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## Property, Psyche, and the Theory of Tenancy: Independent and Interdependent Lease Law Covenants Through the Lens of Cultural Psychology

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**PROPERTY, PSYCHE, AND THE THEORY OF TENANCY:  
INDEPENDENT AND INTERDEPENDENT LEASE LAW COVENANTS THROUGH  
THE LENS OF CULTURAL PSYCHOLOGY**

*Hanjo Hamann*<sup>†</sup>

*Abstract*

*Is it property or contract? This question has perplexed scholars studying the residential lease for most of the last century. The present contribution combines the complementary perspectives of legal history and cultural psychology to clarify our theory of tenancy. From a historical perspective, I find that the oscillation of tenancy between competing doctrinal paradigms has resulted in a compromise solution rather than a coherent theory. While piecemeal reforms in the 1970s revised the doctrine of independent covenants, they did not provide a theoretical justification for increasing interdependence. From a psychological perspective, I suggest that such a theoretical justification may come from cultural psychology as the discipline that studies the behavioral effects of independent and interdependent self-construals. I provide the first comprehensive review of how this strand of psychology has informed legal issues in the last twenty years, and I extend this line of inquiry to include tenancy. I conclude that whether we regard tenancy as property or contract (i.e., as based on independent or interdependent covenants) will affect the amount of cooperation that we should expect from landlords and tenants. A theory of tenancy based on this insight would open up avenues for further research in law and society, comparative law, and contract theory.*

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Existing landlord-tenant law in the United States . . . developed within an agricultural society at a time when . . . the landlord-tenant relationship was viewed as conveyance of a lease-hold estate and the covenants of the parties generally *independent*. These doctrines are inappropriate to modern urban conditions and . . . the modern tendency to treat performance of certain obligations of the parties as *interdependent*.

—UNIFORM LAW COMMISSION (1972)<sup>1</sup>

Interdependent ways of being . . . are associated with relatively tight connections among people, producing a social order in which cooperation . . . is promoted and protection from threat is assured . . . Independent ways of being are more often associated with more material resources and looser connections among people, giving rise to a social landscape in which people . . . are less assured of ingroup protection.

—MARKUS & HAMEDANI (2019)<sup>2</sup>

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1. Uniform Residential Landlord and Tenant Act (URLTA), *infra* note 98, § 1.102 Comment.

2. Hazel R. Markus & MarYam G. Hamedani, *People are Culturally Shaped Shapers*, in *HANDBOOK OF CULTURAL PSYCHOLOGY* 11, 20 (Dov Cohen & Shinobu Kitayama eds., 2d ed. 2019).

## I. INTRODUCTION

What is our theory of tenancy? Considering the tangible and immediate ailments of many poor tenants<sup>3</sup>—especially in communities of color and in households hit by the COVID pandemic—a *theory* of tenancy may at first seem like “a matter of academic interest and of no particular significance,” as some suspected even eighty years ago.<sup>4</sup> Yet, just like eighty years ago, such skeptics would be “far from correct,”<sup>5</sup> as the present essay will demonstrate. I revisit the infamous doctrine of independent covenants, which affects lease law practice by determining how landlords and tenants share the burden of apartment maintenance. In recent years, landlord–tenant law has “gone a long way towards making covenants interdependent, but perhaps not quite as far in as in the law of contracts.”<sup>6</sup> In effect, even a millennium of historical development has not resulted in a clear theoretical conception of whether lease law covenants should be considered independent or interdependent. On this question, the current contribution will bring to bear two complementary perspectives.

First, a *historical* perspective will reveal that our lack of a clear theory derives from tenancy’s oscillation between two competing doctrinal paradigms (*tenancy-as-conveyance* and *tenancy-as-contract*), which have been amalgamated into a compromise of sorts (*tenancy-as-composite*) without clarifying conceptually where lease law should stand between independent and interdependent doctrinal conceptions (*infra* II.).

Second, a *psychological* perspective will then draw on recent research into the behavioral effects of independent and interdependent cognitive construals under the umbrella of *cultural psychology* (III.). I will provide the first comprehensive review (after nearly twenty years of such research) of how cultural psychology has informed legal questions. On this basis, I will show specifically how cultural psychology provides

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3. Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 GEO. J. POV. L. & POL. 97, 98–99 (2019) (“Millions of families in the United States reside in substandard conditions . . . residential property that lacks heat, running water, reliable electricity, or stable flooring. Toxic mold covers walls and ceilings. At night, tenants and their children try to sleep with insects crawling over their skin and the sounds of rats gnawing on furniture.”); see also Nicole Summers, *The Limits of Good Law: A Study of Outcomes in Housing Court*, 87 U. CHI. L. REV. 145, 147–49 (2020), for a similarly grueling description from an empirical study based on 2016 filings.

4. W.F. Woodruff, *Lessor and Lessee: Parties to a Contract or Landlord and Tenant?*, 8 U. KAN. CITY L. REV. 35, 39 (1939).

5. *Id.*

6. Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1189 (2006).

empirical evidence to suggest that tenancy's position between independent and interdependent covenants may shape the psychological self-construal that landlords and tenants form in their respective roles in the tenancy relationship (IV.).

My contribution thus provides a novel framework for a behaviorally-informed theory of tenancy. Once we reframe tenancy accordingly, from a perspective informed by historical and interdisciplinary research, we will subsequently recognize three avenues of further research that this reframing will open up (V.).

## II. TENANCY'S FUNDAMENTAL TENSION: FROM INDEPENDENT TO INTERDEPENDENT COVENANTS

The common law of leases rests on "almost a millennium of legal theory," during most of which time it was "protective of [landlord] interests."<sup>7</sup> Ever since the Norman conquest of England (1066), Anglo-American land law went through "diverging developments" that one writer once summarized on some two-hundred law review pages, and later a two-volume treatise.<sup>8</sup> Much of this development came from a fundamental tension in tenancy that has received plenty of intellectual attention: "What is a lease? Is it a *conveyance* of an estate in land or is it a *contract* with respect to occupancy?"<sup>9</sup> I will first explain both of these competing paradigms and mention some of the many practical questions that turn on them (*infra* A.). I will then show how a long historical development amalgamated both paradigms into a composite (B.), leaving us without a coherent theory but rather piecemeal regulation dealing with the doctrine of independent covenants (C.).

### A. Tenancy's Paradigms: Conveyance and Contract

To understand the fundamental tension inherent in United States lease law, consider its uneasy position between property and contract as two of the most basic building blocks of private law. While a contract is described as "a promise (or set of promises) that the law protects and enforces," property traditionally means "ownership, mastery, control

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7. Paul G. Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695, 701 (1969).

8. David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History (Parts I, II, III)*, 34 REAL PROP., PROB. & TRUST J. 143-203, 295-361, 443-516 (1999); DAVID A. THOMAS, *HISTORY OF AMERICAN LAND LAW* (2013).

9. Woodruff, *supra* note 4, 36.

over land.”<sup>10</sup> Stated this way, contract and property may seem mutually exclusive on several dimensions: intangible vs. tangible, legally constructed vs. physically real, and relating humans to each other vs. relating humans to things.

Yet, as the previous quote suggests, property in the legal sense is not a tangible thing (as common parlance might have it) but “control over” said thing. And not merely physical control either (which we call possession) but normative control, protected through law against competing contenders. Therefore, both contract and property are intangible, legally-construed relationships between humans that differ merely in what the relationship is about. Contract relationships are about “a mysterious substance called ‘consideration,’”<sup>11</sup> meaning an exchange of value between people where each side gives up some value contingent on receiving some value.<sup>12</sup> Property relationships, in contrast, were famously characterized by Blackstone as “that sole and despotic dominion . . . in total exclusion of the right of any other individual in the universe.”<sup>13</sup> Put concisely then, one could say that contract law governs relationships of social *interdependence*, whereas property law governs relationships of exclusionary *independence*.

Neither of these polar opposites fully describes the relationship between a property owner and a temporary resident, which we call a “residential lease,” “rental,” or “landlord–tenant” agreement, or “tenancy” for short. To see why tenancy might be either property or contract (or both, or none—as we will see later),<sup>14</sup> consider the following divergent interpretations throughout history.

Some have regarded tenants as “owner[s] of a possessory estate,” with “all the rights which accompany ownership of such an interest.”<sup>15</sup>

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10. LAWRENCE M. FRIEDMAN & GRANT M. HAYDEN, *AMERICAN LAW: AN INTRODUCTION* (3d ed. 2017), 143, 147 (criticizing on page 146 that “as far as the law is concerned the word ‘property’ means primarily real property; personal and intellectual property seem less important.”).

11. *Id.* at 143.

12. This may happen repeatedly, or even continuously—creating varying intensities of exchange; see James D. Gordon II, *Dialogue About the Doctrine of Consideration*, 75 *CORNELL L. REV.* 986, 1003–04 (1990).

13. 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*1. Even in modern jurisdictions, an owner may “deal with the thing at his discretion and exclude others from every influence.” *E.g.*, Germany’s Bürgerliches Gesetzbuch [BGB] [Civil Code], § 903, [www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p3704](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3704) [https://perma.cc/K8S7-YR96].

14. John V. Orth, *Leases. Like any Other Contract?*, 12 *GREEN BAG 2D* 53, 65 (2008) (asserting that “leases are not . . . like anything else except themselves.”).

15. Lesar, *infra* note 49, at 1279–80 (“He may make any use of the premises not illegal . . . He may use the premises or not, as he sees fit.”); see also Lesar, *infra* note 50, at 370–74.

The idea is that the landlord essentially divides her legal power over the real estate and conveys shreds of it to the tenant. This *tenancy-as-conveyance* paradigm posits a one-time “transfer of control,”<sup>16</sup> so it works well insofar as tenants expect nothing in return for their rent other than being left alone on their premises. “In technical terms,” it was noted, “the tenant ‘covenanted’ to pay the rent while the landlord ‘covenanted’ to keep him in quiet possession.”<sup>17</sup> This “implied dependent covenant of quiet enjoyment”<sup>18</sup> meant that “once the landlord transferred possession of the land, his only remaining role was passive: receiving rent.”<sup>19</sup> He was specifically “*not* expected to assist in the operation of the land,” but instead “to stay as far away as possible.”<sup>20</sup> Insofar as landlords and tenants seek to maintain this distance and enforce their independence from each other, “the concept of a lease as a conveyance afforded both parties remedies superior to those available in contract.”<sup>21</sup>

The competing construction (already implied in the last quote) could be called *tenancy-as-contract*. The idea is that the landlord continuously provides a reasonably well-maintained space to the tenant in exchange for the tenant continuously providing a reasonably measured amount of rent. Such an arrangement “appears to the average person to be a bilateral contract; it contains detailed covenants addressing a multitude of issues,” so it might as well “be governed by contract law, like any other contract.”<sup>22</sup> Insofar as a tenant requires her landlord’s support with this

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16. Orth, *supra* note 14, at 55.

17. Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 *FORDHAM L. REV.* 225, 228 (1969); Orth, *supra* note 14, at 55–56 (“[V]iew of a lease as a conveyance had generated the covenant of quiet enjoyment, the landlord’s duty not to interfere with the tenant’s possession of the premises.” But simultaneously “[T]he payment of rent was not thought of as the performance of a promise by the tenant but rather as a sort of interest the landlord retained in the land . . .”).

18. Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 *MOD. L. REV.* 242, 247 (1974).

19. JOHN G. SPRANKLING, *UNDERSTANDING PROPERTY LAW* ch. 15 (4th ed. 2013) (adding that “The landlord provided no services to the tenant, nor did the tenant expect any.”); see also Friedman, *infra* note 210, at 166 (“When a landlord executes a lease he is still deemed to have performed substantially all that is expected of him.”).

20. Quinn & Phillips, *supra* note 17, at 228 (adding that “should the landlord interfere, he risked violating real property law.”).

21. Bettina B. Plevan, *Contract Principles and Leases of Realty*, *B.U. L. REV.* 24, 26 (1970); Lesar, *infra* note 50, at 375 (“the concept of the lease as a conveyance afforded the parties remedies superior to those available in contract.”); Jean C. Love, *Landlord’s Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, *WIS L. REV.* 19, 26 (1975) (asserting that this “actually worked to the tenant’s advantage, since it permitted him to enforce his legal rights through the real action of ejectment, rather than the contractual action of debt.”); see also Orth, *supra* note 14, at 58.

