy" in the preamble of the Housing Act of 1949, 42 U.S.C. § 1441 (1976), states:

> The Congress declares that the general welfare and security of the Nation and

private sector warranty of habitability is as programmatic as is the national commitment to the goal of "a decent home and a suitable living environment for every American family."[377] An exception is Chief Justice Richard Neely of the West Virginia Supreme Court of Appeals who dissented in part from that court's decision adopting a non-waivable implied warranty of habitability, pointing out:

> Experience in the last thirty years . . . adequately demonstrates that the creation of new *law* does not usually create new *wealth*. . . .
>
> The inability to redistribute wealth which does not exist which inexperienced administrators in former colonies found to their disappointment to be an unrepealable law of nature in the 1960s will daunt the majority's efforts to create first class housing in West Virginia.[378]

One reason state courts and legislatures have been slower to recognize housing reality in the private sector than their federal counterparts have in the public sector is that that reality has been obscured by widely held misconceptions about the suppliers and consumers of rental housing. Recent changes in the rental housing market challenge the premises upon which much landlord-tenant law reform of the past twenty years has been based. To see why this is so, one must look back to the nineteenth century when multiple-unit rental housing in the United States began to appear, mainly as tenement housing for the poor. Today, after nearly a hundred years which saw the rise, and then the exodus, of the urban middle class, this form of housing is increasingly occupied once again by persons whose incomes are too low to permit them to pursue successfully the American dream of home ownership.[379] Affordability has become the most pressing problem in rental housing, not only, as widely believed, because the cost of housing is increasing, but because the class of renters is becoming poorer, owing to the withdrawal of the more affluent households, especially husband-wife households, from the rental market into ownership status.[380] This shift in the profile of consumers of rental housing, with lower-income households increasingly predominating, portends, according to Sternlieb and Hughes, "an ominous lag in rent paying capacity in the future."[381] That fewer than two-fifths of all renters in 1970 paid more than a

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> the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization *as soon as feasible* of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.

Id. (emphasis added).

[377] 42 U.S.C. § 1441 (1976).

[378] Teller v. McCoy, 253 S.E.2d 114, 132 (W. Va. 1978) (emphasis in original).

[379] G. STERNLIEB & J. HUGHES, THE FUTURE OF RENTAL HOUSING 1-3 (1981).

[380] *Id.* at 5.

[381] *Id.* at 3.

quarter of their incomes for rent, in contrast to nearly a half of all renters in 1977,[382] must be understood not only as reflecting the rising cost of housing, but also the changing composition of the rental population.

It is unclear whether the partisans in the residential landlord-tenant law revolution believed that change in the law would improve the quality without affecting the supply of rented housing.[383] Among the spectators, however, there were many who feared that the imposition of new duties, and therefore costs, on landlords would adversely affect both the quality and the supply of such housing.[384] There was much theoretical discussion and speculation about the probable effects on the rental housing market of housing code enforcement and the new rights and remedies of residential tenants.[385] Thus far, however, empirical studies have been able to find little discernible impact of the changed law, for better or worse, on the cost, quality and supply of rental housing, or even upon proceedings in the courts of first instance where most landlord-tenant litigation takes place.[386] In fact, no one really knows what effects the law might eventually have on these matters, for housing codes in general have not been strictly enforced,[387] nor have tenants' new rights and remedies been vigorously or widely asserted.[388]

The most recent of the empirical studies of the effects of changed landlord-tenant law surveyed the operation of the URLTA in Cleveland, Ohio, and Portland, Oregon.[389] The authors' overall conclusion was that the Act "has been only marginally effective, benefiting primarily middle-income tenants in

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[382] Herbers, *Rapid Rise Reported in Nation's Housing*, N.Y. Times, March 23, 1981, at 1, col. 6, and at B14, col. 1.

[383] *See* Judge Wright's opinion in Robinson v. Diamond Hous. Corp., 463 F.2d 853, 856-71 (D.C. Cir. 1972). *See also* Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies, and Income Redistribution Policy*, 80 YALE L.J. 1093, 1095-96 (1971).

[384] R. POSNER, ECONOMIC ANALYSIS OF LAW 356-59 (2d ed. 1977); Abbott, *supra* note 1, at 67-86, 108-11; Meyers, *supra* note 7, at 889-93.

[385] *See* the authorities cited in notes 383 and 384 *supra*; Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 1139-40 (1975); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175, 1186-92 (1973).

[386] Krumholz, *Rent Withholding as an Aid to Housing Code Enforcement*, 25 J. HOUSING 242 (1969); Abbott, *supra* note 1, at 62-64, 139-46; Mosier & Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REF. 8, 60-70 (1973); Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CAL. L. REV. 37, 54-68 (1978); Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 774-76 (1976); Hirsch, Hirsch & Margolis, *supra* note 385, at 1098, 1116-36. *See also* the summary of several empirical studies in Cunningham, *supra* note 1, at 144-53.

[387] Abbott, *supra* note 1, at 49-66, surveys and adds to the literature.

[388] Abbott, *supra* note 1, at 63-64; Gerwin, *supra* note 129, at 666; Hirsch, Hirsch & Margolis, *supra* note 385, at 1130-31; Moiser & Soble, *supra* note 386, at 61; Note, *The Great Green Hope*, *supra* note 386, at 776-77.

