

Renting in Collegetown

Daniel E. Wenner

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NOTE

RENTING IN COLLEGETOWN

Daniel E. Wennert†

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The Common Council of the City of Ithaca¹ makes the following findings:

- A. Based on a comparison of Tompkins County's average annual wages and median annual rent . . . with similar statistics for surrounding counties, a rental housing affordability problem exists in the City of Ithaca.
- B. Problems exist in the relationship between landlords and tenants, as well as between landlords and their neighbors and tenants and their neighbors.²

INTRODUCTION

Sign here. The landlord utters these words, the tenant signs, and it is done. The leasehold is established. It begins in "college towns,"³ which often are wrought with rental problems, as it does in other communities. But, college communities are usually small and isolated, which forces students to rent housing under unsatisfactory conditions.⁴ Some of the houses and apartments in these college towns are in poor condition, yet because they are replete with legend and lore, they attract those students who value popularity above comfort.⁵ For both the student⁶ and the residential populations, however, certain particularities of college towns necessitate their living in substandard accommodations and entering into unfair form leases.⁷

The unique rental markets of college towns have made both rental affordability and landlord-tenant disputes areas of great con-

¹ Ithaca, New York, located in Tompkins County, is the home of both Cornell University and Ithaca College. The Common Council of the City of Ithaca is the legislative body for Ithaca.

² ITHACA, N.Y., CODE § I00-I(A)-(B) (1994) (footnote added).

³ For the purpose of this Note, the term "college town" refers to either a city or a town in which the college or university is the primary focus. Some examples of college towns are Davis, California (University of California Davis); Boulder, Colorado (University of Colorado); Gainesville, Florida (University of Florida); Lawrence, Kansas (University of Kansas); Ann Arbor, Michigan (University of Michigan); Ithaca, New York; Burlington, Vermont (University of Vermont); Charlottesville, Virginia (University of Virginia); and Lexington, Virginia (Washington & Lee University). This Note focuses almost exclusively on the college town of Ithaca, New York.

⁴ See *infra* text accompanying notes 91-96.

⁵ See Evan Atkins, *It Takes a Village*, W & L: WASH. & LEE U. ALUMNI MAG., Summer 1997, at 14, 16-20 (detailing and providing a history of some of the legendary dwellings at Washington & Lee University in Lexington, Virginia).

⁶ For the first few years of school, most students live in dormitories. In fact, at many schools students must live in fraternities, sororities, or off-campus apartments after their freshman or sophomore year. For example, about 52% of the students at Washington & Lee live either off-campus or in fraternities. See *id.* at 17 (describing the distribution at Washington & Lee, where 48% of the students live in dorms, 18% live in fraternity houses, and 34% live off campus); see also *infra* text accompanying notes 83-84 (noting the substantial number of students that live in apartments in Ithaca).

⁷ See *infra* Part III.A.

cern. Indeed, the Common Council of Ithaca found that "[t]hese problems are serious enough to warrant city action"⁸ in the form of the "Rental Housing Advisory Commission."⁹ The landlord-tenant difficulties prevalent in college towns force tenants to live in dilapidated residences and to pay excessive rent. More disturbingly, landlords often present renters with biased form leases on a take-it-or-leave-it basis.¹⁰

This Note contemplates the problems that exist between owners and renters, addressing both market inefficiency and bargaining inequality.¹¹ It details the use of form leases, which typically limit the rights and remedies of renters. In particular, it focuses on Ithaca, New York, analyzing the local rental market and offering a way to alleviate that market's problems. This Note does not contend that arms-length contracting should replace the use of form leases; rather, it suggests both that Ithaca landlords currently employ form leases that disfavor renters and that, instead, they should use a more amicable one. Furthermore, this Note argues that to resolve some of the unique difficulties that college town renters face, Ithaca residents should demand that landlords use only a form lease that resembles the Davis Model Lease ("DML").¹²

Part I briefly reviews the historical development of landlord-tenant law to illustrate how the lease contract became such a significant element of the landlord-tenant relationship. It then catalogs and examines the prevalence of typical standard form leases. Part II describes the characteristics of college towns in general and of Ithaca in particular. This Part portrays the leasing dynamic in Ithaca and draws an analogy between present-day Ithaca and the company town of the early twentieth century. Part III demonstrates how typical form leases cause problems in the Ithaca rental market. It articulates how the

⁸ ITHACA, N.Y., CODE § 100-1(C) (1994).

⁹ *Id.* § 100-2. Currently, the Rental Housing Advisory Commission, which the Common Council of the City of Ithaca found so important in 1990, is on the verge of disbanding and has proposed no significant initiatives to alleviate the rental problems in Ithaca. See Interview with Kathleen Decker, Rental Housing Specialist for the Ithaca Building Department and Member of the Rental Housing Advisory Commission, in Ithaca, N.Y. (Nov. 4, 1997) (notes on file with author).

¹⁰ See *infra* Part III.A.2.

¹¹ Some of these problems also apply to cities and towns other than college towns. Similarly, a form lease like the Davis Model Lease ("DML") certainly would help in most rental markets. Some of the same landlord-tenant dilemmas on which this Note focuses probably also exist in larger cities. In particular, the characteristics of a college town might resemble the characteristics of a resort town or another small city. Despite these similarities, the scope of this Note concentrates on the rental environment in college towns, focusing specifically on Ithaca, New York. The rental market in Ithaca is sufficiently representative of other college towns, and this Note focuses solely on college towns because their rental markets are particularly susceptible to landlord abuses. See *infra* Part II.

¹² DAVIS MODEL LEASE (University of California Davis, 1992). For a complete copy of the DML, see Appendix.

rental market provides an example of a market failure, and it explains why tenants are unlikely to negotiate for favorable terms when signing a form lease. This Part continues by describing how Ithaca's college students affect the rental market because they act with both rational ignorance and undue optimism. Finally, Part IV offers a solution to this problem by advocating the cooperative adoption of the DML. This Note then concludes by discussing how the DML's use will equalize the relative bargaining positions of owners and renters in Ithaca.

I

THE LANDLORD-TENANT RELATIONSHIP AND FORM LEASES

A. The Historical Development of the Modern Landlord-Tenant Relationship

Though it initially developed in property law, the landlord-tenant relationship gradually has grown roots in contract law.¹³ Because contract law extensively affects the modern landlord-tenant relationship, any serious attempt to alleviate inequalities inherent in that relationship must focus on the nature of the contract itself, as embodied in the lease. Nevertheless, to understand fully the modern relationship between landlords and tenants, one first must comprehend its origins and how it has changed.

The English estate system began in 1066 when William of Normandy defeated Harold Godwinson to claim the English throne.¹⁴ The social structure of England developed around the land tenure in which a man's relationship to his land and to his lord defined his social position.¹⁵ Under this system, the lord owned the land and granted possession to tenants in exchange for labor.¹⁶ These tenants in turn granted land to other tenants, creating a feudal pyramid of personal obligations in exchange for land.¹⁷ Despite the very per-

¹³ See 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, 751-53 (1988) (examining the courts' shift from using property law to relying on contract law to interpret alienability clauses). *But see* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 504 (1982) (arguing that "landlord-tenant case law was already deeply pervaded by contract notions by the end of the nineteenth century" and maintaining that "[l]ease law was never pure property law"). Professor Glendon primarily contends "that the movement in residential lease law has been not from one area of private law to another, but from private ordering to public regulation." *Id.* at 505.

¹⁴ See A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 2 (2d ed. 1986) (contending "that the feudal structure of society . . . was firmly established in England after the Norman Conquest").

¹⁵ See *id.* at 2-4.

¹⁶ See *id.*

¹⁷ See *id.* at 5-6. Usually the obligations included providing knights for the lord, often through "subinfeudation." *Id.* at 5. In subinfeudation, a tenant-in-chief would grant a parcel of land to a subtenant and would assign the subtenant to be the knight provided for the landlord. See *id.* Interestingly, the terms "landlord" and "tenant" continue to dominate

sonal nature of the lord-tenant relationship, land became both inheritable and freely alienable by the thirteenth century.¹⁸

Feudalism as well as English law developed two categories of estates: the freehold estates—consisting of the “fee simple,” the “fee tail,” and the “life estate”—and the nonfreehold, or leasehold, estate—consisting of the “term of years.”¹⁹ The freehold estates provided a family with economic stability within a community, while the property system treated the term of years differently.²⁰ The leasehold estate did not have social significance in the feudal system; rather, this estate established a relationship between the landlord and the tenant and based that relationship solely on a personal contract.²¹ The tenant did not retain rights in the property until the law allowed him to enforce the contract, which thereby secured his promised interest in the property.²² Nevertheless, the tenant’s interest in the property relied as much on contract law as it did on property law.²³

the rhetoric of renting. Unfortunately, these feudal terms also reflect the reality of the power discrepancy between the modern landlord and tenant. See EMILY JANE GOODMAN, *THE TENANT SURVIVAL BOOK 1* (1972) (“Regardless of wealth, job, education or type of car, all tenants, because they do not own property, are second-class citizens. Within the landlord-tenant relationship, tenants—the people who *live* in the buildings—are powerless compared to the person, corporation, institution or government that owns the building.”).

¹⁸ See SIMPSON, *supra* note 14, at 51-54 (describing the development of the free alienation system and discussing the impact it might have had on a lord who may have been “saddled with a bad tenant who is unfit to perform the service due”).

¹⁹ See, e.g., CORNELIUS J. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 56 (2d ed. 1988); Lewis M. Simes, *Historical Background of the Law of Property*, in 1 *AMERICAN LAW OF PROPERTY* §§ 1.7-.11 (A. James Casner ed., 1952).

²⁰ See MOYNIHAN, *supra* note 19, at 56-57. The term of years originated in the thirteenth century “as a money lending device designed to evade the Church’s prohibition of usury.” *Id.* at 56. If an owner needed cash, he would lend a portion of his land to “recoup both principal and profit.” *Id.* Cornelius Moynihan attributes the distinction between freehold and nonfreehold estates to this difference in use. See *id.* at 56-57. The law also differentiated the leasehold by treating it as an interest in personal property instead of real property, referring to it as a “chattel real.” SIMPSON, *supra* note 14, at 248-50.

²¹ See ALBERT M. KALES, *ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS* § 21, at 21 (1920).