22. SPRANKLING, *supra* note 19, at 237–38.

“multitude of issues,” she would seek to obtain proactive cooperation and to enforce the mutual interdependence in the relationship. To that end, remedies available under contract law afford “the tenant more protection than parallel property law rules.”<sup>23</sup>

In short, we find two competing paradigms of tenancy, but neither is truer (or conceptually more apposite) than the other because “the choice of a conceptual paradigm for leases has no real ontological foundation; it cannot be said that leases are ‘really’ conveyances, in their essence, as distinguished from pure contracts. Nor can it be said that leases are really, in their essence, contracts.”<sup>24</sup> Nonetheless, distinguishing between *tenancy-as-conveyance* and *tenancy-as-contract* bears on numerous practical questions and has “modern implications”<sup>25</sup> for doctrinal issues ranging from alienation or subleasing of a leasehold,<sup>26</sup> bankruptcy during the lease term,<sup>27</sup> security of tenure,<sup>28</sup> consumer protection against summary eviction,<sup>29</sup> the doctrine of constructive eviction,<sup>30</sup> damages for anticipatory breach,<sup>31</sup> and tort liability for personal injury or property damage.<sup>32</sup> Given this practical relevance, what is our current theory of tenancy?

#### B. Tenancy's Trajectory: Towards Tenancy-as-Composite

*Tenancy-as-conveyance* and *tenancy-as-contract* were introduced—and are commonly viewed—as fundamentally antagonist notions, which many scholars have used to anchor a grand narrative of historical progress from one paradigm to the other. It is indeed tempting to perceive *tenancy-as-conveyance* as an antiquated “archaic” holdover from English land law<sup>33</sup> and *tenancy-as-contract* as its “modern”

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23. *Id.* at 236.

24. Humbach, *infra* note 59, at 1288–90 (adding at 1290, “Thus, at an ontological level, the choice of conceptual paradigm, conveyance or contract, may be trivial.”).

25. Edward Chase & Michael Allan Wolf, *Landlord and Tenant Estates*, in POWELL ON REAL PROPERTY ch. 16 (release 103, June 2003), 16–18 (with a list of examples).

26. *See generally* Johnson, *infra* note 60.

27. *See generally* Woodruff, *supra* note 4, 40–44; *see generally* Bennett, *infra* note 39, 55–63.

28. *See generally* Sullivan, *infra* note 56.

29. *See generally* Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135 (2000); *see also* Chused, *infra* note 58, at 1396–1403.

30. *See generally* Weinberg, *infra* note 51, at 66–82; *see also* Plevan, *supra* note 21, at 29–33.

31. Bennett, *infra* note 39, at 48–55.

32. Love, *supra* note 21, at 21.

33. Edward Chase & E. Hunter Taylor, Jr., *Landlord and Tenant: A Study in Property*



successor in exchange-based market societies.<sup>34</sup> We might then look for the Big Switch—the historical singularity that effected modernity’s triumph over the forces of the feudal past.<sup>35</sup> This quest was, in fact, a staple of lease law scholarship for some 50 years between the 1930s and 1980s.<sup>36</sup> The debate between “traditionalist” and “revisionist” writers has filled quite literally a thousand law review pages,<sup>37</sup> not to speak of various books on the matter.<sup>38</sup>

To get an impression of the “traditionalist” narrative of progress, consider one of the earliest commentators: He observed “a complete metamorphosis” of tenancy in keeping “with our development from an agricultural to an industrial state,” where “the task of modern courts has been to divorce the law of leases from its medieval setting of real property law, and adapt it to present-day conditions and necessities by means of contract principles.”<sup>39</sup> Freeing lease law from its medieval shackles—such was the vision of 1937.<sup>40</sup> Six decades later, by 1997, another commentator noted that “during the last fifty years the law of

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*and Contract*, 30 VILLANOVA L. REV. 571, 573 (1985) (“archaic and ill-suited to the needs of modern tenants”); Quinn & Phillips, *supra* note 17, at 231 (“It all made sense back in those days with the landlord off on the hunt or drinking port in the quiet of the evening, and the tenant asking only to be left alone to tend his fences and to shear his sheep . . . . Get away from the simplicities of the rural scene, however, and the old ideas get strangely and radically out of joint. What once made sense, now looks more like nonsense.”).

34. See text accompanying note 39, and SPRANKLING, *supra* note 19, at 238 (“the application of contract law principles is necessary . . . in light of modern conditions.”).

35. Bennett, *infra* note 39, at 72.

36. *Id.* at 48.

37. A 1985 review cited eleven authorities for the “traditionalist” account (conveyance to contract), four others for “revisionist” alternatives, and concluded (130 pages later) that both got it wrong. Chase & Taylor, *supra* note 33, 572 n.2, 573 n.6. I readily add another six authorities not covered in the 1985 review: Donahue, *supra* note 18; Garrity, *supra* note 7; Glendon, *infra* note 46; Love, *supra* note 21; Spector, *supra* note 29; Sullivan, *infra* note 56. Together, all of these articles happen to add up to exactly 1,000 pages.

38. See, e.g., SPRANKLING, *supra* note 19, at ch. 8, 9, 15; see e.g., THOMAS, *supra* note 8; see generally MARK WONNACOTT, THE HISTORY OF THE LAW OF LANDLORD AND TENANT IN ENGLAND AND WALES (2011).

39. Dale E. Bennett, *The Modern Lease—An Estate in Land or a Contract*, 16 TEX. L. REV. 47, 72 (1937).

(“In place of the old feudal tenancy we now have a contract, everywhere regarded in actual business dealings as such.”). I here disregard the eponymous abridged version in 4 CURR. LEGAL THOUGHT 157 (1937).

40. Later courts agreed; see *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1074–79 (D.C. Cir. 2019); see also *Green v. Super. Ct.*, 517 P.2d 1168, 1171–76 (on “the transformation of the landlord-tenant relationship.”).

landlord and tenant underwent what some commentators term a 'revolution' and others a 'culmination . . . of certain long-standing trends.'<sup>41</sup>

Yet the supposed 20th century "developmental movement from property to contract principles"<sup>42</sup> eventually turned out to be "overstated."<sup>43</sup> Increasing numbers of critics contended "that in fact no such development took place."<sup>44</sup> Even early commentators found *tenancy-as-conveyance* and *tenancy-as-contract* appearing concurrently in the 18th century writings of Blackstone,<sup>45</sup> and certainly "by the end of the nineteenth century," when "landlord-tenant case law was already deeply pervaded by contract notions."<sup>46</sup> Some historians even point to 12th century sources that "called leases 'contracts' and discussed them together with other contracts such as sales and loans."<sup>47</sup>

A more accurate account of tenancy's trajectory may require a less straight-forward narrative than unidirectional progress. This was developed most prominently by Hiram Lesar, whom contemporaries praised for his "substantial" contributions in "two excellent articles on the reform of Landlord and Tenant law":<sup>48</sup> He traced tenancy through 900 years of history and observed that "the lease originated in English law as primarily a personal contract."<sup>49</sup> So instead of a singular

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41. Sullivan, *infra* note 56, at 1015.

42. Chase & Taylor, *supra* note 33, at 573; Weinberg, *infra* note 51, at 30 ("the most striking change in the Anglo-American law of landlord and tenant was the change of mind, or concept, with which legal scholars in the early twentieth century began to approach this body of law.").

43. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 825 (2001) (asserting that "the substance of the [20th century] reform proposal was sound, but the characterization of the issue was overstated.").

44. William M. McGovern, Jr., *Dependent Promises in the History of Leases and Other Contracts*, 52 TUL. L. REV. 659, 660 (1978) (adding at 679 that "[r]arely has a proposition about legal history been so often asserted with so little evidence to support it" as the conveyance-to-contract narrative); Siegel, *infra* note 55, at 650 ("Real property analysis of leasing disputes . . . originated in the nineteenth century to resolve a selected group of leasing problems . . . . Therefore, the landlord-tenant reformers' battle cry, 'from conveyance to contract,' is illusory.").

45. Woodruff, *supra* note 4, at 36-37 ("but later authors do not reconcile these definitions.").

46. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 504 (1982); Orth, *supra* note 14, at 55 ("there were almost always some contractual elements to a lease.").

47. McGovern, *supra* note 44, at 705 (concluding that it "is not true" that "principles of contract law were historically not applied to leases because of the idea that a lease was a conveyance of property.").

48. Elmer M. Million, *Hiram H. Lesar: A Contributor to the Law of Landlord and Tenant*, 5 S. ILL. U. L. REV. 3, 8 (1980) (referring to Lesar, *infra* notes 49, 50).

49. Hiram H. Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279 (1960); *see also* Lesar, *infra* note 50, at 371 ("this tenure was contractual in nature"); Spector, *supra* note 29, at 149 ("Near the beginning of the sixteenth century, substantive rules of real

contractual shift in the 20th century, tenancy had (over the past nine centuries) experienced an almost feverish oscillation “from status to contract to property to modern contract,” “and back.”<sup>50</sup> Even at times when most scholars presumably regarded the lease as property, this perception was less than monolithic: One of Lesar’s students found that *tenancy-as-conveyance* had been out of fashion for some two centuries before the 20th century even began; only then did scholars exorcise the supposedly medieval bogeyman in their midst—without realizing that they first had to resurrect him themselves.<sup>51</sup>

Given the vagaries of this development (more topsy-turvy than trajectory), we should assume that the competing notions of *tenancy-as-conveyance* and *tenancy-as-contract* coexisted continuously for much of the first millennium of the common law of tenancy. Some researchers contend that this had always been the “typical scholarly response,” contrary to which most “courts persisted in . . . characteris[ing the lease] as a conveyance of property.”<sup>52</sup> One of the earliest proponents of *tenancy-as-contract* had merely wanted to provide a “clarification” of “judicial thinking” while “in many instances, the results would not necessarily be changed.”<sup>53</sup> Other scholars proposed to focus on more momentous conceptual shifts in tenancy—not from conveyance to contract, but “from private to public law”<sup>54</sup> or just “from one type of contract to another.”<sup>55</sup>

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property . . . largely displaced the law of contract in disputes between landlords and tenants.”).

50. Hiram H. Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369, 377 (1961). This article was partly extended, partly condensed from Lesar, *supra* note 49 (subsequent citations will only refer to either of the articles) and concisely reiterated by Love, *supra* note 21, at 23–27; Sullivan, *infra* note 56, at 1021–32.

51. Michael Weinberg, *From Contract to Conveyance: The Law of Landlord and Tenant, 1800-1920 (Part I)*, 5 S. ILL. U. L. REV. 29, 31 (1980) (“Contrary to the claims of conventional legal history, the idea of the lease as a conveyance had been largely lost to eighteenth and nineteenth century legal memory. . . . It was not truly rediscovered and revitalized until the second decade of the twentieth century.”); see also McGovern, *supra* note 44, at 703 (“The differences between medieval and modern law as to the dependency of promises have been greatly exaggerated.”).

52. Love, *supra* note 21, at 27 (citing Corbin [1960] and Williston [1962] as typical scholars); see also Lesar, *supra* note 49, at 1289 (noting that “the courts have been slow in accepting the idea that a lease is both a conveyance and a contract,” although “they are firmly headed in that direction.”).

53. Bennett, *supra* note 39, at 164.

54. Glendon, *supra* note 46, at 505.

55. Stephen A. Siegel, *Is the Modern Lease a Contract or a Conveyance?—A Historical Inquiry*, 52 J. URBAN L. 649, 686 (1975) (adding, however, “that any contract based model for modern leasing is ultimately inappropriate.”).