[389] Brakel & McIntyre, *The Uniform Residential Landlord and Tenant Act (URLTA) in Operation: Two Reports*, 1980 AM. B. FOUND. RESEARCH J. 555.

the suburbs or in the cities' better neighborhoods, while largely failing in the aim of helping the inner-city poor and upgrading the quality of slum housing."[390] One factor inhibiting the effectiveness of the Act seemed to be the informed initiative it required on the part of tenants.[391] But the authors of the study also sensed that the limits of law itself were involved: "Certainly most landlord-tenant problems in urban centers involve social policy considerations beyond the reach of private civil suits."[392]

Although changes in landlord-tenant law cannot be directly implicated, and may not even be especially important among the variety of factors that bear on housing availability, it is true that the supply of rental housing, especially low-cost, low-quality, housing, in the United States has been diminishing in recent years. In 1979, it was estimated that annual losses of rental units were running at about two percent, due to a falling rate of production of rental units, combined with loss of existing units through abandonment or demolition of older buildings.[393] Conversion of desirable buildings into condominiums and cooperatives, although a significant and controversial phenomenon in several metropolitan areas, has actually accounted so far for only a small proportion of the annual losses nationwide.[394] According to Sternlieb and Hughes, the primary significance for rental housing of the condominium-cooperative conversion movement is that it furthers a "cream-skimming process" of withdrawal of middle class and affluent tenants from the rental housing market, which in turn augurs ill for the rent-paying capacity of the remaining tenant population as a whole.[395] The condominium-cooperative conversion issue, which is generally viewed as involving a conflict between the property rights of landlords and tenants, also represents a conflict between low-income renters seeking affordable rental units and aspiring homeowners who are increasingly being priced out of the market for traditional detached single-family homes. Consequently, the state and local condominium conversion control movement is to some extent in tension with long-standing federal legislation and programs encouraging home ownership.

The shrinking rent-paying capacity of tenants is an important element among the factors that have reduced the investment appeal of rental housing to

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[390] *Id.* at 559 (italics omitted).

[391] *Id.* at 586, 600-01.

[392] *Id.* at 606.

[393] Oser, *Major Drop in Rental Units Cited*, N.Y. Times, June 4, 1979, at D1, col. 6. *But see* Lowry, *Rental Housing in the 1970s: Searching for the Crises*, in RENTAL HOUSING: IS THERE A CRISIS? 23 (Weicher, Villani & Roistacher eds. 1981) [hereinafter cited as RENTAL HOUSING] who states that "It is more accurate to say that in many places renters are unable to find dwellings of the size and quality they have come to prefer at rents they are accustomed to paying." *Id.* at 35.

[394] According to CONVERSION OF RENTAL HOUSING, *supra* note 338, at ii, 1.3 percent of the nation's rental housing had been converted to condominiums by the end of 1979. The conversion trend has been gathering momentum since 1977, but its impact is mainly felt in the largest metropolitan areas. *Id.* at 1V-9-10.

[395] STERNLIEB & HUGHES, *supra* note 379, at 3, 95.

sizeable investors.[396] Operating costs rose sharply in the 1970's, but market forces, and in some places, rent control, have limited the extent to which rents could rise.[397] Despite the inconclusiveness of empirical studies on the point, housing economists Sternlieb and Hughes speculate that habitability requirements, together with other changes in landlord-tenant law, may also discourage institutional investors to some degree.[398] The desire to own rental housing as a hedge against inflation may be offset for many investors by the fact that the recent residential landlord-tenant reforms involve them in a continuing relationship rather than an arm's length transaction. The need for frequent interaction with tenants and the fear of being seen in an unpopular light, may be contributing to the increasing avoidance of the field of rental housing by investment capital.[399] Unlike employers, who have long accommodated themselves to the constraints of a legally imposed "relationship" with their employees, landlords cannot simply pass their increased costs on to their consumers, since the tenant *is* the consumer and the tenant population is becoming poorer.

One effect of the increasing disinclination of large investors, for whatever reasons, to be residential landlords, is that much more rental housing is being purveyed by small operators than is generally supposed.[400] In fact, as of 1978, the *majority* of rental housing units in the United States were in two- to four-unit buildings or in single-family homes, while fewer than 10 percent were located in buildings containing fifty units or more.[401] Most of the buildings with fewer than five units are owned and operated by small-scale investors.[402] The growing importance of the small operator in the rental housing market raises troubling questions about residential landlord-tenant law, both of the conventional and regulatory sort. To the extent that small operations are exempted from the application of such laws (as they often are, especially under rent control schemes), a substantial proportion of tenants are left without the protections that the landlord-tenant revolution appeared to confer. Yet if small operators are not exempted, one slightly more affluent sector of the population is being burdened with the essentially public responsibility of furnishing a housing subsidy of sorts to the poor without discussion or, probably, even consciousness on the part of the lawmakers that this is what is occurring.[403]

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[396] RENTAL HOUSING, *supra* note 393, at 23, 28, 29.

[397] STERNLIEB & HUGHES, *supra* note 379, at 12. *See also* RENTAL HOUSING, *supra* note 393, at 23, 24, 28-30. Lowry points out that between 1970 and 1980, rents not only rose less than operating costs but less than the consumer price index. *Id.* at 28.

[398] STERNLIEB & HUGHES, *supra* note 379, at 12.

[399] *Id.*

[400] *Id.* at 94.

[401] *Id.* at 9.

[402] RENTAL HOUSING, *supra* note 393, at 23, 31.