²² See *id.*

²³ See SIMPSON, *supra* note 14, at 250 (describing the uniqueness of the leasehold estate because of its reliance on both contract and property law and the corresponding problems it posed to “the old lawyers”). Though this dual contract and property system for leaseholds still exists, the contractual element has achieved greater prominence, especially in residential tenancies. See MOYNIHAN, *supra* note 19, at 58 & n.4. Some courts have taken to the extreme the notion that contract overwhelms property. In Massachusetts, the Supreme Judicial Court took a strong step by declaring that in its precedent on the implied warranty of habitability, it had “overthrown the doctrine of caveat emptor and the notion that a lease is a conveyance of property.” *Young v. Garwacki*, 402 N.E.2d 1045, 1049 (Mass. 1980). But see *219 Broadway Corp. v. Alexander’s, Inc.*, 387 N.E.2d 1205, 1207 (N.Y. 1979) (recognizing that a lease’s primary purpose is to act as a means of conveying real property and that “[u]ntil this end is achieved, any rights or obligations of the parties which may be embodied in the lease remain dormant”); cf. Hiram H. Lesar, *Landlord and Tenant*, in 1 *AMERICAN LAW OF PROPERTY*, *supra* note 19, § 3.11, at 203 (“[I]t is idle to speculate whether

Although the common law allowed parties to contract for various rights and duties, it still depended heavily on property law to assess the traditional rights and duties of landlords and tenants.²⁴ In general, the common law bound the landlord to provide the tenant with a legal right to possession²⁵ and to allow him quiet enjoyment of the premises.²⁶ The common law, however, did not require the landlord to warrant that the premises would be fit for the contracted use²⁷ unless the parties expressly agreed to this warranty.²⁸ Moreover, the common law of leaseholds ignored the contract law principles requiring mutual dependency of promises; thus, even if a landlord breached his duty, the tenant would retain his obligation to pay rent.²⁹ The essential aspects of the rental arrangement—the payment of rent and possession of the property—are products of property law. Therefore the landlord grants temporary possession to the tenant and retains a reversionary interest. In so doing, the landlord ensures that posses-

the land or the promise is the principal element of a lease If the warp is conveyance, the woof is contract and neither alone makes a whole cloth.”)

²⁴ See MOYNIHAN, *supra* note 19, at 71-72.

²⁵ See *id.* at 72. This requirement represents a contentious area of the law. The courts have taken two views concerning the requirements of providing a tenant with the right to possession. Some courts have espoused the English Rule, which gives the tenant a right to delivery of possession by the landlord. Under this rule, if there is a holdover tenant or some other reason that prevents the tenant from taking possession, then the tenant has a cause of action against the landlord for breach of this duty. See Lesar, *supra* note 23, § 3.37, at 250-51. Other courts have recognized the American Rule, which requires that the landlord provide the tenant with a legal right to possession, but does not require the landlord actually to deliver the premises. See *id.* at 250. This view immunizes the landlord from liability for the holdover tenant's tort, but still gives the tenant a cause of action against the holdover tenant himself. See *id.* at 251.

²⁶ See MOYNIHAN, *supra* note 19, at 72; Lesar, *supra* note 23, § 3.38 (stating that the caselaw provides the landlord with a limited license to enter the premises once the lease commences, for example to collect rent or to make repairs, and that some authority further requires that the tenant consent in the latter circumstance).

²⁷ See MOYNIHAN, *supra* note 19, at 72; see also CHARLES W. SLOANE, LANDLORDS AND TENANTS 13-14 (1878) (addressing New York's rejection of the warranty of habitability upon turnover). The traditional view of a tenancy held that the tenant took the property at his own risk. This doctrine of caveat emptor was the rule for leaseholds. See *id.*; Lesar, *supra* note 23, § 3.45, at 267. Early court decisions uniformly held that caveat emptor governed the leasehold, refusing to recognize an implied covenant that the premises would be fit for habitation. See, e.g., *id.* at 267 n.2. The term “caveat emptor” literally means “[l]et a buyer beware.” BLACK'S LAW DICTIONARY 222 (6th ed. 1990). The term “summarizes the rule that a purchaser must examine, judge, and test for himself.” *Id.*

²⁸ See Lesar, *supra* note 23, § 3.45, at 267 (noting that the tenant alone retains the option either to “inspect the premises and determine for himself their suitability” before entering into a lease or to contract for “an express warranty” to ensure protection).

²⁹ See MOYNIHAN, *supra* note 19, at 73-74; see also Lesar, *supra* note 23, § 3.45, at 267 (noting that a tenant could not use the unfitness of the premises “either as a defense to an action for rent or as a basis for recovery in tort for damages to person or property” (footnote omitted)). Courts did recognize some exceptions to caveat emptor, such as the “furnished house” exception, which provided a defense to an action for rent to a tenant who did not have an opportunity to inspect the complete premises prior to leasing. See *id.* at 267-68.

sion of the property returns to him after the lease term expires.³⁰ The law of contract began to "infiltrate" landlord-tenant law³¹ when courts recognized that a landlord should not retain the right to collect rent after he wrongfully had evicted the tenant.³²

Until the latter part of the twentieth century, courts and legislatures stood firmly on the ground of caveat emptor,³³ but they eventually realized that property law, which had developed around agrarian leases, dealt insufficiently with the problems facing urban tenants.³⁴ The states slowly began to abandon caveat emptor and turned to contract law, requiring landlords to deliver the premises in a habitable condition and to maintain this condition throughout the leasehold.³⁵ The D.C. Circuit brought this implied warranty of habitability into the mainstream in the leading case of *Javins v. First National Realty Corp.*,³⁶ an influential decision that convinced other courts to hold that an

³⁰ This transaction itself is a lease, obligating both the renter to pay rent and the landlord to deliver possession. See Lesar, *supra* note 23, § 3.2. Before the modern reliance on contract law, a lease did not need to enumerate the rights and duties of each party because the courts treated a lease as a conveyance and relied solely on property law to determine whether covenants were mutually dependent, whether the tenant was liable for rent if some event destroyed the property, or whether a landlord had to mitigate damages if the tenant were to abandon the premises. See *id.* § 3.11, at 202-03. Today, courts rely on contract law to resolve these questions. See *id.* at 203-04.

³¹ 3A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 686, at 242 (1960).

³² See MOYNIHAN, *supra* note 19, at 74. Wrongful eviction is not limited to the forcible removal of a tenant from the property. If the landlord evicts a tenant from a "substantial part" of the premises, this wrongful eviction relieves the tenant of his duty to pay rent because the eviction interferes with the essence of his use. 3A CORBIN, *supra* note 31, § 686, at 241. A landlord's failure to provide certain necessities, such as heat and light, constitutes a "constructive eviction," which allows the tenant to both abandon the leased premises and refuse to pay rent. *Id.* at 242-43 (internal quotation marks omitted). In the case of a constructive eviction, the courts abandon property law and apply the contract principle of mutual dependency, see *id.*, which they rarely did at common law, see *supra* note 29 and accompanying text. As in most states, New York courts have recognized this doctrine and have applied it in numerous situations. See, e.g., *Tallman v. Murphy*, 24 N.E. 716, 718 (N.Y. 1890) (releasing the tenant from his obligation to pay rent after he abandoned the premises because of "repeated explosions, which caused the walls and ceilings to crack . . . and the rooms . . . [to] fill [] with smoke and coal gas [that made] the inmates sick"); *Flechner v. Douglass*, 239 N.Y.S. 121, 122 (App. Div. 1929) (holding that a tenant who abandoned his property potentially could forego his rental obligation because the landlord did not supply hot water).

³³ See GOODMAN, *supra* note 17, at 26-27 (describing the historical prevalence of caveat emptor and its recent demise).

³⁴ See MOYNIHAN, *supra* note 19, at 76 ("The old rules that had their source in a rural agricultural society were found to be unsuited to an urban society faced with a critical housing shortage.").

³⁵ See *id.* at 77 (noting that "[t]he courts have substituted an implied in law warranty of habitability that results in a duty on the part of the landlord to put and maintain the dwelling unit in a condition that meets the standards set out in the relevant state and municipal housing codes").

³⁶ 428 F.2d 1071 (D.C. Cir. 1970).

implied warranty exists in lease agreements.³⁷ The *Javins* court reasoned that urban tenants were ill-suited to repair their apartments because they lacked the specialized skills to perform maintenance work.³⁸ The court approached landlord-tenant law from the perspective of consumer protection. It reasoned that tenants were basically consumers buying a product, and if a tenant was to pay the same amount of rent during the lease period, the apartment should remain in substantially the same condition throughout.³⁹ *Javins*'s progeny has retreated from caveat emptor, requiring a minimum standard of habitability for the urban apartment.⁴⁰ The development of the contract law notion of mutually dependent lease clauses propelled the lease to the forefront of and opened the gateway to the modern landlord-tenant relationship.

B. The Prevalence and Inequality of the Typical Form Lease

Post-*Javins* developments in landlord-tenant law have benefited those tenants who are willing and able to confront their landlord in court to enforce their expanded rights. In theory, a landlord cannot include a provision in a lease that courts or statutes have deemed unenforceable. Nevertheless, landlords continue to include in most leases provisions that conflict with the law⁴¹ because courts invalidate these provisions only on a case-by-case basis.⁴² This case-by-case approach means that when a court strikes down an unenforceable provision in one residential lease, "similar provisions in other leases remain untouched."⁴³ For example, the Supreme Court has held that form

³⁷ See MOYNIHAN, *supra* note 19, at 77 ("Although *Javins* was not the first case to announce the rule of an implied warranty of habitability in residential tenancies, it was influential in persuading other courts to adopt the concept" (footnote omitted)).

³⁸ See *Javins*, 428 F.2d at 1078; see also 1 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 1.1, at 7 (4th ed. 1997) ("The parties may differ in their expectations of who will make repairs within the leased quarters, but neither expects [the] tenant to maintain the roof, foundation, and walls, the heating, electrical or plumbing systems, or the means of access.").

³⁹ See *Javins*, 428 F.2d at 1079.

⁴⁰ See MOYNIHAN, *supra* note 19, at 78 (noting that either by statute or by judicial decision, most states have abandoned caveat emptor and have required the landlord to keep the premises habitable). For an example of a case that examines the factual requirements to maintain a valid cause of action under the warranty of habitability, see *Solow v. Wellner*, 595 N.Y.S.2d 619 (App. Term 1992).

⁴¹ See Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 845 & n.1 (1988). For example, most form leases contain provisions waiving the tenant's right to a jury trial, requiring the tenant to pay the landlord's legal expenses in the event of litigation, or waiving other statutory rights. See Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 841-51 (1974) ("[T]he traditional form lease takes away many of the tenant's protections under preexisting law . . . by means of . . . waivers of statutory rights."); Kurt E. Olafsen, Note, *Preventing the Use of Unenforceable Provisions in Residential Leases*, 64 CORNELL L. REV. 522, 523-24 (1979).

⁴² See Bentley, *supra* note 41, at 837 & n.11.