All such narratives are necessarily partial in both senses of the word. Regardless of the exact dynamic of change, there resulted a third conception of tenancy that I would like to call *tenancy-as-composite*, borrowing Paul Sullivan's apt metaphor.<sup>56</sup> This conception acknowledges that due to its variegated history, "most of the law of leases is based on a lease as a conveyance and the rest on a lease as a contract."<sup>57</sup> Tenancy is therefore best understood as a "mixture of possessory and contractual obligations."<sup>58</sup> and it is a matter of mere rhetoric (logomachy<sup>59</sup>) whether we consider tenancy as "both a conveyance and a contract"<sup>60</sup> or as "neither a conveyance nor a contract":<sup>61</sup> "For if the warp is conveyance, the woof is contract, and neither alone makes a whole cloth."<sup>62</sup>

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56. Paul Sullivan, *Security of Tenure for the Residential Tenant: An Analysis and Recommendations*, 21 VT. L. REV. 1015, 1016 (1997) ("The modern lease is a marbled composite of property and contract.").

57. Friedman, *infra* note 210, at 194; SPRANKLING, *supra* note 19, at 238 ("For some purposes (e.g., repair duty), courts tend to treat it as a contract; for other purposes (e.g., classification of estates), the property approach still lingers."); even earlier Woodruff, *supra* note 4, at 39 ("Inherent in the relation . . . are both the elements of a contract and of an estate for years."); Daniel N. Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L. J. 287, 303 (1970) ("The modern tendency is to regard a lease as a contract as well as a conveyance.").

58. Richard H. Chused, *Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L. J. 1385, 1387 (1979); similarly Garrity, *supra* note 7, at 700 ("As commerce and business developed, . . . certain contract principles became intertwined with the conveyancing-based law of landlord and tenant in response to the demands of an increasingly mercantile society.").

59. John A. Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U. L. Q. 1213, 1289 (1983); see also William M. McGovern, *The Historical Conception of a Lease for Years*, 23 UCLA L. REV. 501 (1976) (asserting that "the significance often attributed to the classification of leases as 'freehold' or 'chattel', 'contract' or 'property'" may have been "greatly exaggerated" and blind to "pragmatic considerations.").

60. *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244, 244 (1952); Orth, *supra* note 14, 59 ("both a conveyance and a contract . . . with all the complications and confusions the combination produces."); SPRANKLING, *supra* note 19, at 238; Alex M. Johnson, Jr., *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751, 751 (1988) ("both a conveyance of real property and a contract.").

61. Siegel, *supra* note 55, at 687.

62. Lesar, *supra* note 50, at 377.

*C. Tenancy's Revision: Independence to Interdependence*

Because of tenancy's historical trajectory, scholars described it as a "hybrid," "compound,"<sup>63</sup> or "strange amalgam"<sup>64</sup> of sorts. Less flattering observers called it "a hodgepodge of inconsistent decisions,"<sup>65</sup> and they viewed one rule in particular as theoretically unjustifiable: the "standard doctrine in landlord-tenant law" that lease covenants are "independent."<sup>66</sup> This "common law rule of independent covenants required the tenant to pay the agreed upon rental amount regardless of any level of disrepair the premises may have suffered."<sup>67</sup> As its name suggests, the doctrine of independent covenants—which some considered "the most pernicious of the old rules"<sup>68</sup>—originated in property law with its focus on relationships of independence, and was thus firmly rooted in the *tenancy-as-conveyance* paradigm. Once tenancy turned to a more hybrid approach, such a complete "absence of reciprocity" struck commentators as "an eccentricity of the law" that resulted "in patent legal injustices readily translatable into terms of human misery and suffering."<sup>69</sup>

Why did a rule with so little theoretical justification survive, nonetheless? Some scholars<sup>70</sup> explain that the "doctrine of independence has its

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63. Glendon, *supra* note 46, at 508 (stating tenancy is a "compound of property and contract"), 509 ("Thus, the lease has long been a hybrid of many strains: contract and conveyance, personal and real property, promise and covenant.").

64. Weinberg, *supra* note 51, at 31; Glendon, *supra* note 46, at 504; Merrill & Smith, *supra* note 43, at 821.

65. Robert H. Kelley, *Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated*, 41 WAYNE L. REV. 1563 (1995), 1568–69.

66. Chase & Taylor, *supra* note 33, at 578 (citing four court cases from 1893–1938); Friedman, *infra* note 210, at 166, 180 ("Though a lease contains covenants, it is still held today that covenants in a lease are independent . . . any covenants are incidental embroidery.").

67. Spector, *supra* note 29, at 167–68 (adding that this "differs greatly from the contract model applicable to a general sales or service transaction . . . contract law treats the parties' material promises as mutually dependent."); Sullivan, *supra* note 56, at 1037 ("The traditional rule in landlord and tenant law was that the tenant's contractual duty, or 'covenant,' to pay rent was independent of the landlord's covenant to maintain the premises in good repair."); Loeb, *supra* note 57, at 303 ("Even where a lease contained the landlord's express covenant to repair, the courts generally treated that covenant as independent of the duty to pay rent."); Orth, *supra* note 14, at 56 ("The independency of covenants meant that breach of a covenant by one party did not relieve the other party of the duty to perform.").

68. Chused, *supra* note 58, at 1388; Quinn & Phillips, *supra* note 17, at 252 ("It should be quietly put to rest."); *see also* Love, *supra* note 21, at 21 (describing tenants as "shackled" by the doctrine of independent covenants).

69. Quinn & Phillips, *supra* note 17, at 252.

70. *See* McGovern, *supra* note 44, at 679, for a skeptical account of the doctrine of independent covenants. The Author indicates that "[i]t is hard to see any connection between the dependency of promises and the conveyance of property rights between

origins in a time when the rule of *Nichols v. Raynbred* [1615]—that *no* covenants are dependent—prevailed.<sup>71</sup> The subsequently evolved “contract doctrine of mutual dependence of promises, developed by Lord Mansfield in the late eighteenth century, was not imported into the law of leases”<sup>72</sup> because tenancy did not happen to be considered a contract at that particular time.<sup>73</sup> The “inertial force of precedent”<sup>74</sup> then perpetuated “the missing doctrine of mutually dependent covenants.”<sup>75</sup> By the late 1960s, scholars started complaining that,

if one assumes as a first principle of basic fairness that whenever two people enter into an agreement one’s performance is always interrelated and dependent upon the other’s, he will never understand landlord-tenant law. The simple reason is that it is built on a different first premise.<sup>76</sup>

Yet, rather than clarify tenancy’s theoretical premises—i.e., its theory—courts and policymakers chose to revise it through a quick succession of reforms,<sup>77</sup> all designed to “reduce the level of independence that landlords enjoyed under traditional doctrine.”<sup>78</sup>

The first of these, sponsored by the American Bar Foundation (“ABF”), was a research project at the University of Chicago Law School in 1968 that resulted in a “tentative draft” for a Model Residential Landlord-Tenant Code.<sup>79</sup> This pioneering restatement was motivated, in

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parties to a contract.” *Id.*

71. Donahue, *supra* note 18, at 243; *see also* Bennett, *supra* note 39, at 48 (“[C]ontract principles . . . were only emerging when the law of landlord and tenant first developed.”).

72. Glendon, *supra* note 46, at 511; Garrity, *supra* note 7, at 701 (“Medieval conveyancing doctrines were not sufficiently modified, however, to incorporate into landlord-tenant theory such contract principles as mutuality of covenants [sic] and mitigation of damages.”).

73. *Green v. Super. Ct.*, 517 P.2d 1168, 1172 (Cal. 1974) (“[B]ecause the law of property crystallized before the development of mutually dependent covenants in contract law, a lessee’s covenant to pay rent was considered at common law as independent of the lessor’s covenants.”). This account was disputed by McGovern, *supra* note 44, at 660 (“[M]any promises have been held dependent from a very early period; and that, conversely, many are held independent even today . . . [T]hese reasons have not substantially changed over the centuries.”).

74. Love, *supra* note 21, at 28.

75. Glendon, *supra* note 46, at 513; *see also* Orth, *supra* note 14, at 62 (“If leases are indeed contracts, then the covenants in leases ought to be ‘dependent,’ just as the promises in contracts are . . .”).

76. Quinn & Phillips, *supra* note 17, at 226.

77. Observers noted “an extraordinary ferment in landlord-tenant law in the United States.” Donahue, *supra* note 18, at 242.

78. Spector, *supra* note 29, at 205.

79. MODEL RESIDENTIAL LANDLORD-TENANT CODE 3 (AM. BAR ASS’N, Tentative Draft 1969).

particular, by “the need for revision of” such “doctrines long defunct” as the “doctrine of independent covenants.”<sup>80</sup> One of the Model Code’s general provisions therefore provided the following:

Material promises, agreements, covenants, or undertakings of any kind to be performed by either party to a rental agreement shall be *interpreted as mutual and dependent conditions* to the performance of material promises, agreements, covenants, and undertakings by the other party.<sup>81</sup>

The authors of this Model Code explicitly acknowledged that such dependence contradicted the “general rule” in courts of their day, but asserted that “modern pleading allows a result substantially equivalent to a finding of dependent covenants,”<sup>82</sup> hence vindicating their doctrinal innovation.

A more authoritative vindication came in January 1970, when the United States Court of Appeals for the D.C. Circuit heard three cases (originated in 1966) that together resulted in the landmark decision of *Javins v. First National*.<sup>83</sup> In *Javins*, the court faced a tenancy dispute on the “simple” facts of “approximately 1500 violations of the Housing Regulations . . . since the term of the lease had commenced.”<sup>84</sup> Faced with the outrageous practical effect of the property-based doctrine of independent covenants, the court concluded that “in accord with the legitimate expectations of the parties and the standards of the community . . . leases of urban dwelling units should be interpreted and construed like any other contract.”<sup>85</sup> This implied a reversal of the independence assumption inherent in previous theorizing, because “[u]nder contract principles . . . the tenant’s obligation to pay rent is dependent upon the landlord’s performance of his obligations, including his warranty to maintain the premises in habitable condition.”<sup>86</sup>

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80. *Id.* at 5.

81. *Id.* at § 2-102(2), emphasis added.

82. *Id.* at 38.

83. *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

84. Vivid description of the *Javins* fact pattern in Richard H. Chused, *Chapter 6: Saunders (a.k.a. Javins) v. First National Realty Corporation* in Gerald Korngold & Andrew P. Morriss (eds.), *Property Stories* (2004), 121 (“It must have been quite a scene . . . the tenants living in the Clifton Terrace Apartments who had refused to pay their rent because of the terrible conditions . . . brought bags of mouse feces, dead mice, roaches and pictures of their apartments to the courtroom . . . A housing inspector was also there, carrying a pile of paper” that “stood at least one and one-half feet high”); extended in 11 *GEO. J. POV. LAW & POL.* 191, 192 (2004).

85. *Javins*, 428 F.2d at 1075.

86. *Id.* at 1082.

While the *Javins* court was not the first to advocate for (inter)dependence—indeed, even before it, “the thrust of the case law has been to create an interdependence between the duty to pay rent and the duty to repair”<sup>87</sup>—*Javins* came to be “recognized as the seminal” case, which “numerous other habitability decisions have espoused.”<sup>88</sup> It was considered “the most lucidly written and frequently cited of the many opinions” that followed,<sup>89</sup> one of which was California’s *Green v. Superior Court* (1974).<sup>90</sup> *Green* explicitly referred to *Javins* to justify that “in keeping with the contemporary trend to analyze urban residential leases under modern contractual principles, . . . the tenant’s duty to pay rent is ‘mutually dependent’ upon the landlord’s fulfillment of his implied warranty of habitability.”<sup>91</sup> Yet even decades later, skeptics still observed “that the courts that have stated that tenancies are to be construed using the contract law paradigm apparently have not really meant it”<sup>92</sup> so that “[t]he bold assertion of the *Javins* court that residential leases should be interpreted and construed ‘like any other contract’ remains an aspiration, not a reality.”<sup>93</sup>

Two years after *Javins*, in August 1972, a committee of the National Conference of Commissioners on Uniform State Laws proposed a new Uniform Residential Landlord and Tenant Act (“URLTA”),<sup>94</sup> with the reporter-draftsman being Julian Levi, the project director of the 1969 ABF Model Code.<sup>95</sup> URLTA’s stated purpose was “to simplify, clarify,

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87. Loeb, *supra* note 57, at 303–04; *see also* Lesar, *supra* note 50, at 375 (citing in n.39–40 three decisions from 1892–1914, six decisions from the 1920s, and five from 1930–1942); even more extensive review of early decisions in Bennett, *supra* note 39, at 48–71.