[403] One day in any metropolitan housing court suffices to revise the stereotype of the slumlord. In Boston, for example, the landlord is apt to be a policeman, taxi-driver or school teacher who has mortgaged himself to the hilt to buy a two- or three-decker building in which he and his family occupy one floor. The tenant is apt to be elderly or a single-mother, one of the 25

Recall, however, that the main focus of the landlord-tenant litigation and legislation of the 1960's and 1970's was the *quality* of rental housing. On this point, studies now beginning to appear indicate that the habitability issue, which was at the very core of the landlord-tenant revolution, is decreasingly central to the reality of housing deprivation, especially in urban areas of the United States. Even at the lowest income levels, the primary housing problem in the United States today is not substandard conditions, but inadequate income.[404]

Despite the fact that a uniform definition of habitability has eluded policymakers and researchers,[405] there seems to be general agreement that the quality of American housing has steadily improved since the Depression years of the 1930's when President Franklin D. Roosevelt spoke of a third of the population as being ill-housed.[406] Traditionally, a dwelling was considered inadequate if it was in need of major repairs or if it lacked complete plumbing.[407] Under these standards of physical condition and sanitation, nearly a quarter of all occupied units in 1960 were still substandard, with the highest incidence of problems occurring in rural areas.[408] By 1970, however, only 11 percent of households, most of them in rural areas, still lived in physically inadequate housing even though the concept of housing adequacy had become steadily more demanding.[409]

After 1970, the federal government ceased trying to measure housing quality through information on physical conditions and plumbing facilities gathered in the Census. Instead, beginning in 1973, the Annual Housing Survey has collected data on some thirty different kinds of housing deficiencies.[410] The information yielded by the Annual Housing Survey has been used by the Department of Housing and Urban Development, the Office of Management and Budget and the Congressional Budget Office to develop new more sophisticated definitions to replace the traditional measures of inadequate housing.[411] In 1980, a study by the United States Department of Hous-

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percent of the city's population who are dependent on welfare. Sternlieb & Hughes, *The Changing Demography of the Central City*, SCIENTIFIC AMERICAN, August 1980, p.48, 53.

[404] J. WEICHER, HOUSING: FEDERAL POLICIES AND PROGRAMS 13, 15 (1980); Frieden & Solomon, *The Nation's Housing: 1975 to 1985*, 87 (MIT-Harvard Joint Center for Urban Studies, 1977); PRESIDENT'S COMMISSION ON HOUSING, INTERIM REPORT 6 (October 30, 1981).

[405] REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 67-68 (1968); Frieden & Solomon, *supra* note 404, at 80-98; WEICHER, *supra* note 404, at 15.

[406] Frieden & Solomon, *supra* note 404, at 87; WEICHER, *supra* note 404, at 13-15; PRESIDENT'S COMMISSION, *supra* note 404, at 11; Frieden, *Housing*, in I ENCYCLOPEDIA OF SOCIAL WORK, 639, 643 (17th ed. 1977) [hereinafter cited as Frieden, *Housing*].

[407] Keith, *An Assessment of National Housing Needs*, 32 LAW & CONTEMP. PROBS. 209, 210 (1967).

[408] *Id.*

[409] Frieden, *Housing*, *supra* note 406, at 643-44.

[410] WEICHER, *supra* note 404, at 18.

[411] PRESIDENT'S COMMISSION, *supra* note 404, at 15.

ing and Urban Development found that only 5.3 million households (4.4 percent) were then living in physically inadequate conditions as judged by current standards.[412] According to every available measure of quality, the housing stock steadily improved from 1970 to 1977.[413] Nevertheless, certain geographical areas have not followed the national trend. According to the 1981 Interim Report of the President's Commission on Housing:

> They [inadequate units] are found disproportionately in rural areas in the South and in older larger cities. New York City and the nearby New Jersey cities of Newark, Paterson, and Jersey City showed a particularly high concentration (almost 19 percent), double the average of other large cities. New York City alone accounted for more than 29 percent of all deficient housing in large cities identified in the 1977 Annual Housing Survey and for 9 percent of all deficient housing in the country. Miami and Washington, D.C. both had more than a 16 percent incidence of inadequate units.[414]

Although substandard housing has been reduced nationwide, it clearly remains a severe hardship for many persons.

The President's Commission on Housing attributes this residual inadequacy in housing quality to inadequate incomes, a finding which may presage a shift in federal housing policy from production strategies to the direct provision of financial assistance through vouchers.[415] Critics of the Reagan administration's emerging housing policy point out, however, that the voucher system presupposes that recipients of vouchers will be able to find housing on the private market, a questionable assumption in the nation's large cities where low-cost housing is scarce.[416] It is hard to find fault with the voucher system as such, since it directly attacks the problem of affordability of rental housing. In the current housing market, however, it can hardly be an adequate solution in itself to the housing problems of the poor.

At the same time that the physical condition of the housing stock was improving, however, new problems were coming to light that have caused many experts to accept broader concepts of what constitutes housing deprivation. The concept of inadequate neighborhood environment was introduced.[417] Then, it was observed that as the supply of low-cost, low-quality housing diminished, many people who lived in adequate housing were spending a third

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[412] Herbers, *Rapid Rise Reported in Nation's Housing*, N.Y. Times, March 23, 1981, at 1, col. 6, and at B14, col. 1.

[413] Ozanne, *Double Vision in the Rental Housing Market and a Prescription for Correcting It*, in RENTAL HOUSING: IS THERE A CRISIS? 39, 43 (Weicher, Villani & Roistacher eds. 1981).