⁴³ Olafsen, *supra* note 41, at 522.

waivers of constitutional rights, such as the right to a jury trial, are unenforceable contracts of adhesion,⁴⁴ which involve a "great disparity in bargaining power."⁴⁵ Despite this holding, many form leases continue to state explicitly that tenants waive their right both to a jury trial in any legal proceeding against the landlord and to counterclaim in any proceeding in which the landlord attempts to regain possession.⁴⁶

Form leases create a more pervasive problem because courts rarely invalidate an entire form lease.⁴⁷ As a result, other landlords continue to use them despite their illegal provisions. The form lease in *McKinney's Forms*⁴⁸ provides a poignant example of this problem. Section twenty-four of this form lease allows a landlord to terminate the lease if a court declares that a tenant is bankrupt.⁴⁹ The pocket supplement, which probably only a lawyer or law student would know to reference, specifically declares that section twenty-four is now void pursuant to federal statute.⁵⁰ Because landlords probably will not refer to the pocket part, however, they likely will continue to use the

⁴⁴ Contracts of adhesion essentially are form contracts that one party has written and that leave little or no room for negotiation. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983) (outlining "seven characteristics" that demarcate adhesion contracts); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 549-53 (1971) (discussing the coercive nature of contracts of adhesion). For a discussion of the characteristics of contracts of adhesion, see *infra* note 165.

⁴⁵ *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972). In *Overmyer*, the Court held that when a corporation waives one of its rights through a contract, the contractual term is enforceable if the corporation was aware of the legal consequences. See *id.* at 187. The Court also noted, however, that if the facts differed such that "the contract [was] one of adhesion, where there [was] great disparity in bargaining power," and if the party received no consideration for the waiver, then the legal issue is different, and *Overmyer* is not controlling precedent. *Id.* at 188.

⁴⁶ See 11A MCKINNEY'S FORMS, REAL PROPERTY PRACTICE § 6:20, at 58-59 (1980); see also CURTIS J. BERGER, LAND OWNERSHIP AND USE § 5.1, at 236-43 (3d ed. 1983) (providing a copy of the "Standard Form of Apartment Lease Approved by the Association of the Bar of the City of New York").

⁴⁷ See Bentley, *supra* note 41, at 837 ("Although courts may invalidate certain terms contained in contracts of adhesion, they are unlikely to hold all the clauses in a printed-form lease unenforceable.").

⁴⁸ 11A MCKINNEY'S FORMS, REAL PROPERTY PRACTICE (1980).

⁴⁹ See 11A *id.* § 6:20, at 57 ("If the TENANT is declared bankrupt or insolvent in any action or proceeding or if the TENANT makes an assignment for the benefit of creditors, then the LANDLORD may, if he wishes, terminate this lease by giving the TENANT 30 days notice of such termination.").

⁵⁰ See 11A *id.* § 6:20 (Supp. 1998) ("Paragraph 24 of the lease set forth in the main volume is no longer valid and should be disregarded. See 11 U.S.C.A. § 541(c)(1)."). Contrary to the citation in the pocket supplement, the section that appears to invalidate paragraph 24 is 11 U.S.C. § 365(e)(1)(B), which legislates that "an executory contract or unexpired lease of the debtor may not be terminated or modified . . . at any time after the commencement of the [bankruptcy] case solely because of a provision in such contract or lease that is conditioned on . . . the commencement of a case under this title." 11 U.S.C. § 365(e)(1)(B) (1994).

entire form, including the unenforceable provision. Moreover, tenants will not know that it is invalid.

What benefit does a landlord derive from inserting an unenforceable provision? The answer is twofold. First, the practical effect of an unenforceable provision typically benefits the landlord.⁵¹ In the event of a dispute with the landlord, a tenant probably will read the lease to ascertain his rights under the agreement. The tenant likely will believe that every provision is binding⁵² because he is ignorant about the law and presumes that his landlord, on the other hand, knows the applicable law and would not include an invalid lease term.⁵³ The tenant, therefore, will "be deceived into foregoing valid claims or defenses against his landlord."⁵⁴ Compounding this problem is the fact that the tenant is unlikely to consult a lawyer in the event of a dispute.⁵⁵ Moreover, even if the renter does discover that the lease term is unenforceable, he "is not likely to suffer [or prove] significant actual damages."⁵⁶ In this event, the tenant will not recover substantial damages,⁵⁷ and the court simply will declare the term invalid and analyze the dispute without it. Because the court will not impose any punishment on the landlord,⁵⁸ the landlord possesses no legal incentive to remove the unenforceable lease provision.⁵⁹

⁵¹ See Olafsen, *supra* note 41, at 522.

⁵² See *id.*; see also Kuklin, *supra* note 41, at 846 n.3 (suggesting that the author "and others believe that tenants do have faith in the enforceability of terms"); Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 272 (1970) (reporting that in his study, over half of the surveyed tenants believed that two particular lease provisions were enforceable, though in reality the provision "would be struck down, either as violative of a specific statutory prohibition or as contrary to public policy").

⁵³ See Kuklin, *supra* note 41, at 862 ("[I]t is the [tenant]'s knowledge that he is ignorant and his belief that the [landlord] is not that inclines the [tenant] to rely upon the implicit assertion of the enforceability of the term.").

⁵⁴ Olafsen, *supra* note 41, at 522. Professor Bailey Kuklin explains how the retention of unenforceable provisions works to the advantage of the landlord:

An offeror may be tempted to include such terms on the rationale that little may be lost and much might be gained. For if the offeree never learns of his rights and a dispute arises, the offeror might gain an advantage not otherwise obtainable, such as an immediate capitulation by the offeree or a beneficial settlement. If the offeree does learn, well, what can he do about it other than exercise the rights he had anyway.

Kuklin, *supra* note 41, at 845-46.

⁵⁵ See Mueller, *supra* note 52, app. c at 298 (question 51) (noting that 84% of the surveyed tenants claimed that they had not consulted a lawyer concerning a dispute that arose after signing the lease).

⁵⁶ Kuklin, *supra* note 41, at 846 (explaining that because the tenant discovers the term before enforcement, the tenant has not been harmed by its inclusion and therefore has no claim for damages on this basis).

⁵⁷ See *id.* at 885-92 (articulating the overwhelming problems the tenant will encounter in recovering significant damages under either tort or contract theory).

⁵⁸ See *id.* at 846 ("Unless there is a specific statutory prohibition of the practice which provides an admonitory sanction, there is little to deter the [landlord].").

⁵⁹ See *id.* (indicating that if the landlord includes the illegal term and a court deems it

Landlords derive a second benefit from including the unenforceable provision. If the tenant ignores the lease term and legally challenges the landlord, the presumption of validity in the crowded court system aids the landlord.⁶⁰ The city courts that typically handle landlord-tenant disputes often are "rushed, crowded, and informal forums, where most litigants are unrepresented."⁶¹ Thus, in the interest of efficiency, judges often presume that the signed lease is "prima facie valid" and strictly enforce it as such.⁶² When a waiver of fundamental rights, such as the right to a jury trial, is involved, courts are supposed to "indulge every reasonable presumption" against the term.⁶³ If the waiver does not impede a fundamental right, however, courts presume that the contract is valid.⁶⁴ Even when a court invalidates a term in one tenant's form lease, landlords will continue to use

unenforceable, the landlord is no worse than if he simply had left out the term, but if the term discourages legal action, the landlord actually has benefited from its inclusion).

⁶⁰ See Bentley, *supra* note 41, at 837-39.

⁶¹ *Id.* at 838.

⁶² *Id.* at 838-39. *But cf.* Avildsen v. Prystay, 574 N.Y.S.2d 535, 535 (App. Div. 1991) (stating that a judge may nullify a contract when "an egregiously oppressive contractual provision was perceived to emanate from a gross inequality in bargaining power between the contracting parties"). While courts are supposed to construe the language of a contract against the drafter, they should do so only when the contract term is ambiguous. See Jacobson v. Sassower, 489 N.E.2d 1283, 1284 (N.Y. 1985) ("Because the retainer clause of this agreement is ambiguous, [the trial court] properly construed it against [the] defendant . . ."); 196 Owners Corp. v. Hampton Management Co., 642 N.Y.S.2d 316, 317 (App. Div. 1996) (stating that "any ambiguity in the agreement should be construed against the drafter"). Some commentators have criticized the strict enforcement of lease terms in form leases because tenants often do not read or understand these terms. See, e.g., Mueller, *supra* note 52, at 257 ("Fulminate as one will about the just deserts of carelessness, the lax reading habits of the public can lead to unexpected obligations on a scale large enough to require a re-examination of basic tenets concerning the efficacy of signing a form or the enforceability of onerous fine print.").

⁶³ Street v. Davis, 542 N.Y.S.2d 968, 969 (Civ. Ct. 1989) (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)) (finding a jury waiver clause unenforceable because it appeared in fine print and was therefore inadmissible under N.Y. C.P.L.R. 4544). This rule of construction does not preclude a landlord from including an enforceable jury waiver clause. See *id.* at 970 (indicating that "[t]he landlord has always had the opportunity to include an enforceable jury waiver clause" as long as he conforms to the fine print guideline of N.Y. C.P.L.R. 4544).

⁶⁴ See, e.g., Chimart Assocs. v. Paul, 489 N.E.2d 231, 234 (N.Y. 1986) (remarking that "there is a 'heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties'" (alteration in original) (quoting George Backer Management Corp. v. Acme Quilting Co., 385 N.E.2d 1062 (N.Y. 1978))); Da Silva v. Musso, 428 N.E.2d 382, 386 (N.Y. 1981) ("Under long accepted principles one who signs a document is, absent fraud or other wrongful act of the other contracting party, bound by its contents." (citations omitted)); Agristor Leasing v. Barlow, 579 N.Y.S.2d 476, 479 (App. Div. 1992) ("Furthermore, one who signs a written agreement is conclusively bound by its terms unless fraud, duress or some other unlawful act on the part of a party . . . has been demonstrated." (citation omitted)); State Bank v. Patel, 561 N.Y.S.2d 740, 741 (App. Div. 1990) (holding that a person who signs a contract is "bound by its terms unless there is a showing of fraud, duress or some other wrongful act" (quoting Columbus Trust Co. v. Campolo, 487 N.Y.S.2d 105, 107 (App. Div. 1985))).

the entire form because the strategic advantages remain intact.⁶⁵

Some form lease provisions and landlord actions are not simply unenforceable; they actually violate municipal codes.⁶⁶ Landlords include these provisions in their leases because only the municipality possesses the authority to enforce the code.⁶⁷ The violation often will continue because limited resources sometimes prevent the municipality from acting.⁶⁸ Moreover, tenants, especially nonstudents, often fear that their landlord will retaliate if they complain about poor conditions,⁶⁹ resulting in the perpetuation of low-quality accommodations. These illegal lease provisions therefore endure, and the corresponding landlord actions continue, because they benefit the landlord and largely are impossible for the tenant to prevent.