88. Chase & Taylor, *supra* note 33, 573 n.3 (citing five other cases in 1969–1974); RESTATEMENT, *infra* note 99, § 5.5 Reporter’s Note (calling *Javins* the “leading case to impose an obligation on the landlord to keep the premises up to the standards set by the codes” and citing seven “decisions following the *Javins* case” in 1971–1975).

89. Chused, *supra* note 58, at 1388.

90. *Green v. Super. Ct.*, 517 P.2d 1168 (Cal. 1974).

91. *Id.* at 1181. The court asserted “that the application of contract principles, including the mutual dependency of covenants is particularly appropriate in dealing with residential leases of urban dwelling units” because the justification for “the ancient property doctrine of ‘independent covenants’” had “completely eroded.” *Id.* at 1173, 1180; *see The California Lease—Contract or Conveyance?*, *supra* note 60, at 251–56, for California’s earlier common law regarding the (inter)dependence of covenants.

92. Kelley, *supra* note 65, at 1568. The court further added that “twenty years” after *Javins*, “the same court retained segments of the property law paradigm.” *Id.* at 1569.

93. SPRANKLING, *supra* note 19, at 238.

94. Unif. Residential Landlord & Tenant Act (Nat’l Conf. of Comm’rs on Unif. State Ls.) (recommended in San Francisco, 4–11 Aug. 1972, approved by ABA in Houston, Feb. 1974).

95. MODEL CODE, *supra* note 79, at 3.



modernize, and revise . . . the rights and obligations of landlords and tenants.”<sup>96</sup> This entailed—as cited in the epigraph of this paper<sup>97</sup>—a recognition of “the modern tendency to treat performance of certain obligations of the parties as interdependent” rather than considering “the covenants of the parties generally independent,” which the URLTA drafters regarded as “inappropriate to modern urban conditions and inexpressive of the vital interests of the parties and the public which the law must protect.”<sup>98</sup>

Around the time of the URLTA adoption, the American Law Institute designated Harvard Professor James Casner as the reporter for a new Restatement (Second) of Property, which was published five years later, in 1977.<sup>99</sup> It centered around “two distinctive features,” one of which being “the rejection of the ancient dogma that the covenants of the respective parties are entirely independent, in favor of a concept of mutual dependence akin to that accepted in the law of contracts.”<sup>100</sup> This “rule of dependence of covenants,” noted the reporter later, “came only after considerable debate, some of it quite heated.”<sup>101</sup> Eventually, the Restatement’s chapter on “tenant’s rights that grow out of the nonperformance by the landlord” explicitly adopted an approach of “logically extending” the “emerging judicial sentiment” which “repudiates the independence-of-obligations approach in leases.”<sup>102</sup> The effect of this repudiation has also been disputed: While the Restatement’s reporter claimed that it enabled the “widespread judicial overthrow of the doctrines of *caveat emptor* and independence of covenants” which otherwise “would have been significantly retarded,”<sup>103</sup> critics asserted with equal confidence that the Restatement “had little influence on the actual daily application and administration of the law.”<sup>104</sup>

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96. Unif. Residential Landlord & Tenant Act (URLTA) § 1.102(b)(1).

97. See text accompanying note 1.

98. Unif. Residential Landlord & Tenant Act (URLTA) § 1.102 Comment.

99. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT Introduction (AM. L. INST. 1977).

100. *Id.*

101. A. James Casner, *Restatement (Second) of Property as an Instrument of Law Reform*, 67 IOWA L. REV. 87, 90 (1981).

102. RESTATEMENT, *supra* note 99, at ch. 7, pt. II, intro. note; Casner, *supra* note 101, at 90 (noting that the Restatement rejected the “long-operative doctrine of independence of covenants” and “moved boldly into this issue, coming down strongly in favor of . . . making performance of the tenant’s obligations dependent on the landlord’s performance.”).

103. Casner, *supra* note 101, at 90–91.

104. David A. Thomas, *Restatements Relating to Property: Why Lawyers Don’t Really Care*, 38 REAL PROP., PROB. & TRUST J. 655, 695 (2004); see also *id.* at 655 (“legislatures, bench and the bar . . . have largely ignored the property Restatements.”).

In short, a string of piecemeal reforms within the span of a decade (1968–1977) sought to abandon the independence doctrine. The American Bar Foundation, a Federal Appeals Court, the National Conference of Commissioners on Uniform State Laws, and the American Law Institute all advocated for mutual legal dependence of landlords and tenants. This prominent advocacy prompted subsequent observers to hail “a revolution of sorts in American landlord–tenant law”<sup>105</sup> and to report that “a tidal wave of change began sweeping over American landlord–tenant law,”<sup>106</sup> during which the “law of landlord–tenant relations has been completely rewritten.”<sup>107</sup> Yet, our review has shown that the thrust of the revisions was sometimes doubtful,<sup>108</sup> and despite best intentions, these piecemeal reforms did not clarify our theory of tenancy.<sup>109</sup> Such a clarification would need to take into account potential effects of independent or interdependent doctrinal construals. We next turn to empirical research findings to enable us to consider such effects.

### III. INDEPENDENCE AND INTERDEPENDENCE: THE PSYCHOLOGICAL LENS OF SELF-CONSTRUAL

To inform a theory of tenancy, we need to consider how independent and interdependent construals may affect real human beings in a tenancy relationship. Let us therefore turn to a branch of psychology dedicated to studying independent and interdependent relationships. I will first outline its development (*infra* A.), explore its conceptual toolkit (B.), and justify why policy analysts should pay particular attention to its findings (C.) before reviewing the actual use cases found in the legal literature, including its newest use case—tenancy (IV.).

#### A. Cultural Psychology: Introducing the Self-Construal Paradigm

In 1975, an aspiring social psychologist submitted a doctoral thesis that came to redefine how psychologists think about independence and interdependence. Twenty-six year old PhD student Hazel Markus presented her research on “cognitive generalizations about the self,” which

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105. Glendon, *supra* note 46, at 503; Spector, *supra* note 29, at 205 (“revolution and subsequent regulation.”); see also Symposium, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517–683 (1984).

106. SPRANKLING, *supra* note 19, at 235.

107. Love, *supra* note 21, at 21.

108. See text accompanying notes 92, 93, and 104.

109. See Merrill & Smith, *supra* note 43, at 821 (“the courts drew up short of completely adopting a contract model.”).

she called “self-schemata.” As she explained in a subsequent publication, human beings use past experiences to form implicit self-schemata “that organize and guide the processing of self-related information contained in the individual’s social experiences.”<sup>110</sup> The researcher reported novel data on how prevalent and varied such generalizations were—and her seminal paper struck a chord: Venerated as one of “the important” psychological studies of the 1970s, it “inspired a generation of researchers,”<sup>111</sup> and became immensely influential in psychology circles.<sup>112</sup>

More than 40 years later, Markus is a professor for behavioral sciences at Stanford University and her research has grown into an entire subfield of the behavioral sciences: “cultural” psychology.<sup>113</sup> Contrary to what this moniker may suggest, cultural psychologists do not compare societies or macro-cultures holistically (as *cross-cultural* psychologists would) but instead study human behavior in the context of what Markus called “social experiences” 40 years ago. As a field of study, this research entered the mainstream with a paper on “Culture and the Self” by Markus and a former PhD student from Japan.<sup>114</sup> While they were not the first researchers to “broach the issue of the self as critical in understanding cultural differences,” their seminal paper was among “the first to make this argument clearly and to make it accessible to a wide audience.”<sup>115</sup> It quickly turned into a “modern classic of social psychology,”<sup>116</sup> being cited an average of three times each day since being

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110. Hazel Markus, *Self-Schemata and Processing Information About the Self*, 35 J. PERS. & SOC. PSY. 63, 64 (1977).

111. Patricia G. Devine & Amanda B. Brodish, *Modern Classics in Social Psychology*, 14 PSYCH. INQ. 196, 200 (2003).

112. This is evidenced, *inter alia*, by its being cited an average of 2–3 times every week since being published: on December 7, 2019, at least 2,231 weeks after the February 1977 publication, Google Scholar listed 5,700 citations. GOOGLE SCHOLAR, scholar.google.com/scholar?cites=6398172316660250160 [https://perma.cc/364T-GBVH].

113. See HANDBOOK OF CULTURAL PSYCHOLOGY (Dov Cohen & Shinobu Kitayama eds., Guilford Press 2d ed. 2019); Steven J. Heine, *Cultural Psychology*, in HANDBOOK OF SOCIAL PSYCHOLOGY 1423, 1428–33 (Susan T. Fiske et al. eds., Wiley 2010). Popular exposition in HAZEL ROSE MARKUS & ALANA CONNE, CLASH!: 8 CULTURAL CONFLICTS THAT MAKE US WHO WE ARE (Hudson Street Press 2013).

114. Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCH. REV. 224 (1991).

115. Susan E. Cross, Erin E. Hardin & Berna Gercek-Swing, *The What, How, Why, and Where of Self-Construction*, 15 PERS. & SOC. PSYCH. REV. 142, 143 (2011); see also Heine, *supra* note 113, at 1423 (“Around 1990, several seminal papers and books emerged that articulated how cultural experiences were central to and inextricably linked with psychological processing (Bruner, 1990; Markus & Kitayama, 1991; Stigler, Shweder, & Herdt, 1990; Triandis, 1989).”).

116. Devine & Brodish, *supra* note 111.

published.<sup>117</sup> Much of this impact surely results from the concept's appeal across disciplines—being the brain-child of social psychologists, it was also inspired by a vast body of anthropological research as “evidence that people hold divergent views about the self.”<sup>118</sup>

Cultural psychologists study context-rich social situations to illuminate how human thought and action are shaped by their “interpretive frameworks.”<sup>119</sup> Putting it this way may evoke the proverbial image of “lenses through which we see the world,” yet this simile might be misleading: Whereas lenses can be shed and the naked eye turned on the phenomenon of interest, cultural psychology asserts that observers can never be separated from their interpretive framework, which some have called “systems of thought.”<sup>120</sup> As a fundamental tenet, “[s]ituations and cultures are in fact not separate from people” because “as people adapt to the resources, requirements, and norms of different situations . . . their psychologies become different.”<sup>121</sup>

This differentiation happens through a process that cultural psychologists call *self-construal*, in which individuals define their own self-image in response to a sociocultural context. “Among the many different ways people can construe themselves,” notes a recent review article, “cultural psychological research provides consistent evidence for at least two shared, influential, and widely practiced types of self-construals”: “people can perceive and understand themselves to be separate from and independent from others” or see themselves “as connected to and interdependent with others.”<sup>122</sup> This particular dichotomy has proven such a fruitful application of the broader concept of self-

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117. On December 7, 2019, at least 1,492 weeks after the April 1991 publication, *supra* note 114, Google Scholar listed 28,900 citations. GOOGLE SCHOLAR, scholar.google.com/scholar?cites=4945959484737709785 (last visited Dec. 7, 2019) [https://perma.cc/FWK7-9AZ9].

118. Markus & Kitayama, *supra* note 114, at 224 (listing 16 influential anthropological publications); see also the concurrent manifesto by cultural anthropologist RICHARD A. SHWEDER, THINKING THROUGH CULTURES: EXPEDITIONS IN CULTURAL PSYCHOLOGY (1991).

119. Markus & Hamedani, *supra* note 2, at 12.

120. Richard E. Nisbett et al., *Cultures and Systems of Thought: Holistic Versus Analytic Cognition*, 108 PSYCH. REV. 291 (2001).

121. Markus & Hamedani, *supra* note 2, at 14.

122. *Id.* at 18; macro-sociologically, this corresponds to *individualism* and *collectivism*, Cross et al., *supra* note 115, at 143–44 (“IND-COL describes cultures; self-construal describes individuals . . . Unfortunately, the two terms are often confused or used interchangeably.”); from legal literature only Amir N. Licht, *The Mother of All Path Dependencies Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 170–71 (2001) (section “Level of Analysis – Cultural vs. Individual”).