[414] PRESIDENT'S COMMISSION, *supra* note 404, at 18.

[415] *Id.* at 4. The Commission has recommended a system of "consumer-oriented housing assistance grants" as the primary federal program for responding to the shelter needs of the poor. *Id.* at 5.

[416] Daniels, *U.S. Housing Vouchers for City Opposed*, N.Y. Times, February 5, 1982, at B1, col. 3, and at B8, col. 3.

[417] "Neighborhood inadequacy" was deemed to be a form of housing deprivation when public services or street conditions are so unsatisfactory that the affected resident expresses the desire to move to get away from them. Frieden & Solomon, *supra* note 404, at 84-85, 91-92.

or more of their incomes for rent. According to a major study published in 1977:

> Housing deprivation is changing from a problem of physically inadequate shelter to a problem of excessive cost. The number of households living in physically inadequate units has declined sharply since 1960. However, the number of those paying an unreasonably high percentage of their incomes for rent has increased rapidly.[418]

Using a concept of "excessive cost" as a form of housing deprivation, MIT reseachers estimated in 1973 that of the then total of 69.3 million households in the United States, there were 6.3 million households living in physically inadequate units, and an additional six million who were living in adequate units but carrying an excessively high rent burden.[419] Bernard Frieden predicted in 1977 that in the foreseeable future, "In all likelihood, the housing problems of the poor will increasingly take the form of excessive cost burdens rather than shelter inadequacy."[420] This seems already to have been the case in 1977. According to information from the 1977 Annual Housing Survey, of the 10.5 million households with the lowest income levels in the United States, two million lived in housing deemed inadequate by present standards.[421] But almost two-thirds of these 10.5 million poor households paid over 30 percent, and a quarter paid more than half, of their incomes for rent.[422]

The prevalence of this form of housing deprivation among low-income tenants sheds light on the following conclusion of Brakel's study of the URLTA in operation in Oregon:

> [W]hatever the changes in the law—the most common landlord-tenant dispute before the courts is an unchanging one, precipitated by the tenant's inability, or carelessness relative to his obligation, to pay rent. In these cases the tenant's delinquency has little to do with his or her subjective assessment of the condition of the premises (whatever the objective judgment may be), with any breach of plausible expectations that the tenant has of the landlord (whatever the latter's formal, legal obligations may be), or with any other unrequited rights or remedies that could realistically be viewed to be a part of the relationship between landlords and tenants in marginal neighborhoods. The conclusion that follows from this recognition is that the URLTA is fundamentally irrelevant to the typical landlord-tenant case, rent delinquency, and that the courts are right—despite much clamoring by reformists about judicial ignorance and insensitivity—in treating the act as largely irrelevant. The act's relevance may be primarily to the *a*typical case, and—to turn the idea around once more—the unremit-

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[418] *Id.* at 87. A household was considered to have an excessive rent burden if (1) it consisted of two or more people with a head under age 65 and its rent amounted to more than 25% of its annual income, or (2) it consisted of a single person or two or more people with a head over 65 and its rent amounted to more than 35% of its annual income. *Id.* at 83-84.

[419] *Id.* at 85. Another form of housing deprivation, overcrowding in physically adequate units, was found to be a relatively minor and declining problem affecting only half a million households in 1973. *Id.* at 95.

[420] Frieden, *Housing*, *supra* note 406, at 644.

[421] PRESIDENT'S COMMISSION, *supra* note 404, at 21-22.

[422] *Id.*

> ting application of the act to *typical* disputes (i.e., FED cases) may be inequitable and unresponsive to the realities of the individual landlord-tenant relationship as well as to the relationship in the aggregate—to the social and economic forces that affect ownership, tenancy and transfer, and the quality of housing.[423]

These observations of the ABA researchers are consistent with the data that indicate that "[f]ar more Americans, even among the poor, live in decent housing but pay a disproportionate share of their income in order to do so, than live in housing that is seriously inadequate."[424]

The role of law and governmental programs of various sorts in the improvement of housing quality that has taken place since World War II is, however, problematic. It is likely that such improvement is more strongly correlated with rises, until very recently, in real incomes and a decline in the price of housing relative to other goods, than with the long-standing federal housing programs, not to mention the relatively recent changes in state landlord-tenant law.[425] If so, a worsening economic situation would most probably be accompanied in time by a decline in housing quality, both with respect to the physical condition of the premises and the accompanying services. In such a case the efficacy and durability of the new landlord-tenant laws would be severely tested.

B. *A Revolution in Ideas*

It begins to appear that the primary significance of the landlord-tenant revolution so far has been ideological. This effect, however, is no small matter. Ideas have consequences, and one consequence of the transformation of landlord-tenant law may well be the introduction of implicit rights to decent housing and, to a degree, continuity of tenure in American residential leasing law.

It is fairly clear that there is presently no constitutional right to housing, decent or otherwise.[426] Any rights in this area are ordinary legal rights recognized by legislatures or courts. The Supreme Court in recent years has

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[423] Brakel, *supra* note 3, at 582.

[424] PRESIDENT'S COMMISSION, *supra* note 404, at 11. *See also* notes 418-22 *supra*. One would expect, however, that in cities where poor housing is concentrated, the picture would be somewhat different from that presented by Brakel & McIntyre's study of URLTA's operation in Ohio and Oregon.