In addition to the inclusion of unenforceable and illegal provisions, form leases take advantage of the tenant through the use of disorganized formats and fine print. The chaotic arrangement of leases makes it difficult for many tenants to locate and identify specific provisions. Most form leases randomly organize the clauses to confuse tenants.⁷⁰ Furthermore, form leases often are oppressively long. One

⁶⁵ See Bentley, *supra* note 41, at 837-39 (bemoaning landlords' continued use of form leases with provisions that courts have disallowed and describing the advantages landlords gain from their use); Olafsen, *supra* note 41, at 522 (same).

⁶⁶ Cf. GOODMAN, *supra* note 17, at 43 (implying that landlords include lease provisions that do not comport with municipal codes).

⁶⁷ See *id.* For example, the City of Ithaca requires that when a tenant does not have access to individual heating control devices or his/her device controls the temperature of other dwelling units, adequate heat shall be provided to maintain the indoor temperature in habitable spaces . . . at 68°F. when the outside temperature falls below 55°F. between the first day of September and the 31st day of May.

ITHACA, N.Y., CODE § 210-25(A)(2) (1996). Hypothetically, a landlord might demand that the tenant who does have control of the heat keep it set below 68°F, in violation of the above provision. Only the City of Ithaca has the authority to enforce the provision. A renter can sue the owner to force the owner to turn up the heat, but the renter has no standing to sanction the owner for wrongdoing on the basis of violating the code provision.

⁶⁸ See GOODMAN, *supra* note 17, at 43 ("The catch [with municipal codes] is that there is little or no code enforcement and tenants may not be able to compel any. . . . Tenants are in the position of slaves or children or incompetents, unable to exercise any rights on their own.").

⁶⁹ See *id.* at 22-23. This irrational fear exists despite the fact that most jurisdictions outlaw retaliatory action (e.g., eviction) by landlords. See RESTATEMENT (SECOND) OF PROPERTY, §§ 14.8-9 (1977). Even so, many tenants are unaware of such laws and fear eviction for challenging their landlords. Cf. GOODMAN, *supra* note 17, at 22-23 (noting that "everybody is afraid of the landlord").

⁷⁰ See Bentley, *supra* note 41, at 841. Even the most basic terms of the lease, which identify the parties and describe the premises, seek to confuse the tenant by typically embodying "a welter of qualifications that, in effect, footnote the agreed-upon terms." *Id.* at 842. For example, a New York statute requires the landlord to put the tenant in possession of the premises at the beginning of the lease, "[i]n the absence of an express provision to the contrary." N.Y. REAL PROP. LAW § 223-a (McKinney 1989). But the form lease has "an agreement to the contrary," thereby stripping the tenant of his rights under the law. Bentley, *supra* note 41, at 844.

residential form lease from New York City is approximately 9100 words in length.⁷¹ In comparison, the United States Constitution contains just over 7600 words. Form leases also contain fine print to discourage and confuse the tenant that attempts to understand the contract.⁷² In essence, landlords hide important terms by making it unlikely that any tenant will take the time to read the fine print.⁷³ The Supreme Court has discouraged the use of fine print to embody terms that waive constitutional rights,⁷⁴ such as the right to a jury trial.⁷⁵ Moreover, New York courts will not admit into evidence any lease provision that appears in fine print.⁷⁶ Nevertheless, form leases continue to use fine print to give the landlord an unfair advantage. These stylistic devices, along with unenforceable and illegal clauses, tether the tenant to the often unfair provisions of the form lease.

Given the prevalent use of form leases, tenants often sign leases without bargaining for terms. The tremendous transaction costs of investigating and understanding form leases increase the likelihood that rational actors will choose to remain ignorant of the lease terms. Because most renters do not scrutinize these form leases, landlords likely will not alter the lease terms that disfavor tenants.

⁷¹ See Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 822 (1974). Curtis Berger commented that this lease contains "more words than the Book of Hosea, which also warned of a Lord's wrath." *Id.* He surveyed commonly used form leases from various metropolitan areas. See *id.* at 821 & n.122. He posited that "the median-length form, with 3800 words, could not be read and fully understood by a bright law student in less than an hour." *Id.* at 822.

⁷² See, e.g., Bentley, *supra* note 41, at 839 n.13 (describing a civil court case in which the tenant's lawyer argued that the court should disregard a waiver because the lease was "very hard to read, and [the waiver] has twenty-five lines and is not readily apparent" (internal quotation marks omitted)). One commentator suggested that the print is usually so fine that a law student might not be able to read the form. See Berger, *supra* note 71, at 822. To illustrate how fine the print can be, note that the text of some leases is about eight and one-half lines per inch, which is the font of the average law review footnote. See *id.*

⁷³ See Mueller, *supra* note 52, at 256-57 (noting that of the surveyed tenants who did not read their leases "particularly carefully" prior to signing, 33% said that it was because the lease was offered on a "take it or leave it" basis, 26% found the "very length of the lease contract form to be discouraging and confusing," 20% feared that they would be unable to understand the "legal language," and a scant three percent said that they did not want to take the time to read the lease).

⁷⁴ See *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (articulating that "a waiver of constitutional rights in any context must, at the very least, be clear").

⁷⁵ See U.S. CONST. amend. VII.

⁷⁶ See N.Y. C.P.L.R. 4544 (McKinney 1992) (excluding "any printed contract or agreement . . . where the print is . . . less than eight points in depth or five and one-half points in depth for upper case type"). This rule specifically applies to leases for residential space. See *id.*

II

THE UNIQUE DYNAMIC OF THE LANDLORD-TENANT
RELATIONSHIP IN ITHACA

The first Part of this Note presented the current state of landlord-tenant law and outlined the general difficulties in the relationship between renters and their landlords. The remainder of this Note addresses those aspects of this relationship that are peculiar to college towns, especially Ithaca. This Part first catalogs the unique demographics of college towns. Second, it draws an analogy between the company towns of the early twentieth century and the college towns of today. Finally, it places the college town demographic into the economic market model that the preceding Part articulated.

A. The Characteristics of Ithaca

College towns are communities with distinct characteristics. Each contains a university or college, which is the center of city life, and Ithaca is no exception.⁷⁷ Indeed, most college towns could not survive without the job market the university's presence provides.⁷⁸ Furthermore, because the university is the center of town life, students and employees generally live nearby, providing the landlords with a fruitful rental market.

Though an affordable housing problem has existed in most American cities for the last two decades,⁷⁹ the college town is unique because of the "captive student population."⁸⁰ In Ithaca the college population exceeds the permanent, year-round population.⁸¹ This phenomenon is peculiar to college towns. For example, the City of Ithaca has a college population of 56.3%, while Tompkins County, which includes Ithaca, has a college population of only 29.4%, and

⁷⁷ See *supra* note 3.

⁷⁸ For example, according to Cornell Employment Services, Cornell University employed 2602 faculty and 8824 staff as of fall 1997, totaling 11,426. See Telephone Interview with Cornell University Employment Services Department, Ithaca, N.Y. (Jan. 19, 1998). According to the 1990 Census, Ithaca's population is 57,617. See *Zip Reside: 14850 (Ithaca)*, Claritas, Aug. 19, 1997, available in LEXIS, Geodem Library, Ziprez File. If all of these employees live in Ithaca, 20% of the local population works for Cornell University. Even if less than 100% of Cornell's employees live in Ithaca, the number of Ithaca residents that Cornell University employs is staggering. Furthermore, Ithaca College employs a large number of local residents, thereby increasing the percentage of local residents employed by the city's higher education institutions even further.

⁷⁹ See John Emmeus Davis, *Introduction: Toward a Third Sector Housing Policy*, in *THE AFFORDABLE CITY* 1, 3 (John Emmeus Davis ed., 1994) ("The average costs of market-rate rentals and market-priced sales have increased far faster in most American cities than average incomes over the last two decades.").

⁸⁰ REGULATORY ISSUES SUB-COMM., RENTAL HOUS. ADVISORY COMM'N, REGULATORY ISSUES AND AFFORDABLE HOUSING IN ITHACA 1 (1994).

⁸¹ See ITHACA CITY PLANNING & DEV., CITY OF ITHACA: 1990 CENSUS 2 (1993) [hereinafter 1990 CENSUS].

the entire State of New York has a college population of only 8.3%.⁸²

Correspondingly, students represent a large segment of the rental population in Ithaca. Almost fifty percent of Cornell undergraduate students and eighty-two percent of its graduate and professional students live in off-campus housing.⁸³ Similarly, thirty-three percent of Ithaca College students are housed off campus.⁸⁴ Overall in Ithaca, the rental property vacancy rate is 4.5%, while 71.1% of the population are renters.⁸⁵ Comparatively, Tompkins County has a vacancy rate of 5.7%, and renters constitute only 44.7% of the population.⁸⁶ Unsurprisingly, these statistics are similar to those in other college towns.⁸⁷ Ithaca's Rental Housing Advisory Commission surveyed six "cities comparable to Ithaca in terms of surrounding area, population demographics, and presence of a university,"⁸⁸ and the five college towns that responded all exhibited statistics similar to those in Ithaca.⁸⁹ Perhaps most tellingly, renters occupied at least fifty percent of the housing units in the other surveyed college towns.⁹⁰

The dominance of the student population in college towns, along with the relative isolation of cities like Ithaca from other cities that could provide student housing, has deleterious effects on renters.⁹¹

⁸² See *id.* While it is likely that not all members of the "college population" go to school in Ithaca, with Cornell University and Ithaca College in the city, it seems probable that most do.

⁸³ See CITY OF ITHACA, COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY 9 (1995).

⁸⁴ See *id.*

⁸⁵ See 1990 CENSUS, *supra* note 81, at 2; cf. CITY OF ITHACA, *supra* note 83, at 3 (reporting that the vacancy rate in Ithaca in June 1994 was 0.12%, which was down from 1.38% the previous September). More remarkable is the fact that in an area very near to Cornell's campus—Ithaca's "Collegetown"—a staggering 94.7% of the population is in college, the vacancy rate is 4.3%, and 97.5% of the housing is renter occupied. See 1990 CENSUS, *supra* note 81, at 1.

⁸⁶ See 1990 CENSUS, *supra* note 81, at 2.

⁸⁷ See REGULATORY ISSUES SUB-COMM., *supra* note 80, at 6-9.

⁸⁸ *Id.* at 6.

⁸⁹ See *id.* at 6-9.

⁹⁰ See *id.* at 7 (reporting that 51% of the housing units in Lawrence, Kansas are renter occupied; 50% in Boulder, Colorado; 65% in Burlington, Vermont; 51% in Gainesville, Florida; and 60% in Huron (the name given to the fifth city that returned the survey anonymously)).