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construal that it has “become virtually synonymous”<sup>123</sup> with self-construal, overshadowing all other personality dimensions that individuals may construe.

While both of these dominant “types”—independent and interdependent self-construal—seem to be defined as mutually exclusive, psychologists do not assume self-construals to be strictly binary.<sup>124</sup> Instead, independent and interdependent construals appear to mark idealized ends of a graded continuum along which each individual positions herself, with very few people actually occupying the extremes. Their position on the continuum is not fixed, either. It may change over time, and there are already hundreds of studies across several disciplines on how people’s position on the continuum develops, gets expressed, and modified.<sup>125</sup> The general finding, however, of a spectrum between the interdependent “way of being and construal of the self as a connected, relational individual” and the independent “way of being and construal of the self as a separate, bounded, autonomous individual” seems to generalize so well across societies and cultures that it may just be one of the few “universal existential themes” across the social sciences.<sup>126</sup> Some even call it “the most fundamental aspect in which cultures differ in their psychology.”<sup>127</sup>

#### *B. Independence and Interdependence: Vectors of the Self?*

Even when we accept that interdependence and independence meaningfully anchor human self-construal, the idea of its position along “a” continuum between independence and interdependence does not require “one” fixed continuum. An early ambition of cultural psychology—initially proposed as a means of understanding cultural differences in behavior—had to be refined, as an extensive review of the first 20 years of research noted: “researchers also recognize the potential role of within-culture variation in self-construal for explaining many psychological phenomena.”<sup>128</sup> Such “within-culture variation” does not limit, but actually highlights the usefulness of cultural psychology: It

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123. Cross et al., *supra* note 115, at 143.

124. Note that recent evidence even suggests a “tri-partite self-construal” that distinguishes “relational” from “collective” interdependence. *Id.* at 144–45.

125. See *supra* note 117 (finding thousands of citations to Markus & Kitayama’s seminal publication), and Cross et al., *supra* note 115, at 146 (noting that the *Self-Construal Scale* “has been used in hundreds of studies and translated into numerous languages.”).

















126. Markus & Hamedani, *supra* note 2, at 19, 20–21.

127. Heine, *supra* note 113, at 1429.

128. Cross et al., *supra* note 115, at 168 (internal citations omitted).

helps us understand not merely macro-cultures, but even “cultures” of considerably smaller scale. Specifically, the contexts and roles that anyone negotiates on a daily basis. Consider a stylized list of only nine out “of the dozens of cultural contexts” that cultural psychologists have studied:<sup>129</sup>

Table: Nine cultural contexts anchored by competing self-construals.

	Independent	Interdependent
<b>Hemisphere</b>	West 	East 
<b>Gender</b>	Male 	Female 
<b>Race/Ethnicity</b>	White 	Person of Color 
<b>Class</b>	Middle-Class 	Working Class 
<b>U.S. Region</b>	East & West Coasts 	South & Midwest 
<b>Religion</b>	Mainline Protestants, Not religious 	Conservative Protestants, Catholics, Jews, Other 
<b>Workplace</b>	Business 	Nonprofit, Government 
<b>Global Region</b>	Global North 	Global South 
<b>Generation</b>	Gen Xers, Millenials >1960	Baby Boomers <1960

Note: Illustration courtesy of Hazel Rose Markus.

To better illustrate just one of the dichotomies in the table,<sup>130</sup> consider a study by cultural psychologists at Stanford on the effects of social class (fourth table row): They asked 62 professionals “to imagine buying a new car, showing it to a friend, and finding out the next day that the friend purchased the same car.”<sup>131</sup> The researchers put this hypothetical to two different groups of professionals. One group consisted of MBA students—highly educated managers, with years of career development focused on “self-directed, dynamic, and substantively complex” tasks.<sup>132</sup> The other group consisted of firefighters—relatively less educated and

129. Quote and extended discussion in MARKUS & CONNER, *supra* note 113, at 212 (using a slightly simpler version of the table reproduced here).

130. For more elaborate examples from legal contexts, see *infra* IV.

131. Nicole M. Stephens, Hazel Rose Markus & Sarah S.M. Townsend, *Choice as an Act of Meaning: The Case of Social Class*, 93 J. PERS. & SOC. PSYCH. 814, 822 (2007) (Study 4a).

132. *Id.* at 821.

more attuned to working-class constraints, such as “following well-defined rules and performing scripted, routine tasks.”<sup>133</sup> These social experiences were hypothesized to place both groups of respondents on different ends of the spectrum between an independent “preference for individuation and differentiation” (more pronounced in managers), and an interdependent “preference for similarity to and connection with others” (more pronounced in firefighters).<sup>134</sup> The observed difference between these groups was indeed striking: Most firefighters (26 out of 30) responded positively to their friend buying the same car as they had—with replies such as “Fantastic, he gets a great car.”—and only one expressed negative sentiments.<sup>135</sup> The exact reverse was true for managers: Only four expressed positive reactions, and almost half of the respondents (15 out of 32) reacted adversely, with replies such as “I would feel somehow betrayed.”<sup>136</sup>

This finding illustrates the variability of construals even within the same macro-culture (white male professionals in California, United States).<sup>137</sup> This raises questions of intersectionality among social contexts: What if all managers had been Japanese women (two characteristics that both tend towards interdependence)? Or all firefighters white atheists (two characteristics that both tend towards independence)? It would thus seem illusory to imagine a single graded continuum between independence and interdependence. Instead, we should acknowledge that anyone’s “identity” is really multiple identities rolled in one—it is “made up of a number of elements.”<sup>138</sup>

This raises a follow-up question: How do these various elements or identities combine into a coherent whole? Research has identified “two complementary perspectives” labelled, respectively, as “blending” of self-concepts and sequential “frame switching.”<sup>139</sup>

The former may be most graphically illustrated by a simile from physics: Instead of our initial geometric metaphor (“graded continuum”) we could employ a more sophisticated one by imagining the self as a high-dimensional vector space. Within this space, many force vectors—one for each cultural context that shapes the self—represent psychological

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133. *Id.*

134. *Id.* at 816.

135. *Id.* at 822 table 1.

136. *Id.*

137. In both respondent groups, 93–94% of participants were men and more than half identified as Caucasian: 78% of managers, 53% of firefighters. *Id.*

138. AMIN MAALOUF, *IN THE NAME OF IDENTITY* 9–29 (Barbara Bray trans., Arcade Publ’g ed. 1996) (2000) (quoted material is cited on page 10).

139. Heine, *supra* note 113, at 1433.

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forces of attraction or repulsion, pulling the individual a certain distance either towards independence or interdependence. The resultant of all these vectors would be a subject's overall self-construal, i.e., a temporary equilibrium state in a dynamic system of permanent inner tension. Let me refer to this as the vectors-of-the-self model.

The competing view suggests that even the idea of a unified vector space is too simple because the meaning of "independence vs. interdependence" may vary by context. Individuals might have a mental toolbox of differently calibrated independence-interdependence strategies, using situational cues to switch between them: "Much recent evidence shows that multiculturals engage in frame switching for various psychological processes," and even "people with largely monocultural experiences also frame-switch in similar ways."<sup>140</sup> While this perspective seems to eliminate the need for an integrated (holistic) view of self-construal, it really just elevates the problem to a meta-level: We now need to understand *how* individuals switch between frames and how this switching behavior depends on (or is mediated by) cultural meta-construals.

In short: No matter whether we conceive of self-construal *integratively* (as the resultant of psychological forces), or *eclectically* (as a toolbox with an unknown meta-manual), we may conclude that self-construal responds differently to different circumstances. It is sensitive not only to Culture writ large but to all of the many cultures that each of us navigates on a daily basis.

### C. Self-Construal as a Style—and Cause—of Agency

Now that we understand the conceptual foundations of cultural psychology and have considered an integrated view of self-construal, how does all of this matter to policy analysts? How might self-construals predict behavior?

The distinction between independent and interdependent self-construals was never a matter of philosophical hair-splitting but an attempt at better understanding, even predicting, human decision-making. Self-construals, said Markus and colleagues, influence the "*style of agency* or acting in the world": Whereas the independent style implements values such as "being free from constraints as well as free to choose, and being equal to others," the interdependent style maximizes "similarity to others, adjusting to situations, following norms, being rooted in traditions,

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140. *Id.*



meeting obligations, and being ranked in hierarchy.”<sup>141</sup> The question becomes “whether self-construal is best understood as the *cause* of a variety of behaviors or is better viewed as a way to *interpret* cultural differences in behavior.”<sup>142</sup>

There is just one way to find out whether a person “who thinks interdependent thoughts also becomes more” interdependent in their behavior:<sup>143</sup> experimentation. If a sufficiently large sample of individuals gets randomly assigned to either independent or interdependent self-construals, and these groups behave measurably differently, this would be good evidence that a particular self-construal causes or predicts a particular behavior. Yet, since psychologists cannot permanently assign respondents to a particular self-construal, they turned to a method called *priming*. They expose participants to decision-making situations where cues deliberately favor either an independent or an interdependent self-construal, which allows researchers to compare behaviors between these treatments and to isolate the effect of either self-construal on behavior:

[By] showing a change in effect when individualism is accessible and salient, compared to when collectivism is accessible and salient, or in comparison to control, the method allows for examination of these cultural factors even in the presence of other personal or societal concomitants.<sup>144</sup>

As just one example of these studies, consider the prominent pronoun-circling task: Researchers asked participants to proofread a story about a trip to the city which—unbeknownst to participants—existed in two versions with different pronouns. Specifically, “the pronouns were independent (e.g., *I, mine*) or interdependent (e.g., *we, ours*). The participant’s task was to circle all the pronouns in the paragraph.”<sup>145</sup> After this

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141. Markus & Hamedani, *supra* note 2, at 18; see Markus & Kitayama, *supra* note 114, at 228 (suspecting, almost 30 years prior, that “agentive exercise of control” would be influenced by self-construal).

142. Cross et al., *supra* note 115, at 169.

143. Heine, *supra* note 113, at 1433.

144. Daphna Oyserman & Spike W. S. Lee, *Does Culture Influence What and How We Think? Effects of Priming Individualism and Collectivism*, 134 *PSY. BULL.* 311, 313–14, 329–30 (2008) (describing this as “an experimental analogue of chronic between-society differences by temporarily focusing participants’ attention on culture-relevant content.”); see also Cross et al., *supra* note 115, at 169 (“Priming techniques help researchers begin to approximate the ways that self-construal influences thinking and feeling.”).

145. Wendi L. Gardner, Shira Gabriel & Angela Y. Lee, “*I Value Freedom, but “We” Value Relationships: Self-Construal Priming Mirrors of Cultural Differences in Judgment*,” 10 *PSY. SCI.* 321, 322 (1999). This was based upon the prior design of Marilyn B. Brewer and Wendi Gardner, who used three pronoun conditions: *we/us* vs. *they/them* vs. *it*; see Marilyn B. Brewer & Wendi Gardner, *Who Is This “We”? Levels of Collective Identity and*

subtle manipulation, researchers measured participants' personal values using three standardized psychological tests. They found that when subjects had circled interdependent pronouns (*we/ours*) and then provided 20 self-descriptions, they were more likely to describe themselves in terms of their roles in important relationships than in terms of their own personal attributes.<sup>146</sup> Similarly, for standard measures of participants' value orientations, the *we/ours* priming was found to "shift values to reflect more collectivist goals," and in a third test that "measured the extent to which interpersonal norms of helping behavior were seen as objective obligations," subjects showed significantly greater willingness to reproach and even punish other people for exhibiting insufficiently other-regarding behavior.<sup>147</sup>

The pronoun-circling task is just one type of many studies employing "manipulations of self-construal" that cultural psychologists have developed and reviewed.<sup>148</sup> Some ten years ago, Daphna Oyserman and Spike Lee conducted a meta-analysis<sup>149</sup> of the "effects of priming individualism and collectivism."<sup>150</sup> They analyzed 96 studies that used various manipulations of self-construal. The combined evidence of these studies showed that inducing in participants a particular (independent or interdependent) self-construal caused behavioral changes that were "robust to variations in design characteristics," thus "suggesting that these effects of individualism and collectivism are not bound to specific contexts" and "have causal effects on outcomes of interest."<sup>151</sup> This is the best evidence we have to date, and it strongly suggests that where social cues define a situation as independent or interdependent, individual behaviors follow suit.