[425] WEICHER, *supra* note 404, at 27. *See also* PRESIDENT'S COMMISSION, *supra* note 404, at 24, 27.

[426] Mention should be made here, however, of recent New York litigation which resulted in a trial court's order to the State of New York to provide bed and board for at least 750 homeless derelicts in New York City. The decision in Callahan v. Carey, reported in New York Law Journal, December 11, 1979, p.1., was based in part on the New York Constitution, which, unlike the U.S. Constitution, provides for certain "social" rights: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art. XVII, § 1. New York's highest court held in 1977 that this provision not only proclaimed a public goal, but imposed an affirmative duty upon the state to aid the needy. Tucker v. Toia, 43 N.Y.2d 1, 8-9, 371 N.E.2d 449, 452-53, 400 N.Y.S.2d 728, 731-32 (1977).

been reluctant to "constitutionalize" rights which require appropriations to make them fully effective,[427] although for a while in the late 1960's it seemed that things might be otherwise. At that time, a line of Supreme Court decisions emerged in which it appeared that the "importance" of an asserted interest would determine the extent of protection the Court would accord it.[428] These cases were susceptible to the interpretation given them by Professor Michelman that there might be constitutionally protected fundamental rights to food, shelter, education, wages, or more generally, to "minimum welfare."[429] But several decisions of the 1970's were difficult to square with this theory, among them, *Lindsey v. Normet.*[430]

The plaintiff-tenants in *Lindsey* had claimed that the State of Oregon's summary process law was unconstitutional because, among other reasons, it allowed the landlord to evict them from the leased premises for non-payment of rent without permitting the tenants to try to show that their failure to pay the rent was justified or excused by the landlord's failure to keep the premises in a fit, safe and habitable condition. The State's refusal to permit this defense was claimed to amount to a denial of due process of law to the tenants. Also, the statutory establishment of a special speedy eviction procedure different in a number of ways from the usual civil suit was claimed to deny them the equal protection of the laws. In a 5-4 decision, the Supreme Court rejected the tenants' claim that the "need for decent shelter" and the "right to retain peaceful possession of one's home" ought to be recognized as interests so fundamental that they cannot be interfered with unless the State demonstrates some overriding interest.[431] The Court said:

> We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social

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[427] *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 11 (1981) ("Bill of Rights" in the U.S. Developmentally Disabled Assistance and Bill of Rights Act of 1975 creates no substantive rights in favor of mentally retarded persons). *But see* Halderman v. Pennhurst State School & Hosp., 50 U.S.L.W. 2539, 2540 (3d Cir. 1982) (mentally retarded persons have right to noninstitutional treatment under state statutes even though federal statutes confer no such right).

[428] *E.g.*, Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (termination of welfare benefits without opportunity for prior hearing denied due process; " . . . welfare provides the means to obtain essential food, clothing, housing and medical care.") (footnote omitted); Sniadach v. Family Finance Corp., 395 U.S. 337, 341-42 (1969) (garnishment of wages without prior hearing was denial of due process and "may as a practical matter drive a wage-earning family to the wall.") (footnote omitted); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (durational residency requirement for AFDC benefits violated right of interstate movement; impaired "the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life.").

[429] Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 9 (1969). *See also* Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice,* 121 U. PA. L. REV. 962 (1973); Michelman, *The Advent of a Right to Housing: A Current Appraisal,* 5 HARV. C.R.-C.L. L. REV. 207, 209 (1970).

[430] 405 U.S. 56, 72-74 (1972). *See also* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 29-44 (1973); Jefferson v. Hackney, 406 U.S. 535, 545-51 (1972); Fuentes v. Shevin, 407 U.S. 67, 89-90 (1972); Dandridge v. Williams, 397 U.S. 471, 484-87 (1970).

[431] 405 U.S. at 73.

> and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.[432]

Several important legal ideas about housing are contained in this concise paragraph. The Court here, as well as elsewhere in its opinion,[433] clearly indicates that it considers the leased premises to be the landlord's "property." This over-simplified characterization of the relationship then triggers in the landlord's favor the express language of the Constitution protecting private property. Of more import to the present argument, however, is the suggestion that it is for the legislature, not the court, to decide which interests are to be protected. Thus, it begins to seem that *Goldberg v. Kelly*[434] may not be the progenitor of a constitutional right to minimum decent subsistence, but merely an assurance that due process will protect statutory welfare rights from being taken away without proper notice and hearing. Since the "legislature" that defines the private sector landlord-tenant relation will be a local legislature, there can be many different, and constitutional, versions of this relationship. The view which had seemed to explain the earlier procedural due process cases appears only in Justice Douglas' dissent: "[W]here the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing."[435]

The message of the majority opinion in *Lindsey,* as well as that of several other decisions of the 1970's, is that the "rights" which will be protected against loss without proper hearing are limited to those rights created or recognized by legislation.[436] In 1979, and despite the line then being taken by the Supreme Court, Michelman developed further his idea that people might have constitutional rights to such elements of welfare as housing, food, health services and education.[437] He justified the use of the term "rights" because individual interests in such matters could be seen to "regularly and detectibly

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[432] *Id.* at 74.

[433] "The tenant is, by definition, in possession of the property of the landlord . . . ." *Id.* at 72. It is elementary property learning that a lease transfers the ownership of the present interest to the tenant. *E.g.*, Nyer v. Munoz-Mendoza, 1982 Mass. Adv. Sh. 184, 187, 430 N.E.2d 1214, 1216-17 (1982) (landlord does not have "property rights" in door of leased premises).