⁹¹ One should not overlook the negative effects of renting to students. Most of the problems that affect Ithaca's rental market have an impact on the landlords as well as the students. For example, it is natural for students not to care as much about their apartments as permanent residents do because students plan on staying only for a short amount of time. See *infra* note 99 and accompanying text. Students often damage neighborhoods and property. See Kevin Harlin, *Turf War: Noisy Students with Unkempt Houses Exasperate Neighbors*, ITHACA J., Sept. 14, 1996, at 1A ("The conflict is a common one in college towns across the country, and permanent residents of certain neighborhoods on South and East hills for years have been plagued by intoxicated Cornell University and Ithaca College . . . students walking back to campuses late at night."); see also Andreae Downs, *Dialogue on Neighborhood Held*, BOSTON GLOBE, May 10, 1998, § 12 (City Weekly), at 7 (noting that students contribute to "overcrowding, parking, and [leaving] trash strewn on yards and sidewalks" and that "[a]s the student population has increased, and changed, a lot of

First, these demographic and geographic realities impact the supply of and the demand for rental housing.⁹² The lack of "spill-over to adjacent markets" exacerbates the high demand for rental housing in Ithaca.⁹³ This lack of spill-over results in a shortage⁹⁴ of rental housing in the city because renters have nowhere else to go. Because the supply does not expand, renters must both pay more for housing and rent apartments that, given their poor condition, otherwise would be undesirable, if not unrentable. One apartment developer in Ithaca even suggested "that most people would describe the apartment buildings in Ithaca as 'slums'" because of their substandard appearance.⁹⁵ One Cornell Law student conducted her housing search by fax and later found that the floor plan she had received did not match the apartment, leaving her "with a small, dark, unequipped living space ideal for few humans on cold upstate [New York] nights."⁹⁶

Second, the attributes of Ithaca's housing market also affect the local, nonstudent population. Because students usually can afford higher rent payments, the large student population in Ithaca has led to an increase in the median rent.⁹⁷ The City of Ithaca provides the

properties have deteriorated" (quoting a landlord from the Boston area)). The most disorderly tenants in a student-rich neighborhood are often the students. *See id.* Students are more likely to have parties at their apartments, which often result in damage. *See, e.g.,* Matt Bai, *2 Landlords Near NU Say They Won't Rent to Fraternities Again*, BOSTON GLOBE, Apr. 10, 1995, at 13 (reporting that two landlords near Northeastern University whose "houses were trashed this past week by fraternity members to whom they had leased the properties" imposed a policy of "[n]o pets, no parties . . . no frats" (omission in original)). In addition, because students' stays in Ithaca are brief, students often do more damage to their apartments than the security deposit covers, forcing the landlord to fix the damage with his own money. *See* Matt Bai, *Fraternity House Trashed: South End Eviction-Eve Party Causes \$50,000 in Damage*, BOSTON GLOBE, Apr. 9, 1995, at 48 (reporting that an interviewed tenant claimed that "it was common for tenants who are leaving a building to do some amount of damage").

⁹² *See* REGULATORY ISSUES SUB-COMM., *supra* note 80, at 1.

⁹³ *Id.*

⁹⁴ For a description of a shortage as well as its causes and effects, see, for example, WILLIAM A. MCEACHERN, *ECONOMICS* 63 (1988).

⁹⁵ Sarah Striffler, *Modern Amenities, Location Attract Students to New C-Town Apartments*, CORNELL DAILY SUN, Aug. 25, 1997, at 1 (reporting the comment of Jason Fane, developer of the newest high-rise apartment building in Ithaca); *see also* Beth McCarroll, *Housing Search Uncovers Surprises*, CORNELL LAW TOWER, Sept. 17, 1998, at 1 (noting that several Cornell Law students "have experienced the general unclean, varmint-ridden, bug-infested problems that many encounter" in Ithaca).

⁹⁶ McCarroll, *supra* note 95 ("Said to be a first floor abode, it was in actuality predominantly underground, with the only window shaded by a staircase. The square footage was substantially smaller than stated and the refrigerator was a bar-size mini fridge."). Washington & Lee University students similarly contend with accommodations such as "the rickety house by the sewage-treatment plant." Atkins, *supra* note 5, at 16.

⁹⁷ *See* CITY OF ITHACA, *supra* note 83, at 9 (reporting that Ithaca rent increased by 93% while the median household income increased by only 72% in the same ten-year period); *see also* REGULATORY ISSUES SUB-COMM., *supra* note 80, at 1 (stating that "[t]he upward pressure on rents shows no sign of abating in the immediate future"). Students often can afford to pay a high price for a room in an apartment because they commonly receive

following two possible explanations for students' ability to pay higher rent: (1) students often live in groups, which increases their combined purchasing power, and (2) many students, especially undergraduates, receive financial support from their families, which typically have higher median incomes than the national or local average.⁹⁸ A third explanation is that students are more willing to pay higher rent because they make their apartment decisions on a year-to-year basis.⁹⁹ Savings of twenty dollars per month for a year often do not seem as important as the same savings on a lease that is five or ten years in duration. In any event, median rent levels in Ithaca have surpassed median income levels, meaning that a sizeable portion of the population cannot afford rental housing.¹⁰⁰ The low vacancy rates also limit choices and directly influence the supply of rental housing, driving up rental rates.¹⁰¹ As a result, nonstudent residents with low incomes must pay over thirty percent of their gross incomes in rent.¹⁰² The transient nature of students not only results in higher rents but also decreases a landlord's incentive to repair his property, causing rental units to fall more easily into disrepair.¹⁰³

The unique dynamic of a college town population creates a rental environment with its own special difficulties. Unlike most American towns and cities, a majority of the population in college towns is transient, and a supermajority of this population is renters. These population differences combine with geographic isolation to create shortages and higher rents for the college town renter.¹⁰⁴ Though this demo-

money either in the form of a loan or from their parents. On the contrary, a family of four cannot afford the same price because the children do not contribute economically. *See CITY OF ITHACA*, *supra* note 83, at 9 (indicating that students "can afford to pay \$250 apiece for a 4-bedroom apartment, where as [sic] a family of 5 cannot usually afford \$1000 a month in rent").

⁹⁸ *See CITY OF ITHACA*, *supra* note 83, at 9.

⁹⁹ *See Mueller*, *supra* note 52, app. c at 286 (question 7) (noting that 85% of the surveyed tenants in Ann Arbor, Michigan leased their apartment for one year); *see also id.* at 265 n.70 (explaining that most student renters want apartments on a short-term basis—about eight months—because of the length of the school year). In addition, most leases in Ithaca are either ten or twelve months in duration. *See Classified Advertising*, *CORNELL DAILY SUN*, Feb. 13, 1998, at 27 (listing several apartments available for the coming school year with either ten- or twelve-month lease lengths).

¹⁰⁰ *See CITY OF ITHACA*, *supra* note 83, at 9.

¹⁰¹ *See id.* at 11.

¹⁰² *See id.*

¹⁰³ Commentators have argued that landlords make repairs "even though they don't have to" because they fear that "the present tenants will probably move out." *Edited Transcript of Proceedings of the Liberty Fund, Inc. Seminar on the Common Law History of Landlord-Tenant Law*, 69 *CORNELL L. REV.* 623, 676 (Timothy P. Terrell ed., 1984) (remarks of Prof. Peter Aranson). Unfortunately, student tenants probably will move out at the end of the year anyway, thus dissipating the landlords' incentive to retain their tenants by making repairs.

¹⁰⁴ *See REGULATORY ISSUES SUB-COMM.*, *supra* note 80, at 1 ("The upward pressure on rents shows no sign of abating in the immediate future. The obvious effect of an exacer-

graphic and geographic situation is unique in today's society, America has seen it before in the company towns of the late nineteenth and early twentieth centuries.

B. Analogy to Company Towns

An analogy to company towns¹⁰⁵ sheds light on the relationship between the university environment and its residents. This analogy will help describe the experience of living in a college town. Students, like workers in company towns, not only have no choice but to live in the college town, but also have limited bargaining power in negotiations over lease provisions.¹⁰⁶

First, it is important to define a company town. A company town is a community "inhabited solely or chiefly by the employees of a single company or group of companies which also owns a substantial part of the real estate and houses."¹⁰⁷ In the late nineteenth and early twentieth centuries, as industry flourished and the need for labor grew dramatically,¹⁰⁸ companies often built their towns near their mines to ensure that the towns were "temporary and isolated in nature,"¹⁰⁹ as many college towns are today. One might guess that the populations were somewhat static in company towns because of the culture surrounding industrial communities. One interesting feature of company towns, however, which also is present in college towns,

bated shortage of rental housing units coupled with a burgeoning population will be higher rents.").

¹⁰⁵ This environment is distinct from an industrial community, which "depend[s] on a single employer, but [is] developed by private interests." MARGARET CRAWFORD, *BUILDING THE WORKINGMAN'S PARADISE I* (1995). That distinction has no relevance to this discussion. The demarcations between actual company towns and mere industrial communities have significance for the design and dynamic of the town. This Note, however, focuses on factors that apply equally to both environments. For example, in both cases, the community associated with the industry lives in housing near the town. The reasons why they are unable to leave the surrounding area are also similar.

¹⁰⁶ At first glance, specific differences exist between company towns and college towns, but these considerations do not change this Note's analysis. For example, unlike the company of the company town, universities seldom own all of the housing in the college town, but this difference does not undermine the thrust of this Note's argument because the housing characteristics in both types of towns are similar, regardless of ownership.

¹⁰⁷ Horace B. Davis, *Company Towns*, in 4 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 119, 119 (Edwin R.A. Seligman et al. eds., 1931).

¹⁰⁸ See, e.g., CRANDALL A. SHIFFLETT, *COAL TOWNS* 68 (1991) (articulating that "coal companies complained of labor shortages throughout the period between 1900 and 1920").

¹⁰⁹ See Kevin P. Stein, *Company Housing Between 1880-1930: Its Evolution as a Weapon Against Labor* 20 (1986) (unpublished senior honors thesis, Cornell University—New York State School of Industrial and Labor Relations) (on file with the Cornell University Library). The unique characteristics of company towns existed because of the temporary nature of mines, which often did not exist longer than 20 years, see *id.*, but one reasonably might argue that the isolation of the mining areas also created a disincentive for major housing development.

was the fluidity of the population.¹¹⁰ The shortage of workers required that the mine owners attract and retain laborers,¹¹¹ however, companies often struggled in the realm of worker retention.¹¹²

Company towns began to decline in large part because of the automobile.¹¹³ Because most workers' financial well-being improved, they had more liquid income and could purchase cars with installment buying.¹¹⁴ Indeed, the increased availability of inexpensive automobiles meant that workers became less dependent on housing near the company. They had the flexibility to move farther away from their work, thereby increasing their housing options.¹¹⁵ The college student generally lacks this choice, however, because even if he owns a car, he may not be able to obtain a parking permit.¹¹⁶ Without a parking permit, the student must live within walking distance of school

¹¹⁰ See SHIFFLETT, *supra* note 108, at 76 (explaining that "there was a big turnover of men because some would mine in the winter and farm in the spring and fall" or work in the mines "on a part-time basis").