To understand how this could be such a universal human tendency, some researchers have turned to studying the brain. The last 10–15 years saw a surge of neurological studies of self-construal priming. One

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*Self Representations*, 71 J. PERS. & SOC. PSY. 83, 87 (1996).

146. Gardner et al., *supra* note 145, at 323.

147. *Id.* at 322–23.

148. Cross et al., *supra* note 115, at 150–53.

149. This is "a statistical approach to synthesizing the results of several studies—sometimes a handful, sometimes hundreds," that "systematizes literature reviews" and was suggested to support "evidence-based jurisprudence." Hanjo Hamann, *Unpacking the Board A Comparative and Empirical Perspective on Groups in Corporate Decision-Making*, 11 BERKELEY BUS. L.J. 1, 29–30 (2014).

150. Oyserman & Lee, *supra* note 144, at 314, 329 (explaining that "the question asked is if the proposed association between culture and cognitive processes, for example, is stronger when an aspect of individualism or collectivism is made accessible and salient.").

151. *Id.* at 330.

researcher in particular promoted this kind of research—Shihui Han, head of the Culture and Social Cognitive Neuroscience lab at Beijing University. He repeatedly reviewed the growing evidence on the neurocognitive processes translating self-construal into behavior.<sup>152</sup> This evidence, he argued, indicates “that the interdependent self-construal priming may facilitate mental readiness for attention to social contexts whereas the independent self-construal priming may promote a mental readiness state for self-focusing.”<sup>153</sup> The former kind of “mental readiness” induced by interdependent self-construal may even go so far as to experience rewards to a friend just as strongly as rewards to oneself.<sup>154</sup> Such findings suggest that altering the way someone construes a situation can change their experience of the world in such fundamental ways that behavioral acculturation becomes a literal “no-brainer.”

#### IV. THE PSYCHO-LOGICAL SYNTHESIS: CONSTRUING TENANCY AS A PROCESS OF SELF-CONSTRUAL

The previous section showed that the psychology of culturally framed construal illuminates how social forces interact to shape people’s propensity for independent or interdependent behavior. More significantly, we have seen that exogenous cues may alter construals and (hence) behavior causally. This implies that how law treats a particular relationship (as either independent or interdependent) will change people’s perception of—and behavior in—this relationship. To probe this assumption, we will now review applications of self-construal psychology to legal issues (*infra* A.). As the closest analogue to the present question, we will then focus specifically on how self-construal got applied to property theorizing (B.). Extending these previous applications, we will lastly consider how tenancy may be affected by independent or interdependent construal (C.).

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152. Shihui Han & Georg Northoff, *Understanding the Self: A Cultural Neuroscience Approach*, in 178 *PROGRESS IN BRAIN RESEARCH* 203, 207–10 (J. Y. Chiao ed., Elsevier 2009); Shihui Han et al., *A Cultural Neuroscience Approach to the Biosocial Nature of the Human Brain*, 64 *ANNU. REV. PSYCH.* 335 (2012); Shihui Han, *Cultural Priming on Cognition and Underlying Brain Activity*, in *THE SOCIOCULTURAL BRAIN: A CULTURAL NEUROSCIENCE APPROACH TO HUMAN NATURE* 134–59 (Oxford UP 2017).

153. Shihui Han & Glyn Humphreys, *Self-construal: a cultural framework for brain function*, 8 *CURRENT OP. PSYCH.* 10, 12 (2016).

154. Michael E.W. Varnum et al., *When “Your” Reward is the Same as “My” Reward: Self-Construal Priming Shifts Neural Responses to Own vs. Friends’ Rewards*, 87 *NEUROIMAGE* 164, 164 (2014).

A. *The Self-Construal Paradigm Applied to Legal Issues*

The “use cases” of self-construal in legal thinking have never been reviewed. They are not easily tracked, as they scatter across various legal domains and rarely cite one another. Yet, such a review might help us both to illustrate the abstract cultural dimensions introduced previously,<sup>155</sup> and to model the role of self-construal in tenancy in a similar fashion.

In order to conduct the first comprehensive review of self-construal reasoning in English-speaking law journals, I searched the HeinOnline database to obtain 46 relevant articles for close reading.<sup>156</sup> Except for papers dealing exclusively with foreign jurisdictions,<sup>157</sup> the earliest substantial discussion of self-construal appeared in 2003/04 (roughly ten years after cultural psychology’s seminal manifestos) in the domains of criminal procedure, privacy law, and corporate governance. Those early contributions were later (in 2011–14) complemented by self-construal theorizing in (intellectual) property, tort law, and civil procedure. I focus my review on these six domains, glossing over other areas—such as contract, trademark, and biotech law—where self-construal may have been noted in passing, but not discussed substantially.<sup>158</sup>

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155. *See supra* III.B.

156. I searched for (“construal? of self”~1 OR “self-construal”) OR (“culture and the self” AND markus)) AND (independen\* OR interdependen\*). This yielded 149 search results on 18 July 2021, but I limited close reading to academic journals including “law reviews” but excluding the negotiation literature.

157. *E.g.*, Günter Bierbrauer, *Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans*, 28 L. & SOC. REV. 243, 245 (1994) (noting, however, that “This study focuses on norms rather than on formal legal practices.”); Aleardo Zanghellini, *Gay Surrogacy, Intentionality and Tahitian Parenting*, 20 GRIFFITH L. REV. 1, 25 (2011) (discussing the “increased legal acceptability of surrogacy in Australia.”); Keren Cuervo, Lidón Villanueva & Miguel Basto-Pereira, *Prediction of Youth and Adult Recidivism Among Spanish Juveniles Involved in Serious Offenses*, 47 CRIM. JUST. & BEHAV. 399 (2020).

158. *See* Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J. L. & GENDER 437, 456, 460 (2013) (citing surveys where women were considered “more interdependent and concerned with others, while the male respondents more frequently defined themselves as independent and self-assertive” to show that this may “raise costs and risks for women in negotiations.”); Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2049 n.126 (2005) (citing Markus & Kitayama, *supra* note 114, to note the role of self-construal in consumer persuasion resistance); Sophie Mills, *Owning Myself: A Reconciliation of Perspectives on the Body*, UCL JURIS. REV. 191, 192 n.40 (1999) (citing Markus & Kitayama, *supra* note 114, on concepts of the body as they relate to “controversies surrounding ownership of regenerative cells and tissue.”); somewhat more elaborate in the context of policing *see* Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 718–20 (2015) (seeking an “improve[d] understanding as to how community rights would

*Criminal Procedure:* In their review of cognitive biases that affect jury decision-making in criminal trials, Stanford psychologists Lee Ross and Donna Shestowsky suggested a psychological explanation for both the undue impact of character evidence on jurors and the frequent failure of the entrapment defense.<sup>159</sup> The researchers observed that “jurors often have a difficult time believing that various police tactics could induce otherwise honest people . . . to commit criminal acts” and explain this as a function of the documented “dispositionist bias” that “especially people in the individualistic cultures . . . tend to show” according to self-construal research in cultural psychology.<sup>160</sup>

*Privacy Law:* In a feminist reevaluation of the right to privacy as initially conceived in 1890, Jessica Bulman contended that the seminal article on the topic had espoused “a distinctly male privacy” that “inadequately address[ed] women’s needs.”<sup>161</sup> The author argued that women had been treated as “the objects rather than the subjects of privacy,” denying their urge to “forge their personalities in conjunction with others.”<sup>162</sup> This imbalanced concept of privacy was satirized, the author argued, by intellectual contemporaries like Edith Wharton, whose novels advocated for a more “expansive sense of privacy,” catering to “the needs of the interdependent self rather than the right to be left alone.”<sup>163</sup> Discussing this literary critique, Bulman relates it specifically to self-construal research: “Many social psychologists have argued that the interdependent self is a non-Western and female notion, in contrast to the independent self that is Western and male.”<sup>164</sup> The author perceived these psychological findings as empirical corroboration for a critique of

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function” from a study on educational policy tailored to independent or interdependent thinking styles). More tangentially, see Darby Dickerson & Marjorie M. Buckner, *Communication Conundrums: Theories About and Tips for Effective Decanal Communication*, 48 U. TOL. L. REV. 211, 236 (2017) (on self-construal in deceptive communication with law school deans).

159. Lee Ross & Donna Shestowsky, *Contemporary Psychology’s Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1093 (2003).

160. *Id.* (in n.55 citing Markus & Kitayama, *supra* note 114).

161. Jessica Bulman, *Edith Wharton, Privacy, and Publicity*, 16 YALE J. L. & FEM. 41, 54 n.79, 81 (2004) (citing the seminal article by Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 [1890] to argue that “their examples—for instance, the man who does not dine with his wife and wishes to keep this a secret—underscore the gendered meanings of privacy in their article.”).

162. *Id.* at 55, 81 (adding that even in private spaces women could “not exercise a meaningful right to privacy, for their homes were their husbands’ castles.”).

163. *Id.* at 45, 78 (“Whereas they [Warren & Brandeis] posit an inviolate personality, she [Wharton] posits an interdependent self; and whereas they champion ‘the right to be let alone,’ she suggests that privacy is only possible in the context of publicity.”).

164. *Id.* at 67 n.137 (citing Markus & Kitayama, *supra* note 114).

privacy law along the lines of what Wharton's female character developments implied.

From quite a different angle, Lara Ballard rejected what she perceived to be "hair-splitting between American and European perspectives" on privacy, instead suggesting that privacy scholars put on "the lens of traditional Daoist metaphysics."<sup>165</sup> Her analysis of privacy starts by questioning our "assumptions about the nature of the self as a legal subject" and contrasts them in detail with "Daoist and Zen concepts of selfhood."<sup>166</sup> The author derived this juxtaposition from "socially-situated models of the self" as anchored culturally between independence and interdependence:

To the Westerner, it makes sense to speak of a person as having attributes that are independent of circumstances or particular personal relations . . . . But for the Easterner (and for many other peoples to one degree or another), the person is connected, fluid, and conditional.<sup>167</sup>

The author urges privacy scholars to study cross-cultural differences "to instigate a more inclusive and global conversation about privacy," but she also admonishes them "not to equate nations with cultures," since self-construal cuts across national and other social contexts.<sup>168</sup> This neatly echoes our previous reading of self-construal as highly variegated and context dependent.<sup>169</sup>

*Corporate Law*: In a series of articles on cultures of corporate governance, Amir Licht explored various implications of self-construal and cultural differences more generally. In one of the first articles referring to self-construals, the author integrated psychological studies on "cognitive styles across cultures" into what he called "foundations for a new theory" of corporate governance.<sup>170</sup> By pointing to evidence for different self-construals in the West ("characterized by a sense of autonomy and

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165. Lara A. Ballard, *The Dao of Privacy*, 7 MASARYK U. J. L. TECH. 107, 111, 114 (2013).

166. *Id.* at 107, 131.

167. *Id.* at 136 (later citing Hazel Rose Markus at 139).

168. *Id.* at 114, 172 (noting that "collectivistic sub-cultures" exist even "within the United States; chief among them, the U.S. Armed Forces.").

169. See *supra* III.B., and Oysermann & Lee, *supra* note 144, at 312 ("American society can often be characterized as individualistic but there are situations in which American society is better characterized as collectivistic, such as when national group membership is salient or threatened.").

170. Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 656, 673 (2004) (referring at 675 to Markus & Kitayama, *supra* note 114, and similar concepts such as "Schwartz's Autonomy/Embeddedness dimension" and "Hofstede's and Harry Triandis' Individualism/Collectivism distinction."). Compare previously Licht, *supra* note 122 (strictly cross-cultural [i.e., macro-comparative], with no reference to individuals' self-construal).

distinctiveness from others”) and in East Asia (where “one’s identity is diffused socially across significant others in one’s in-group”), the author questioned “the universality assumption about cognitive processes.”<sup>171</sup> He concluded that

the very notion of ‘conflict of interest’ takes on a different meaning in a high Embeddedness society, in which the individual self is perceived as an interdependent entity in a large array of other social members. As a result, basic institutions from the standard American corporate governance toolkit, e.g., the independent director, may be incompatible with East Asian corporate governance systems, or would at least produce different outcomes.<sup>172</sup>

In another study published in the same year, the author noted that stock corporations may occasionally cross-list securities in multiple jurisdictions as “a vehicle for international convergence toward globally desirable governance regimes.”<sup>173</sup> He reiterated much of his previous analysis<sup>174</sup> and concluded “that basic concepts of corporate governance—including accountability, self-dealing, and fair and equitable treatment—would be related to certain value emphases and cognitive styles,”<sup>175</sup> and therefore ill-suited to be transplanted easily.

In later work, the same author kept engaging in self-construal research on occasion<sup>176</sup> and returned to it in 2011 for a treatise on property law, which—given its close relation to the present inquiry—I will discuss separately in section B. Concurrently, another dimension of property became infused with self-construal thinking, namely intellectual property.

*Intellectual Property:* In a critique of the assumptions underlying current IP law, Keith Sawyer identified “a set of ten implicit beliefs about creativity that members of Western and European cultures often hold.”<sup>177</sup> He hypothesized that independent selves, with their focus on uniqueness and differentiation, “believe that artists embody these traits to an extreme—artists are more unique, more different, and more separate than the average person”—whereas interdependent selves “hold to

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171. Licht, *supra* note 170, 674–75.

172. *Id.* at 683.

173. Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT. L. 195, 197 (2004).

174. *Id.* at 221 (referring to the same concepts as Licht, *supra* note 170).

175. *Id.* at 223–24 (in n.147 citing another study by Hazel Rose Markus).

176. See Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture, Law, and Corporate Governance*, 25 INT. REV. L. & ECON. 229, 233 n.20 (2005); Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 REV. L. & ECON. 715, 740 n.32 (2008).

177. R. Keith Sawyer, *The Western Cultural Model of Creativity: Its Influence on Intellectual Property Law*, 86 NOTRE DAME L. REV. 2027, 2027 (2011).

a very different cultural model of creativity.”<sup>178</sup> After discussing each of the ten Western “creativity beliefs” and finding that many of them are not supported by scientific evidence, the author concluded “that an alternate IP regime could result in increased creativity and innovation.”<sup>179</sup> To suggest contours for such an alternate regime, the author discussed creativity beliefs in cultures of interdependent self-construal, and resorted to an unusual writing technique that directly put interdependent creativity to the test: He enlisted a captive live audience of prominent IP law scholars as unwitting coauthors by having them brainstorm what a more interdependent IP regime should look like.<sup>180</sup> Among the suggestions that the author cited and endorsed was legally enabling “collaboration without adverse IP consequences,” an emphasis on “doctrines of fair use in copyright, experimental use in patent law,” protection of moral IP rights, patenting of idea execution rather than ideation, and taking into account the role of intermediaries in generating intellectual property.<sup>181</sup>

More recently and more broadly, Gregory Mandel and his coauthors went about “debunking intellectual property myths” by empirically examining “attitudes towards intellectual property rights, personal property rights, and real property rights” in college student samples from the United States and China.<sup>182</sup> In a section entitled “Psychological Conceptions of Property,” they referred to findings from cultural psychology to shed light on “the distinct histories of property rights in China and America.”<sup>183</sup> Deriving hypotheses on the effect of independent and interdependent construals, the authors tested them in a vignette study, obtaining mixed results and concluding that comparing across cultures “is not as straightforward as commonly assumed” because “Americans and Chinese have richer and more complex preferences for property rights than previously considered.”<sup>184</sup>

*Tort Law:* Comparative law scholar Salil Mehra noted a close correlation between independent and interdependent self-construals and two other macro-level dichotomies: dispositionist/situationist biases in behavioral law-and-economics and litigious/harmonious jurisdictions in

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178. *Id.* at 2029.

179. *Id.* at 2052.

180. *Id.* at 2055–56.

181. *Id.* at 2054–55.

182. Gregory N. Mandel, Kristina R. Olson & Anne A. Fast, *Debunking Intellectual Property Myths: Cross-Cultural Experiments on Perceptions of Property*, *BYU L. REV.* 219, 220 (2020).

183. *Id.* at 242.

184. *Id.* at 219.



comparative law.<sup>185</sup> Attempting to turn this correlation into fruitful “implications for comparative law studies of accidents,”<sup>186</sup> he first identified three “offshoot[s] of the cultural psychology project,” and reviewed two of them for evidence on blame attribution.<sup>187</sup> Then he conducted his own experimental study of how respondents from the United States and from Japan attribute harm in ambiguous accident situations.<sup>188</sup> Based on his findings, he posited “a culturally-inflected transmission belt of harm attribution,” identifying detailed implications for comparative law, for the international human rights debate with Asia, for extraterritorial enforcement, and for tort remedies against transnational environmental harm.<sup>189</sup>

*Civil Procedure:* In an analysis of “how jury diversity works to promote its underlying political and civic goals,” Berkeley psychologists Christina Carbone and Victoria Plaut considered the effects of both culture and “differences in socioeconomic status” on jurors’ perspectives.<sup>190</sup> They referred to “a growing line of research”—including the MBA/firefighter study discussed earlier<sup>191</sup>—as a demonstration of how “working class contexts . . . foster an interdependent model of the self with a focus on maintaining integrity, adjusting the self to one’s environment, and connection and similarity to others,” whereas “middle class contexts . . . foster an independent self with a focus on expressing uniqueness and controlling one’s environment” as well as “personal choice, especially as an expression of personal freedom.”<sup>192</sup> The authors argued that the resulting “orientations toward independence/individualism and interdependence/collectivism” would

potentially impact a juror’s expectations and interpretations of standards such as due care and the obligations people in society owe to one another—questions that often come up in the context of civil trials.<sup>193</sup>

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185. Salil K. Mehra, *Blaming: Harm Attribution in the United States and Japan*, 75 U. PITT. L. REV. 39, 60 (2013).

186. *Id.* at 39.

187. *Id.* at 55–59 (the offshoots being “experimental results,” “studies of different cultural contexts,” and “perhaps most controversially, claimed links between culturally-contingent mental processes and the philosophical traditions that inform different cultures’ worldviews”; only the former two are examined further in the article).

188. *Id.* at 65–90.

189. *Id.* at 90–96.

190. Christina S. Carbone & Victoria C. Plaut, *Diversity and the Civil Jury*, 55 WM. & MARY L. REV. 837, 838, 859–61 (2014).

191. See text accompanying notes 130–138.

192. Carbone & Plaut, *supra* note 190, 860–61.

193. *Id.* at 859–60.

To conclude our *tour d'horizon* of how self-construal research has informed various legal domains, I will lastly turn to the study that I had previously set aside for a more detailed discussion, as it concerns the domain most pertinent to our present inquiry.

B. *Self-Construal in Property (Lehavi & Licht 2011)*

Among the many uses to which legal literature has put self-construal theory, one study stands out as particularly instructive in the present context.<sup>194</sup>

Amnon Lehavi and Amir Licht delved into what independent and interdependent self-construal might mean for property law: They studied bilateral investment treaties and their purported and real effects “on securing cross-border property rights.”<sup>195</sup> Cross-border property protection, the authors argued, is attenuated by five sources of heterogeneity across national property regimes, one of them being “cultural heterogeneity among societies in their approaches to the concept of property.”<sup>196</sup> This proceeded into an in-depth study of independent and interdependent self-construals, taking the aforementioned work of Hazel Markus as a “theoretical starting point” but adopting terminology by an Israeli colleague who had translated independence to “autonomy” and interdependence to “embeddedness.”<sup>197</sup> Using this dichotomy, the authors hypothesized that

a cultural construal of the self as diffuse and contextual entails that legal entitlements, including entitlements to assets, will also be diffuse and less well defined. If in high-embeddedness cultures who and what one is may depend on context, then . . . ownership would be fuzzy because the mature self who bears claims to property is fuzzy.<sup>198</sup>

The authors tested this assumption by “conduct[ing] a short-form empirical analysis of the relationship between culture and property rights protection.”<sup>199</sup> Using publicly-available indices for embeddedness (interdependence) and property rights protection across 48

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194. A more recent study by Mandel et al., *supra* note 182, at 243, also examined attitudes to property, using empirical vignettes on four types of property (patent, copyright, personal, and land), but was limited to comparing respondents from the US (White vs. Asian) and East Asia, or China.

195. Amnon Lehavi & Amir N. Licht, *BITs and Pieces of Property*, 36 *YALE J. INT'L L.* 115, 116 (2011).

196. *Id.* at 117.

197. *Id.* at 140, 141.

198. *Id.* at 141.

199. *Id.* at 163 (appendix reporting on the empirical study).

countries, they showed that, statistically, interdependent cultures protect both physical and intellectual property rights significantly less than independent cultures.<sup>200</sup>

The authors then tried to determine the causal direction of this correlation by using an instrumental variable approach developed in earlier work, concluding that “a country’s fundamental societal orientation toward autonomy or embeddedness causally affects the degree to which its particular institutions protect property.”<sup>201</sup> This finding, they argue, should inform cross-border property law—and the design of bilateral investment treaties in particular—“because cultures are widely seen as very stable institutions” so that any “efforts to unify property regimes may face substantial hurdles.”<sup>202</sup>

The study is thus the first application to property law of cultural psychology in general, and self-construal theory in particular. Using a sophisticated empirical design, it demonstrates the effect of cultural dispositions (independence vs. interdependence) on property rights protection across countries. A drawback of this approach, which considers only country-level aggregates, is that cultures of self-construal do not map precisely onto national borders. As we saw earlier,<sup>203</sup> the cultures that make up individual selves cut across nation-states, some being just sub-cultures within any given nation-state or other political entity. While a cross-country perspective may be adequate for transnational investment treaties, it cannot inform the micro-level tenancy contracts within a given country.<sup>204</sup> The present study will thus be the first to explain (in the next section) a specific property institution in terms of cultural self-construal.

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200. *Id.* at 164 (“Embeddedness exhibits a strong, negative coefficient as an explanatory variable for both PPR protection and IPR protection.”), 142 (“the more a country’s culture emphasizes embeddedness values and deemphasizes autonomy values, the less likely it is to protect property rights.”).

201. *Id.* at 144, 164 (“a country’s fundamental societal orientation toward autonomy or embeddedness affects the degree to which its particular institutions protect property rights.”).

202. *Id.* at 148.

203. *See supra* III.B; *see also* text accompanying note 168.

204. The same critique applies to Mandel et al., cited *supra* note 182, which the authors acknowledged by concluding that “Both the United States and China have rich cultural diversity within their societies, which our studies did not explore.” Mandel et al., *supra* note 182, at 273.

*C. Self-Construal as a Frame to Explain Tenancy*

As we have seen, self-construal is shaped by a variety of different cultural contexts, such as class, workplace, and generation.<sup>205</sup> Each social context that a person inhabits adds another dimension to this complex interaction. One dimension that has not been considered yet is the residential context, i.e., whether an individual is an owner or tenant in a given situation. Since this context defines many of people's daily concerns and their most significant financial expenditure,<sup>206</sup> there is ample reason to assume that it would shape their self-construal. Consider the difference between an owner of real estate (the paragon of *independence* as embodied in the "my home is my castle" adage) and an apartment renter in a multi-family unit (*interdependent* as she is on her community and bound by rules on noise and nuisance, ease of access, prohibited storage, etc.). Mapping the underlying mindset of homeowners vs. tenants onto the independent-interdependent spectrum seems rather straightforward.

The same applies to the trajectory of tenancy between the poles of conveyance and contract. As I noted at the outset of this paper, property and contract can be construed, respectively, as the law of independent or interdependent relationships. So the position that tenancy inhabits between these poles—the specific equilibrium of *tenancy-as-composite*—will also affect the behavior of landlords and tenants. We noted earlier that *tenancy-as-conveyance* rested on the tenant being left alone in "quiet enjoyment."<sup>207</sup> We also saw how, based on self-construal research, another legal entitlement (privacy) has been criticized for its exclusive focus on the "right to be left alone."<sup>208</sup> To understand why this focus may have once been (but no longer is) appropriate in tenancy, let us consider the housing culture in which tenancy rules developed.