[434] 397 U.S. 254 (1970) (welfare recipients entitled, as a matter of due process, to a hearing before their benefits are terminated).

[435] *Lindsey*, 405 U.S. at 89 (Douglas, J., dissenting in part).

[436] *See* Meachum v. Fano, 429 U.S. 215, 226-29, *reh'g denied*, 429 U.S. 873 (1976); Bishop v. Wood, 426 U.S. 341, 348-50 (1976); Board of Regents v. Roth, 408 U.S. 564, 569-79 (1972).

[437] Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 665-80.

[exert] a practically significant influence on judicial decisions'' and he defended calling them ''constitutional'' because the alleged welfare rights could be seen to make a difference in whether a statute or an act under statutory authority was held valid.[438]

Michelman also developed a theory of the proper relation between the court and legislature with respect to these rights. He avoided the impractical claim that courts on their own could or should somehow cause welfare programs to be established. He suggested, rather, that the courts should and already do treat legislation in the welfare area as meant to satisfy rights.[439] He argued, drawing on the work of John Hart Ely,[440] that such rights have a basis in the written Constitution: the Constitution speaks through its organic structure and the relationships of its parts as well as through particular provisions. Thus, there can be values and purposes which are not expressed but which underlie and pervade the entire constitutional scheme. The Supreme Court, in fact, on a number of occasions, has accorded constitutional status to rights that are not enumerated in the Constitution, for example, rights to marry, to procreate, to travel, and to educate one's children as one chooses, and it has spun out various and often surprising implications of a ''right to privacy.'' Since no one would dispute that the Constitution is pervasively concerned with political participation through representation, Ely has claimed that ''representation reinforcement'' is a fundamental and constitutionally grounded value that justifies constitutional review of procedures and outcomes of procedures to determine whether they unduly restrict or deny persons the opportunity to participate in political processes.[441] Michelman expands on this notion to argue that since food and shelter are ''universal, rock-bottom prerequisites of effective participation in democratic representation,'' rights to these and other minimum elements of welfare ought to be protected under Ely's theory of representation reinforcement.[442]

Michelman's analyses of the cases are illuminating. If one looks at the facts and outcomes of each case to try to determine what was really moving the Court, and if one discounts the Court's proferred rationale to some extent, it does seem, especially in the earlier cases, that the Court has attached great significance to the ''importance'' of the interests involved.[443] Thus, welfare and wages were accorded protection, but college tuition allowances were not.[444] Related-household requirements were upheld in the area of zoning, but

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[438] *Id.* at 660.

[439] *Id.* at 663.

[440] *See* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978) [hereinafter cited as Ely, *Representation-Reinforcing Judicial Review*]. *See also* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[441] Ely, *Representation-Reinforcing Judicial Review*, *supra* note 440, at 456.

[442] Michelman, *Welfare Rights*, *supra* note 437, at 677.

[443] *Id.* at 680. *See also* cases cited in note 428 *supra*.

[444] *Compare* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (due process requires that

struck down in the food stamp program.[445] Tribe has agreed with Michelman, saying that in the procedural due process cases the "tension among rhetoric, reasoning and results ... may well reflect an unarticulated perception that there exist constitutional norms establishing minimal entitlements to certain services...."[446] Yet a similar type of analysis of Supreme Court decisions, carried out by Van Alstyne in a 1980 article, indicated that the Court is being moved increasingly by concern for property interests of the traditional type.[447] Van Alstyne found that the type of property acquired by work, thrift, skill and exchange is being accorded a higher level of due process protection by the Court than property which is dispensed by or acquired with the aid of the State.[448] He claimed that what distinguishes a large group of cases of the decade of the 1970's from the doctrinal development of related decisions in the preceding decade is the Court's revived emphasis on property rights,[449] which is in turn related to a renewed faith in the marketplace,[450] with a corresponding tempering of "the social impulse to regulate and redistribute."[451] As Van Alstyne sees it, 1972, the year of *Lindsey v. Normet,* marked a turning point:

> Prior to 1972, the extent to which grievous personal loss was buffered by procedural due process depended most of all on the supposed importance of the threatened loss. Since 1972, however, even "grievous loss" is not subject to any due process requirements of one who cannot locate some vested private property in the thing thus threatened.[452]

Thus, Michelman in 1979 and Van Alstyne in 1980 examined many of the same and related decisions, but picked out two quite different patterns: the former, a development in which a group of important "welfare rights" appeared to exert a "regular and detectable" influence on decisions; the latter, a trend toward a revival of solicitude for old-style entrepreneurial property rights. This does not mean that one is right and the other is wrong. Even when

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welfare recipients be afforded opportunity for hearing before benefits are terminated) and Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969) (Wisconsin wage garnishment procedure, without notice and opportunity for prior hearing, violates principles of due process) *with* Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (higher education cannot be equated with elements of basic subsistence so as to invoke compelling state interest test for validity of state university residence classifications).

[445] *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974) (local zoning ordinance restricting land use to dwellings occupied by not more than two unrelated individuals does not involve deprivation of any fundamental right) *with* United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 536 (1973) (exclusion of individuals in unrelated households from federal food stamp program constitutes unjustifiable discrimination).

[446] Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services,* 90 HARV. L. REV. 1065, 1079 (1977).

[447] Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court,* 43 LAW & CONTEMP. PROBS. 66, 70, 82 (1980).