¹¹¹ See *id.* at 67-80 (detailing the shortage of labor and the mine owners' corresponding efforts to attract new laborers).

¹¹² See *id.* at 77 (noting that companies often would pay workers' transportation costs, only to have many of them leave before starting work). The transient characteristic of laborers is an important point. Shifflett gives the example of one company town—Stonega, Pennsylvania—where one-fourth of the labor force "turned over each year." *Id.* Somewhat coincidentally, this is approximately the same turnover rate that a college or university experiences due to graduation. Of course, one striking difference is that 25% of the students leave the university each year because of one natural form of attrition—graduation—whereas miners left company towns for a variety of reasons, including, most importantly, "economic conditions." *Id.* at 78. As of yet, no records that accurately document the reasons for the transience of workers have surfaced, but applicants for Stonega Company jobs listed the reasons for their leaving previous work as "wanted a change," "left voluntarily," or "no reason." *Id.*

¹¹³ Other causes include the slowing demand for coal, see *id.* at 199 (detailing the decline in coal demand due to shifts to alternate fuel sources, labor strife, and the Great Depression), and the New Deal, see CRAWFORD, *supra* note 105, at 202-04 ("If company towns . . . declined during the 1920s, the New Deal dealt them a more serious blow.")

¹¹⁴ See CRAWFORD, *supra* note 105, at 201.

¹¹⁵ See *id.* ("Visitors to company towns during the 1920s reported finding numerous houses left vacant by employees who had moved away and now commuted to work.")

¹¹⁶ According to Cornell Parking and Commuter Services, only 2248 students have permits to park cars on campus. See Telephone Interview with Cornell University Parking and Commuter Services Department, Ithaca, N.Y. (Jan. 19, 1997). Moreover, in 1997 Cornell issued only 1071 transit passes to commuting students. See E-mail from Carol Schusler, Computer Systems Coordinator for the Department of Transportation and Mail Services, Cornell University, to author (July 20, 1998) (on file with author). According to the Undergraduate Registrar and Graduate School Registration Reports of Cornell University, the school had 18,428 students enrolled in 1997 in the schools on the Ithaca campus. See Undergraduate Registrar and Graduate School Registration Reports, *Total Cornell Enrollment: Undergraduate, Graduate, Professional* (last modified Nov. 1997) <<http://www.ipr.cornell.edu?FactBook/Enrollment/Total/Total>>. Given these data, it is inconceivable that all commuting students could obtain a permit for campus parking. If a student cannot drive a car to campus for school, that student must live within walking distance or rely on public transportation.

and cannot move to the surrounding communities.¹¹⁷

Company towns and college towns share several similarities. First, the center of activity for those living in the town is the company or the university. In Ithaca, most residents are students,¹¹⁸ and a large portion of the nonstudent residents work for either Cornell or Ithaca College.¹¹⁹ Furthermore, the majority of the students and residents must live in Ithaca because of the shortage of available housing in nearby areas.¹²⁰ Moreover, the public transportation system in Ithaca does not cater to students, making it even more difficult for them to live in outlying areas.¹²¹ Second, students, like the workers living in company towns, do not stay in the area for an extended period of time.¹²² Students' transiency operates on two levels: they often move from year to year,¹²³ and they only stay at the university for an average of four years. Third, the market is so demand-oriented that property owners in both company towns and college towns share the same small incentive to care about their tenants.¹²⁴

In the final analysis, both company towns and college towns exemplify a failed rental market in which the tenants have relatively negligible bargaining power vis-à-vis the landlords. In both cases, the implicit conditions force the workers or students to live in the town.¹²⁵ Because of this necessity, residents must accept lease provisions that heavily favor the landlord,¹²⁶ not unlike the current leases in Ithaca.¹²⁷ Although the analogy between company towns and college towns is imperfect, it does illustrate the unique problems that face the isolated, centrally dependent communities surrounding universities and colleges.

¹¹⁷ See REGULATORY ISSUES SUB-COMM., *supra* note 80, at 1 (detailing the lack of spill-over in the Ithaca area).

¹¹⁸ See *supra* notes 81-82 and accompanying text.

¹¹⁹ See *supra* note 78.

¹²⁰ See *supra* notes 91-94 and accompanying text.

¹²¹ See Interview with Kathleen Decker, *supra* note 9.

¹²² See *supra* note 112 and accompanying text.

¹²³ See *supra* note 99.

¹²⁴ See SHIFFLETT, *supra* note 108, at 161 (noting that oppression existed in company towns in the form of "the script system, monopolistic company-store practices, price-gouging, . . . [and] eviction from company houses").

¹²⁵ See REGULATORY ISSUES SUB-COMM., *supra* note 80, at 1 ("The relative isolation of Ithaca from other cities concentrates changes in supply and demand within a metropolitan-area housing market, three-fifths of which is within Ithaca City limits.").

¹²⁶ See Stein, *supra* note 109, at 61 (detailing the landlord-friendly lease provisions in company towns, which for example, "required only 'one day's written notice' to vacate the premises" (quoting a lease from one company town)).

¹²⁷ See *infra* Part III.

III

TYPICAL FORM LEASES WREAK HAVOC IN THE ITHACA
RENTAL MARKET

While the courts have turned to contract law to govern modern landlord-tenant relationships, landlords and their lawyers have made the terms and conditions of leases more comprehensive and complex. With this increased reliance on contract, the lease has come to embody more than just a conveyance of land and the corresponding obligation to pay rent;¹²⁸ it has become the essence of the landlord-tenant relationship.¹²⁹ The proliferation of contract theory with respect to leases has undermined the tenants' struggle for equal bargaining power.¹³⁰ Although the occasional landlord may take the time and effort to design his own lease, most often he will use a form lease,¹³¹ which inhibits the ability of tenants to bargain effectively.¹³²

¹²⁸ See Lesar, *supra* note 23, § 3.11, at 202 (noting that modern leases contain provisions concerning repairs, taxes, insurance, and use); see also ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT, at v (1980) (commenting on the law's recent "realization that the modern lease is essentially a bilateral contract, not merely a conveyance of an interest in real property"). Some commentators have argued that the recent reliance on contract law to interpret leases is unnecessary and even harmful. See, e.g., Edward Chase, *The Property-Contract Theme in Landlord and Tenant Law: A Critical Commentary on Schoshinski's American Law of Landlord and Tenant*, 13 RUTGERS L.J. 189 (1982).

¹²⁹ *But cf.* 1 FRIEDMAN, *supra* note 38, § 1.1, at 12 (noting that states have not completely abandoned the common law's emphasis on the property aspects of the lease and advising that they not do so because "[i]t would be difficult to track down all the desirable rules of landlord-tenant law that might disappear if the conceptual underpinning of the common law were suddenly swept away").

¹³⁰ See Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681, 712 (1994) ("Even with the establishment of the warranty of habitability, the contract theory of leases made no significant adjustment in the bargaining positions of the landlord and tenant with regard to the particular terms of the lease . . . [which] remained favorable to the landlord.").

¹³¹ See Stephen R. Bell, Note, *Standard Form Leases in Wisconsin*, 1966 WIS. L. REV. 583, 583-84. This Note uses the term "form lease" to describe a commercially produced lease that is available to landlords. Although "[t]here is no single 'standard' or 'official' form lease," they often contain similar provisions, which "justifies referring to commercially-printed leases collectively." Bentley, *supra* note 41, at 841. Almost any widely used lease can constitute a form lease, but one of the most pervasive is the Blumberg Law Blank Publishers, Inc. No. X327, published in 1968. See *id.* at 841 n.18.

¹³² See *infra* Part III.A.2. Emily Jane Goodman suggests that all leases are "one-sided." GOODMAN, *supra* note 17, at 41. She also warns renters:

Do not be deceived by thinking that the lease is fair and just because of the endorsements it carries. The printed form may say "approved by the Chicago Real Estate Board" or "the Bar Association of the City of Springfield" or "Boston Property Owners Association." These endorsements mean that the document has been approved by the professional real-estate people; it also gives the utmost protection to the landlord. These endorsements often convey to the tenant the erroneous impression that the association is objective and fair and that the lease is a document protecting tenants and landlords alike.

A. The Economics of the Form Lease in Ithaca

Contracts professors often preach that the law of contract embodies the "bargain theory,"¹³³ which teaches that two parties at arm's length negotiate to exchange consideration.¹³⁴ Any first-year Cornell Law student who rents an apartment in Ithaca, however, will swear that leases do not derive from bargain.¹³⁵ Form leases affect the operation of contract by reducing the ability of tenants to bargain and by giving them an incentive not to do so.

1. *The Rental Market in Ithaca Fails*

The unique characteristics of college towns like Ithaca impact the functioning of their rental markets. Most importantly, the economic model degenerates into "monopolistic competition" in which the landlords manage their enterprises with virtual impunity.¹³⁶ The high demand in the rental market makes it improbable that they will experience any negative repercussions from raised rents or dilapidated conditions. Moreover, the student renter is less likely to bargain and more likely to exhibit rational ignorance and undue optimism, which further benefits the landlord.¹³⁷

The hallmark of a market economy is the free market system, in which supply and demand interact to produce equilibrium.¹³⁸ Capitalism assumes that people are "rational maximizer[s]" who will respond to incentives in their surroundings.¹³⁹ It further presumes that when one's surrounding conditions change, one will alter his behavior to react to the change in a way that improves his situation.¹⁴⁰ An example of this common "price system"¹⁴¹ involves baseball tickets: when the Cubs play on a sunny Saturday, bleacher tickets sell for thirty dollars each; when it rains, they cost five dollars.¹⁴² On a sunny day,

¹³³ 1 E. ALLAN FARNSWORTH, *CONTRACTS* § 2.2 (2d ed. 1990).

¹³⁴ See, e.g., *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415, 421 (N.Y. 1995) ("Freedom of contract prevails in an arm's length transaction between sophisticated parties . . . , and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain.").

¹³⁵ See Slawson, *supra* note 44, at 529 (remarking that "[t]he contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance").

¹³⁶ See *infra* text accompanying notes 155-65.

¹³⁷ See *infra* Part III.B.

¹³⁸ See, e.g., McEACHERN, *supra* note 94, at 61-62 (demonstrating how a hypothetical milk market reaches equilibrium).

¹³⁹ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 4 (5th ed. 1998).