When the landlord-tenant dynamic arose in the medieval era, it was "greatly affected" by the "economic and social context" of that time: The tenant was "an enterprising farmer who lived in the rural, agrarian England of the Middle Ages" and "was a 'jack-of-all-trades' who could easily keep the farm structures in good repair, without assistance from the landlord," while the *landlord* found himself higher up in the hierarchy of

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205. See Table in III.B., accompanying note 129.

206. See Zillow Research, *Worsening Affordability Costs Renters Nearly \$2,000 a Year*, ZILLOW (Nov. 28, 2017), [www.zillow.com/research/affordability-q3-2017-17466](http://www.zillow.com/research/affordability-q3-2017-17466) [<https://perma.cc/VE2P-QY3C>] (estimating that "median U.S. rent takes 29.1 percent of the typical household income," or even more, as in San Jose, CA: 38.4 %).

207. See text accompanying notes 18 and 212.

208. See text accompanying note 164.

feudal England—"an absentee owner or country 'gentleman' whose social status precluded any manual labor."<sup>209</sup> In such a social context, independence was in both parties' best interests. As one Milton Friedman noted, the view "that a lease is primarily a *conveyance*" had simply been "based on a forgotten premise that a tenant is primarily interested in the use of the land," with housing being incidental at best.<sup>210</sup>

Eventually this social context changed. As the twentieth century arrived—with increasing urbanization, poor working classes and a separation of labor that made self-sufficiency illusory—legal scholars considered the plight of "the poor urban resident" who "lacks the skill necessary to repair defects in the premises" and "may lack the access necessary to fix defects" in complex "multi-unit buildings."<sup>211</sup> Such an urban "tenant in the multi-family dwelling" was "not an independent farmer" trying to be "left alone to work the fields," but instead she "occupied only a part of a building" and was "dependent on the rest of it."<sup>212</sup> In that sense, "twentieth-century residential tenancies shared few characteristics with the common law tenancies of feudal England," and "more closely resembled transactions for consumer goods and services" that "involved parties' interdependent rights and obligations."<sup>213</sup> Tenants gradually found themselves "in search of parity with consumers,"<sup>214</sup> considering how they depended on their contractual counterpart, the landlord.

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209. SPRANKLING, *supra* note 19, at 226–27; Love, *supra* note 21, at 26 ("In sixteenth century England, when the lease was first characterized as a conveyance of property, the typical lease involved the transfer of land for agricultural purposes to a tenant who paid the rent from the proceeds of tilling the soil."); Quinn & Phillips, *supra* note 17, at 227 ("To comprehend the law it is helpful to envision the tenant leaning on a fence at twilight, watching his fields and awaiting the call to dinner. It is against this simple background that landlord and tenant law took the shape it has essentially retained to this day.").

210. Milton R. Friedman, *The Nature of a Lease in New York*, 33 CORNELL L. Q. 165, 166 (1947).

211. SPRANKLING, *supra* note 19, at 237–38.

212. Quinn & Phillips, *supra* note 17, at 231. The tenant "relied upon the building's water system, lighting system, and heating system; he was sharing walls, doors, corridors and stairways. Agrarian self-reliance in this context is simply not possible." *Id.* "Just as the real property law served the agrarian tenant, it worked against the tenant in the multi-family unit." *Id.* at 232.

213. Spector, *supra* note 29, at 137.

214. Barbara Jo Smith, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty*, 72 WASH. U. L. Q. 475 (1994); Symposium, *Consumer Interests in Residential Real Estate Transactions*, 9 REAL PROP. PROB. & TR. J. 545, 545–86 (1974); James H. Backman, *The Tenant As a Consumer? A Comparison of Developments in Consumer Law and in Landlord/Tenant Law*, 33 OKLA. L. REV. 1 (1980); see also Claude W. Vanderwold, *The Tenant as a Consumer*, 3 U.C.D. L. REV. 59 (1971).

This gradual change in the cultural context of housing had motivated the *Javins* court in 1970 to revise tenancy<sup>215</sup> away from the doctrine of independent covenants. The court started from “the assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land,” but noted that while this “may have been reasonable in a rural, agrarian society,” it had become thoroughly anachronistic “in the case of the modern apartment dweller.”<sup>216</sup> The court chose “to be aided by principles derived from the consumer protection cases,” concluding that it was “overdue for courts to admit that . . . [t]oday’s urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in ‘a house suitable for occupation.’”<sup>217</sup> In such a social context, exclusive focus on a doctrine of independence and quiet enjoyment seemed outdated and inappropriate.

What is more, our review of psychological findings suggests that such a focus would not be merely inconvenient but outright harmful. Insofar as the legal construction of the tenancy relationship emphasized independence, it would shape tenants’ self-construal and concomitant behaviors. The more that lease law emphasized independence, the more tenants would construe themselves as independent selves, and the less they would assert their rights, press for adjudicative relief, or lobby for effective remedies. The robust causal effect of self-construal that psychological research documents<sup>218</sup> implies that how the law treats tenancy may become entrenched as a self-fulfilling prophecy, a self-reinforcing behavioral prediction. Tenants have been shown to be “acutely conscious” of the strength (or weakness) of their bargaining position,<sup>219</sup> and they likewise respond to how the legal regime construes their relationship with the landlord.

It is not just a rhetorical matter of “the vagaries of certain property concepts,”<sup>220</sup> then, whether we conceive of lease law covenants as independent or interdependent, whether we treat tenancy as a conveyance,

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215. See text accompanying notes 83–89.

216. *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1074 (referring at 1077 to “factual assumptions which are no longer true,” namely that “the land was more important than whatever small living structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself.”).

217. *Id.* at 1078–79.

218. See *supra* III.C.

219. Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247 (1970).

220. Bennett, *supra* note 39, at 73.

contract, or composite—or whether we keep tolerating remnant doctrines that stand in the way of effective renter rights enforcement.

#### V. CONCLUSION AND OUTLOOK

What is our theory of tenancy? The present study has considered this question historically, and introduced cultural psychology as a framework to help us question the traditional understanding of tenancy. This allows us to better see the effect that different doctrinal construals of tenancy may have on tenants. In short, our analysis shows that framing the law around independent covenants may cause landlords and tenants to think and behave more competitively, while framing it around interdependent covenants will elicit more cooperation. Put differently: If, as a society, we want landlords and tenants to work together, then our theory of tenancy should rely on assumptions of interdependence. Such an interdependent (strictly contractual) theory of tenancy opens up three avenues for future research.

1. It highlights the need to empirically study psychological independence and interdependence as explanatory variables in the context of real estate. For instance, psychological evidence on the effects of social class membership<sup>221</sup> helps us see how poverty might be an impediment to tenants even asserting their contractual rights—which may result in “a snowball effect” that “systematically excludes poor tenants from access to the legal system.”<sup>222</sup> Thus far, little empirical research has considered these sociolegal factors, but the theory of tenancy outlined above encourages us to test them empirically: “more quantitative and qualitative research is needed to identify” the “legal barriers” to lease law enforcement.<sup>223</sup>

2. Another research avenue leads from a new theory of tenancy into comparative law. There is a long tradition of using comparative insights to inform lease law policy—be they from Germany,<sup>224</sup> the Netherlands

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221. See text accompanying notes 130–138.

222. Sabbeth, *supra* note 3, at 106, 137 (adding at 102 that “Well-settled doctrine allows for tenants’ private rights of action and government enforcement. Yet the laws remain underenforced.”).

223. Summers, *supra* note 3, at 215 (reemphasizing at 217 that “Further research should be conducted into . . . explanations for the limits of the law.”).

224. Michael Lipsky & Carl A. Neumann, *Landlord-Tenant Law in the United States and West Germany—A Comparison of Legal Approaches*, 44 TUL. L. REV. 36 (1969).

(and Louisiana),<sup>225</sup> Scotland, South Africa (and again Louisiana),<sup>226</sup> or England, France, and the European Union.<sup>227</sup> Even federal courts like the D.C. Court of Appeals have justified their decisions on the grounds of comparative evidence.<sup>228</sup> Yet, such inquiries have never considered how independence and interdependence are relevant categories in the jurisdictions under consideration. As a tentative proposal in that direction, consider the work by Israeli contracts scholar Eyal Zamir, who reviewed the remedies that have been “primarily available” for the “lease of residential and other property” in various United States states, but also civil law jurisdictions, and the UN Convention on Contracts for the International Sale of Goods (“CISG”).<sup>229</sup> By relying on the importance of “of mutual cooperation and confidence, dependence and vulnerability,”<sup>230</sup> he proposes a comparative approach that could draw directly on the theoretical reconceptualization suggested here.

3. As a third research avenue that our theory of tenancy opens up, consider contract theory more broadly: Legal theorists are increasingly adopting a “social relations approach” to contract, analyzing the “basic connectedness between people instead of assuming that autonomy is the prior and essential dimension of personhood.”<sup>231</sup> Interdependence ought to be not just a factor in our theory of tenancy, but central to all contracts “that may be plausibly described as cooperative projects,” for it may reveal the conventional trinity of contractual interests (expectation, reliance, and restitution) to be incomplete.<sup>232</sup> Based on doctrinal

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225. Paul du Plessis, *Of Mice (and Other Disasters) and Men—Rent Abatement Due to Unforeseen and Uncontrollable Events in the Civilian Tradition*, 17 TUL. EUR. & CIV. L.F. 113 (2002).

226. Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 438–57 (2010).

227. Melissa T. Lonegrass, *A Second Chance for Innovation—Foreign Inspiration for the Revised Uniform Residential Landlord and Tenant Act*, 35 U. ARK LITTLE ROCK L. REV. 905, 964–69 (2013).

228. *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1075, 1075 n.13 (“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.”).

229. Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 VA. L. REV. 59, 133 (2007).

230. *Id.* at 129 (citing HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 278 [2004]).

231. Sullivan, *supra* note 56, 1018 (describing this view as a “counter-vision to the sources of contract obligation present in the free market model.”).

232. Zamir, *supra* note 229, at 133.



logic,<sup>233</sup> case law,<sup>234</sup> and normative theories,<sup>235</sup> one analysis concluded that contract law protects a fourth (“missing”) interest by continually restoring “contractual equivalence.”<sup>236</sup> This “restoration interest” could “reflect and endorse values of cooperation”<sup>237</sup>—just as interdependence does in our theory of tenancy—and may ultimately shift our theoretical frame towards “Contract as [a] Cooperative Relationship.”<sup>238</sup>

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233. *See id.* at 66–70 (showing that the conventional three interests only cover three cells of a 2x2 contingency table juxtaposing focus (injured vs. breaching party) and perspective (backward-looking vs. forward-looking), with one cell overlooked by extant interests).

234. *See id.* at 70 (reviewing “some of the instances in which courts and legislatures grant remedies aiming at restoring the contractual equivalence.”); *see id.* at 70–71 (noting that “the relative prevalence of such remedies is remarkable, considering that restoration of the contractual equivalence is neither explicitly mentioned in any of the canons of American contract law . . . nor in other sources.”).

235. *Id.* at 63, 102–29 (arguing “that protecting the restoration interest is justified by—or at least compatible with—the major normative theories of contract law, including the will theory, economic efficiency, corrective and distributive justice.”), 130–31 n.190 (pointing to feminist foundations of relational contract theory, which neatly aligns with the role of feminist thought in legal discussions of self-construal theory; *see, e.g.*, Han, *supra* note 161; Schmitz, *supra* note 158).

236. Zamir, *supra* note 229, at 231–32.

237. *Id.* at 133 (arguing that “The availability of restoration remedies reinforces the notion of contract as a cooperative relationship, rather than as a risk-allocation mechanism. To the extent that contract remedies shape the meaning of contract, restoration remedies arguably shape it as a cooperative endeavor.”).

238. *See id.* at 129–34 (§ IV(F)).