[448] *Id.* at 80-81.

[449] *Id.* at 70.

[450] *Id.* at 77.

[451] *Id.* at 72.

[452] *Id.* at 81. *See also* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State,* 62 CORNELL L. REV. 445 (1977).

they are examining the same cases, they may be like two observers of a drawing by M. C. Escher in which it is impossible to distinguish the figure from the ground.

Another observer with a colder eye, however, disputes that there is a pattern at all. To Bork, the ambiguity in the cases is "less suggestive of an emerging constitutional right to basic needs than it is of a politically divided Court that has wandered so far from constitutional moorings that some of its members are engaging in free votes."[453] Repeated dicta by the Court itself also weigh against Michelman's and Tribe's attempts to show that the Court is implicitly recognizing constitutional rights without saying so. Even before *Lindsey v. Normet,* the Court had indicated in *Dandridge v. Williams*[454] that satisfaction of basic needs was not going to be treated as a constitutionally protected interest.[455] Although acknowledging that welfare involves "the most basic economic needs of impoverished human beings,"[456] the Court characterized it not as a right, but as a matter of "wise economic or social policy."[457] In 1973, in *San Antonio Independent School District v. Rodriguez,*[458] the Court said of education, "the importance of a service . . . does not determine whether it must be regarded as [constitutionally] fundamental."[459] Again, in 1976, in *Lavine v. Milne,*[460] the Court said, "[w]elfare benefits are not a fundamental right, and neither the State nor Federal government is under any sort of constitutional obligation to guarantee minimum levels of support."[461] Michelman has argued that these apparently contrary statements in the cases can be distinguished or reconciled with his welfare rights thesis.[462] For the most part, however, they have been interpreted to mean that there are no constitutional welfare rights.[463]

One may entertain the possibility that "welfare rights" are latent constitutional values. This approach would be consistent with Tribe's presentation and analysis of the development of American constitutional law as a process of continuing shift in emphasis and rearrangement among several basic models of constitutional values.[464] Any given value may be now in the foreground, then almost out of sight, now on the rise, then waning, or entering into different balances with other values.

If "welfare rights" do exist and remain latent, however, even such earnest advocates as Michelman and Tribe do not contend that the courts can directly

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[453] Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 698.

[454] 397 U.S. 471 (1969).

[455] *Id.* at 483-87.

[456] *Id.* at 485.

[457] *Id.* at 486 (footnote omitted).

[458] 411 U.S. 1 (1973).

[459] *Id.* at 30.

[460] 424 U.S. 577 (1976).

[461] *Id.* at 584 n.9.

[462] Michelman, *Welfare Rights*, *supra* note 437, at 688-93.

[463] Levin, *Education as Constitutional Entitlement: A Proposed Judicial Standard for Determining How Much is Enough*, 1979 WASH. U.L.Q. 703, 703.

[464] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1 (1978).

fulfill the government's alleged constitutional obligation to meet the most basic needs of citizens.[465] Nor do they suggest that the courts could order the legislature to make housing appropriations. In Michelman's view, "welfare rights" mean that the Court should treat welfare legislation as though it were intended to satisfy constitutional rights.[466] Tribe amplifies this notion by observing that, after the initial welfare decisions are made by state and federal legislatures, the role of the courts will usually be confined to enforcing procedural protections against deprivations of benefits and policing the determination of what constitutes eligibility and need.[467]

American thinking about these matters could perhaps benefit from the distinction made in Italian constitutional law between provisions which are directly enforceable and those which are "programmatic."[468] Many of the Italian Constitution's social goals, the right to employment, for example, impose a duty on the legislature to work toward their realization, but create no directly enforceable rights in individuals.[469] They are, in one sense, just "platform plank[s] elevated to constitutional status."[470] But it is not to be discounted that, representing a national commitment, they may also give a certain direction and impetus to public policy.[471]

However inconclusive the discussion of constitutional welfare rights may be on the point at issue among constitutional law theorists, it does provide useful perspectives on the housing rights that seem to be implicit in the recent development of residential landlord-tenant law. In the first place, it points up the difficulty of separating housing rights from the general problem of rights to a minimum decent subsistence. The need for awareness of this difficulty is further established by recent research indicating that the problem of cost is currently the major form of housing deprivation among the poor,[472] and by the preliminary results of the national housing allowance experiments which suggest that poor people prefer direct financial assistance to reduce their rent burden over improved housing as such.[473]

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[465] *Id.* at 920-21. *See* Michelman, *Welfare Rights*, *supra* note 437, at 684-85.

[466] *Id.* at 684-85.

[467] TRIBE, *supra* note 464, at 920 (footnote omitted).

[468] M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, THE ITALIAN LEGAL SYSTEM 58 (1967).

[469] *Id.*

[470] *Id.*

[471] *Id.* at 58-59.

[472] See text and notes at 417-25 *supra*.