¹⁴⁰ See *id.*

¹⁴¹ See generally STANLEY FISCHER ET AL., *ECONOMICS* 41 (2d ed. 1988) (describing the "price system" as governing "decisions about resource allocation . . . in which supply and demand interact in numerous markets for goods and services").

¹⁴² At the box office, the 1999 face value of a bleacher ticket will be \$15. Bleacher

the uncovered bleacher seats are more attractive to the Wrigleyville population; therefore, the demand for the limited supply of seats is higher. This example illustrates a shortage of seats.¹⁴³ Because of the high demand, prices rise, but the supply cannot expand.¹⁴⁴ This inability to increase supply renders equilibrium unattainable.

A day at Wrigley Field markedly differs from renting housing. Most importantly, if the ticket price becomes too expensive for the Cubs fans in Wrigleyville, they can skip the ballpark and listen to the game on the radio or watch it on television.¹⁴⁵ By contrast, if the rental prices rise too high for the residents of a college town, they have no alternatives.¹⁴⁶ Because of the scarcity of quality housing in Ithaca, the local population must pay high rent for necessary shelter.¹⁴⁷ In other words, the housing market in a college town exhibits what economists call "inelastic demand,"¹⁴⁸ primarily because housing is a necessity rather than a luxury.¹⁴⁹ As the price of rental units increases, the demand remains high,¹⁵⁰ enabling landlords to raise their rents without diminishing their ability to rent.¹⁵¹

An economist may argue that this situation merely would prompt the system's rational actors to build more apartment units to boost the supply to meet the demand.¹⁵² Unfortunately, in Ithaca the only re-

seats at Wrigley Field, the Cubs' home ballpark, are usually sunny and are exposed to the prevailing westerly winds.

¹⁴³ For a description of a shortage as well as its causes and effects, see, for example, MCEACHERN, *supra* note 94, at 63.

¹⁴⁴ See *id.* at 62-63 (describing how inelastic supply results in surpluses and shortages); see also FISCHER ET AL., *supra* note 141, at 46-47 (describing the same relational event but using Chicago fishermen instead of the Chicago Cubs). Incidentally, regardless of the weather at Wrigley Field, the fishermen are more likely to win the pennant.

¹⁴⁵ WGN's television and radio stations broadcast almost every Cubs game throughout the baseball season, giving fans who are unable to afford tickets at the street prices an opportunity to catch all the action.

¹⁴⁶ See REGULATORY ISSUES SUB-COMM., *supra* note 80, at 1 (describing the "captive student population").

¹⁴⁷ See CITY OF ITHACA, *supra* note 83, at 11 (describing how the low vacancy rates and high constant demand has resulted in "high rental rates").

¹⁴⁸ E.g., MCEACHERN, *supra* note 94, at 428-29 & exhibit 4 (illustrating that a "perfectly inelastic demand" results in a market in which "price changes do not affect quantity demanded").

¹⁴⁹ See *id.* at 432 ("The demand for necessities will be less elastic than the demand for luxuries.").

¹⁵⁰ Of course, at some point the rental prices will become so high that people will have to live in public-assisted housing because they will not be able to afford any other apartment. Cf. *id.* at 429 (explaining that even with perfectly inelastic demand, a price change must stay within a "realistic range of possible prices").

¹⁵¹ One can analogize to the rich diabetic who needs insulin to stay alive and will pay almost any price for it. See *id.* at 428. Because he needs insulin to live, an increase in price will not affect his demand for it.

¹⁵² See, e.g., FISCHER ET AL., *supra* note 141, at 46 (explaining the movement to equilibrium in which sellers will increase the supply of their product to keep pace with the demand).

cent housing developments, which have been near campus, have been expensive, multiunit high rises, which only wealthy students can afford.¹⁵³ As Kathleen Decker of the Ithaca Building Department explained, this type of development inflates the entire rental market; the other landlords realize that they too can charge high rent because the market will bear high-priced apartments.¹⁵⁴

How can this be? Ithaca exemplifies a special market that operates as a system of "monopolistic competition."¹⁵⁵ This condition occurs when a large number of sellers—landlords in this case—compete with each other, but still exhibit "some of the characteristics of a monopolist."¹⁵⁶ In the Ithaca market, landlords may differentiate their products in various ways, such as location or quality, and consumers remain willing to pay a high price to secure the more attractive product.¹⁵⁷

The competition in Ithaca more closely resembles a monopoly than perfect competition.¹⁵⁸ The landlord in this market has an incentive to distinguish his property from others. Wealthy renters, such as those college students who receive money from their parents or student loans, will pay more than the average price for higher quality housing.¹⁵⁹ Though monopolistic competition typically exists in mar-

¹⁵³ See Striffler, *supra* note 95 (explaining that the new high-rise apartments in Ithaca with "Manhattan prices," "target[] 'prosperous families' who can afford to have their sons and daughters live in the building").

¹⁵⁴ See Interview with Kathleen Decker, *supra* note 9; see also CITY OF ITHACA, *supra* note 83, at 9 (describing how the high spending power of some students drives up the prices for all tenants). In addition, students that cannot afford to live near campus move to nearby neighborhoods, increasing rents. See REGULATORY ISSUES SUB-COMM., *supra* note 80, at 4 (explaining that "[s]tudents who are unable to attain or unable to afford units in close proximity to the campus spill into outlying neighborhoods and place further upward pressure on rents").

¹⁵⁵ MCEACHERN, *supra* note 94, at 559. Monopolistic competition theory lies between the theories of monopoly and perfect competition. See *id.* at 558-59. The term describes an economic theory in which a significant number of competitors act independently without concern as to how their competition will react to changes in price or output. See *id.* at 559. A reasonable view of this theory might be one in which the market lies on a continuum between monopoly and perfect competition. Each system exhibits qualities of both, but each can be more monopolistic than competitive or more competitive than monopolistic.

¹⁵⁶ *Id.* at 560.

¹⁵⁷ See *id.* at 559-61 (explaining that even though mini-convenience stores often charge higher prices than larger stores, customers are willing to pay more because convenience stores "are often nearer and stay open later").

¹⁵⁸ But see Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 578 (1984) (arguing "that the rental housing industry is intensely competitive" and that "few landlords wield any significant degree of monopoly power").

¹⁵⁹ See MCEACHERN, *supra* note 94, at 566 & exhibit 3; see also Striffler, *supra* note 95 (describing that owners of new apartment buildings "target[]" wealthy students who will pay more for modern accommodations).

kets with high demand elasticity,¹⁶⁰ a college town exhibits very inelastic demand, much like a monopoly.¹⁶¹ Therefore, when a developer builds new, higher quality buildings, like the new high rises in Ithaca, students pay more for apartments in them.¹⁶² When this development occurs, the landlords with lower quality units raise their rents on the basis of the following two facts: (1) the market will bear higher rents, as the demand for higher quality apartments demonstrates, and (2) a rent increase will not lower the demand.

College towns do not exhibit the traditional price system¹⁶³ that one might find in other rental markets. Because of the housing shortage and the inelastic demand in Ithaca, the rental market operates as a system of monopolistic competition.¹⁶⁴ As landlords differentiate their units by accentuating quality and location, they are able to charge high rents and still acquire tenants, regardless of whether they make improvements to the apartments and of whether the supply of rental units increases.

2. *Bargaining for Terms Under a Form Lease*

By creating contracts of adhesion,¹⁶⁵ the use of form leases makes

¹⁶⁰ See MCEACHERN, *supra* note 94, at 561 ("The demand curve faced by a firm in monopolistic competition is highly, though not perfectly, elastic.").

¹⁶¹ See *generally id.* (describing the monopolist's demand curve as less elastic than that of the typical monopolistic competitor).

¹⁶² See *id.* at 566-67 & exhibit 3 (noting that in a system of monopolistic competition, the buyer is willing to pay more for the higher quality products); see also Striffler, *supra* note 95 (indicating that the new high rise in Ithaca attracts "prosperous families").

¹⁶³ See *supra* text accompanying notes 141-44 (describing the Chicago Cubs' ticket sales as an example of the traditional price system).

¹⁶⁴ Even if the rental market in college towns is not a system of monopolistic competition, an increase in supply does not improve the rental market for tenants, as the inelastic demand principle illustrates. If demand is less elastic, then as the price increases demand will decrease only marginally. See MCEACHERN, *supra* note 94, at 421 & exhibit 1. Similarly, if the supply increases, the price drops only marginally, leaving the renters in essentially the same position that they were before the supply increase.

¹⁶⁵ Form leases provide perfect examples of contracts of adhesion. Contracts of adhesion share with form leases the following seven characteristics:

(1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.

(2) The form has been drafted by, or on behalf of, one party to the transaction.

(3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine.

(4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.

(5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.

it difficult for tenants to bargain effectively.¹⁶⁶ A landlord usually offers a form lease on a take-it-or-leave-it basis without providing the potential tenant any chance to negotiate.¹⁶⁷ When bargaining occurs, it invariably focuses on a few tangential provisions, such as whether the landlord will repaint the apartment or whether the tenant can have a dog.¹⁶⁸ Thus, the use of form leases precludes the possibility of bargaining from equal positions.

Some argue that this type of "bargaining" constitutes a legitimate use of the market. Judge Richard Posner argues that the use of a form lease simply enables the landlord to avoid the formidable costs of negotiating separate agreements with each tenant.¹⁶⁹ He acknowledges a possible "sinister explanation": the landlord wants to force the tenant to accept his terms by giving her no choice.¹⁷⁰ But Judge Posner also suggests that a competing landlord will offer more attractive terms that in turn will force a change in the rental market.¹⁷¹

This sinister explanation accurately describes the situation that occurs when parties employ a standard form contract.¹⁷² Certainly, parties often utilize standard form contracts outside the realm of apartment rental.¹⁷³ These contracts resemble form leases because parties that have strong bargaining power are more likely to use form

(6) The adhering party enters into few transactions of the type represented by the form—few, at least, in comparison with the drafting party.

(7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.

Rakoff, *supra* note 44, at 1177 (footnote omitted).

¹⁶⁶ See *Street v. Davis*, 542 N.Y.S.2d 968, 969 (Civ. Ct. 1989) (noting that a residential tenant "cannot truly negotiate these contracts as an equal"); Mueller, *supra* note 52, at 247 ("Disparity in bargaining power between parties to standard-form contracts is a universally recognized problem."). The disadvantage primarily affects the tenant, especially because lease forms function to benefit the landlord. See Berger, *supra* note 71, at 791 n.2. Furthermore, landlords often amend form leases in reaction to changes in the law. See *id.* at 792 n.3.

¹⁶⁷ See Berger, *supra* note 71, at 791; see also *Street*, 542 N.Y.S.2d at 969 (noting that residential tenants "are at risk when entering into contracts drawn up by others and presented to them on a take or leave basis").