[473] The H.U.D. experimental housing allowance program ("one of the biggest social experiments ever undertaken"), which began in 1973 and ended in 1979-80, was designed to test in 12 cities the idea that the best way to help poorly housed families was to give them money. B. FRIEDEN & A. WALTER, WHAT HAVE WE LEARNED FROM THE HOUSING ALLOWANCE EXPERIMENT? 50 (M.I.T.-HARV. JT. CENTER FOR URB. STUD., Working Paper No. 62 (1980). Frieden and Walter's 1980 analysis of the preliminary results of the program, indicates that most participating families chose not to spend much of the allowance on improved housing, but used it rather to substitute for money of their own that they formerly had spent on rent. The fact that most poor families in the experiment were reluctant to pay higher rents or to move in order to im-

Whether thought of as involving housing or welfare in general, constitutional rights or rights of some lesser status, the fulfillment of the national goal of "a decent home" for all depends, at least in the case of the poorest Americans, ultimately on public funding which can only be provided by legislative action. Here, stagflation and scarcity, combined with racial discrimination, pose formidable obstacles. Thus, in the end, the precise nature, or even the existence, of a right to housing will be less important than finding the political will to reach out to the needy. Some of the most difficult problems will come from the fact that many persons consider human welfare goals impossible to reach without a kind of economic activity that can be carried on only at high human and environmental cost, now and in the future. The social concerns of the 1960's that spurred the transformation of many areas of the law, including landlord-tenant relations, are yielding ground to policies favoring the military and "reindustrialization" to compete in world markets, to the point where the historic national priority accorded to housing is in question.

Poverty is increasing[474] and most of the poor in the United States are mothers and children, or elderly persons, with minority groups disproportionately represented.[475] In view of these statistics, the issue of housing for the poor and politically less powerful will be one of many that involve the question of what kind of society we are and what kind of society we want to become. In this connection, one of the conclusions of Eugene Meehan's sad chronicle of the failure of public housing in the United States deserves quoting at length:

> It cannot be too strongly emphasized that the chief obstacle to a successful public housing program was normative, a matter of values and priorities. It is not a question of judging the extent to which the intent of the program designers was good or evil or the degree to which the tenants were virtuous and deserving. What needs restatement and underscoring is the very ancient precept that laws or policies must be supported by the customs, beliefs, and values embedded in the social fabric. . . . [L]aws unsupported by norms will fail. Regardless of technology, good will, rhetorical skill, or depth of conviction, policies that lack support in the fundamental priority structure of the society cannot succeed, particularly if they involve significant costs. Efforts to circumvent the need for basic agreement on norms make for tokenism and sham, for resistance and disobedience and,

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prove their housing conditions brought to light an apparent conflict between the priorities of the clients of the system and the administrators of housing programs: "The poor do not give housing quality the high priority that program administrators do. . . . Their main problem, as they see it, is cost, not quality." *Id.* at 50. The housing allowance experiment appears to confirm the results of a H.U.D. survey in three cities in the early 1970's in which 84% of households with incomes below $5000 rated their dwellings as satisfactory or better. *Id.*

[474] Pear, *Census Shows Increase in Need for Welfare Aid*, N.Y. Times, Nov. 3, 1981, at B12, col. 1.

[475] U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-60, No. 127, Money, Income and Poverty Status of Families and Persons in the U.S. 3 (1980) (Advance Data from March 1981 Current Pop. Survey) (U.S. G.P.O., Washington, D.C.).

> ultimately, for violent resistance. When the social institutions responsible for making policy must create programs out of an interplay of conflicting and competing interests, the results will necessarily reflect the inadequacies and inconsistencies that characterize society as a whole. Such factors limit the life expectancy and potential for accomplishment of any policy proposal. It is both futile and irresponsible to ask a public agency, whether a school, a police force, or a local housing authority, to solve a problem that society at large has not yet resolved in its fundamental norms.[476]

The real problem, according to Meehan, is "society's inability or unwillingness to come to grips with the problem of dealing with the poor and powerless."[477]

The residential landlord-tenant law reforms were, to a great extent, an attempt to alleviate the kinds of housing problems that have been especially burdensome for the poor. In one sense, these reforms, many of them long overdue, represent progress over the classical law. At the same time, however, by promoting the illusion that the problem of housing the poor can be resolved within the private rental sector,[478] they are further evidence of our collective inability to "come to grips" with an aspect of the problem of poverty.

CONCLUSION

Landlord-tenant law has always been a hybrid area in which many strains, property and contract in particular, have mingled and vied for dominance. What has here been called classical lease law was gradually transformed by the same processes that have modernized private law generally. The revolution in residential landlord-tenant law, however, went beyond the mere acceptance of modern principles of private law. Over the past two decades, residential lease law has to a great extent escaped from the realm of private ordering, in which the stronger party typically has the advantage, and has become subject to regulation "in the public interest." Commercial lease law, while conforming generally to the modernization of commercial law, remains, to a much greater degree, within the domain of private law and private ordering. While it seems unlikely that the "publicization" of residential landlord-tenant law will culminate in the foreseeable future in a constitutional right to housing, the national housing legislation does represent a long-standing commitment to the goal of a "decent home" for all citizens. It remains to be seen, however, whether this goal will survive unimpaired under current political and economic circumstances. Meanwhile, the revolution in landlord-tenant law has marginally improved the legal position of energetic, informed and well-represented

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[476] E. MEEHAN, THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING 198-99 (1979).

[477] *Id.* at 199.

[478] West European countries, by contrast, intervene massively in housing markets. The rental housing market in Western Europe, unlike in the United States, is dominated by the public or quasi-public sector. J. BRENNER & H. FRANKLIN, RENT CONTROL IN NORTH AMERICA AND FOUR EUROPEAN COUNTRIES xi (1977).

tenants; has brought yet another private law area under judicial and legislative regulation; and has introduced ideas of security of tenure and social rights whose transforming power is yet to be tested.