¹⁶⁸ See David Vance Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 Nw. U. L. REV. 204, 232 (1976) ("The bargained contract between a residential tenant and landlord rarely fills more than a paragraph, often containing no more than the price and duration of the tenancy. Sometimes the landlord will promise to redecorate; sometimes the tenant will promise to have no pets." (footnote omitted)).

¹⁶⁹ See POSNER, *supra* note 139, at 127 (describing this economic relationship between landlord and tenant in terms of sellers and buyers).

¹⁷⁰ *Id.*

¹⁷¹ See *id.*

¹⁷² See Bell, *supra* note 131, at 583-84.

¹⁷³ See generally Rakoff, *supra* note 44, at 1220-29 (describing several situations in which form contracts or contracts of adhesion are used).

contracts.¹⁷⁴ The weaker party typically has a limited ability to find more desirable terms, either because the particular market functions as a monopoly or because each competitor in the market uses the same clauses.¹⁷⁵ In these situations, the tenant lacks "freedom" of contract because the landlord dictates terms that the tenant likely neither understands nor wants.¹⁷⁶ In addition, the tenant often believes that the landlord immediately will deny any request or that the tenant's own bargaining position is too weak to change the landlord's position.¹⁷⁷

The form lease creates a circumstance in which the market will not change. Judge Posner premises his argument, which one commentator labelled "the 'market for terms' hypothesis,"¹⁷⁸ on the notion that haggling in the specific circumstance is not necessary because market competition will force a seller to alter her standard form contract to respond to systemic changes.¹⁷⁹ He suggests that these changes also will occur in a monopoly because the buyers will read the contracts before deciding whether to make a purchase.¹⁸⁰ If a contract contains undesirable terms, the argument goes, fewer people will purchase, which in turn will force the whole industry to change course and amend the standard form it uses.¹⁸¹

The market-for-terms hypothesis does not apply to the landlord-tenant context primarily because, unlike the imaginary widget, housing is actually "a necessity of life."¹⁸² If the tenant reads and dislikes terms in the unattractive form lease, he probably cannot alter them,¹⁸³ leaving him only the option of finding another landlord. This propo-

¹⁷⁴ See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) ("Standard contracts are typically used by enterprises with strong bargaining power.").

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* (denouncing form contracts as having "terms whose consequences are often understood only in a vague way, if at all").

¹⁷⁷ See Mueller, *supra* note 52, app. c at 295 (question 34) (reporting that of the surveyed tenants who had never bargained with a landlord, 35% did not bargain because they "thought that such a request would have been immediately denied" and 43% did not think they had a "strong enough bargaining position to obtain any concession").

¹⁷⁸ Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 428 (1990).

¹⁷⁹ See POSNER, *supra* note 139, at 127 ("If one seller offers unattractive terms, a competing seller, wanting sales for himself, will offer more attractive terms.").

¹⁸⁰ See *id.* at 128 (arguing that "a consumer facing a monopolized market has a real choice, and he will want it to be an informed choice").

¹⁸¹ See *id.* (asserting that the effect of monopoly "is to reduce the demand for a product, implying that some customers prefer to do without it rather than pay the monopoly price").

¹⁸² *Id.* ("The fact that a product is monopolized does not make it a necessity of life.").

¹⁸³ See Slawson, *supra* note 44, at 530 ("Even the fastidious few who take the time to read the standard form may be helpless to vary it. The form may be part of an offer which the consumer has no reasonable alternative but to accept.").

sition would be simple, except that “the landlord down the street with equally inviting space uses an equally uninviting and unnegotiable [lease] form.”¹⁸⁴ Regardless of whether another landlord actually does offer a different lease, the prevalence of form leases likely will lead a tenant to believe that all landlords offer the same form.¹⁸⁵ Moreover, because tenants generally do not read the standardized contract,¹⁸⁶ they probably will not make decisions with its terms in mind.¹⁸⁷ Furthermore, the landlord himself may be both unaware of how the lease works¹⁸⁸ and ignorant of the law. This ignorance means that he will not know that he should change any of the lease terms. Indeed, he may not eliminate any of them because of fear that he will jeopardize the lease’s effectiveness. Therefore, it is unlikely that market forces will motivate landlords in college towns to alter their lease provisions.

B. Student Renters’ Impact on the Rental Market

1. *Rational Ignorance in Ithaca*

Even if the market-for-terms hypothesis could apply to a college town rental market, the rational actors in Ithaca still would not bargain extensively. An economic system, like a rental market, ideally includes rational buyers and sellers.¹⁸⁹ These rational actors often must make choices in the face of uncertainty. They will make the decision that is best for them by utilizing the “rational-choice” model to choose the option that “maximizes [their own] subjective expected utility.”¹⁹⁰ Under an assumption that they are rational actors, renters

¹⁸⁴ Berger, *supra* note 71, at 791.

¹⁸⁵ See Rabin, *supra* note 158, at 583 (“Because of the widespread use of printed lease forms, a prospective tenant is fully justified in suspecting that most landlords will be offering identical lease clauses on identical lease forms.”).

¹⁸⁶ See Mueller, *supra* note 52, at 256 (reporting data from a tenant study through which he found that only 57% of the tenant sample read their leases when they rented for the first time and only 50% read their subsequent leases); Slawson, *supra* note 44, at 530 (“Indeed, in the usual case, the consumer never even reads the form, or reads it only after he has become bound by its terms.”); Hasen, *supra* note 178, at 430 (pointing out that “[b]oth the Restatement and ‘law and economics’ adherents recognize that adhesion contracts are neither read nor understood”).

¹⁸⁷ See Hasen, *supra* note 178, at 428 (“If [tenants] do not read the standardized terms, . . . they will be unaware that one [landlord]’s standard contract is better than another’s.”).

¹⁸⁸ See *id.* at 429 (noting “that [tenants] may not be the only ones unaware of the terms of the form contract; the [landlords] themselves may have the contracts drafted by lawyers . . . [who do not] inform[] the [landlord] of the contract’s contents”).

¹⁸⁹ See McEACHERN, *supra* note 94, at 8 (describing rational self-interest as “[a] key economic assumption”); POSNER, *supra* note 139, at 3-4 (discussing “[r]ational maximization”); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 211-12 (1995) (arguing that the bargain principle relies on the notion that parties “are normally the best judges of their own utility” and act to maximize this utility through their promises).

¹⁹⁰ Eisenberg, *supra* note 189, at 213.

often disrupt the ability of the rental market to operate as most other markets do because they act with "rational ignorance."¹⁹¹ Form leases encourage tenants to act with rational ignorance with respect to lease provisions because these leases increase the expense of bargaining for terms.

a. *What Is Rational Ignorance?*

Some economists assert that actors will remain ignorant about some information because doing so benefits them. These economists begin with the premise that actors normally will make rational decisions,¹⁹² but may violate the standard rational-choice model because of the "limits of cognition."¹⁹³ Professor Melvin Eisenberg advocates a "bounded rationality" model for decision making, in which an actor utilizes limited information to make a rational choice.¹⁹⁴ Because of

¹⁹¹ MCEACHERN, *supra* note 94, at 792. Rational ignorance means that people choose to ignore information when "[t]he costs of acquiring and acting on such information are typically greater than any expected benefits." *Id.* For example:

The gain to a citizen-taxpayer from obtaining a particular political outcome in an election is equal to the difference between the value to the taxpayer of obtaining his preferred outcome and the value of obtaining his non-preferred outcome, multiplied by the probability that a change in an individual's vote will alter the outcome of the election. Because this probability is very low, it often does not pay for voters to acquire information.

Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 47 n.17 (1988).

¹⁹² Professor McEachern discusses the amount of time and information required to make a rational choice. *See* MCEACHERN, *supra* note 94, at 9. For example, second-year law students typically consider the time required to make the rational choice of where to work. They talk to friends, relatives, professors, classmates, and associates in law firms. Their goal is to digest and to process all of the information available to them. *Cf. id.* (articulating the same point with the example of a student choosing a college). Students will pay others to gather the information for them; in fact, many buy books about the various firms. *Cf. id.* (same). As McEachern points out, this decision takes "time and money, not to mention sheer aggravation and anxiety." *Id.*

¹⁹³ Eisenberg, *supra* note 189, at 213. Professor Melvin Eisenberg suggests that decision makers have certain "cognitive abilities," such as knowing alternatives or prices, that they may use to make decisions. *Id.* "Limits of cognition," such as rational ignorance, force the decision maker to forego his cognitive abilities when he makes a decision. *Id.*

¹⁹⁴ *Id.* at 214 (claiming that "human rationality is normally bounded by limited information and limited information processing"). Melvin Eisenberg argues that there are two degrees of rational decision making: optimal substantive decisions and satisfactory substantive decisions. *See id.* An optimal substantive decision exists in a world in which the costs of searching for and processing information are zero and in which humans can process information perfectly. *See id.* In such a scenario, an actor facing a decision would search for all relevant information, process that information, and make the optimal substantive decision. *See id.* Because of the formidable costs of gathering information and the fallibility of the human mind, however, most actors only aspire to make a satisfactory substantive decision. *See id.* According to Eisenberg, the distinction between these types of rational choices exists in "the difference between searching a haystack to find the sharpest needle in it and searching the haystack to find a needle sharp enough to sew with." *Id.* (quoting JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 140-41 (1958) (internal quotation marks

the costs of ascertaining information, actors do not always obtain the necessary information to make informed decisions.¹⁹⁵ Instead, they "make decisions in a state of rational ignorance of [the] alternatives and consequences that could have been discovered and considered if search and processing had continued."¹⁹⁶ Actors recognize the costs of acquiring and processing the information needed to make more accurate decisions and rationally decide not to bear them. Thus, their ignorance is rational, despite the resulting uninformed decisions.¹⁹⁷

The utilization of form contracts creates an environment in which "rational ignorance plays a particularly powerful role."¹⁹⁸ The resource costs of making an informed decision with respect to a form contract are extremely high.¹⁹⁹ Form contracts often contain many legal terms, the language of which confuses laypeople.²⁰⁰ To execute a form contract safely, a layperson would have to pay an attorney to review it, further increasing the transaction costs and limiting the form contract's efficiency.²⁰¹ Indeed, even an attorney would not

omitted)). Some commentators have deemed this phenomenon of rational ignorance "satisficing." David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 279 (1986) ("To optimize is to choose the best from the full set of market choices; to satisfice is to do as well as one can, given the circumstances.").

¹⁹⁵ See Eisenberg, *supra* note 189, at 215. Consumers engage in this type of rational ignorance decision making either "by (a) failing to choose the best when considerable product diversity exists, because the costs of *acquiring* information preclude consumers from inspecting the full market choice set; or (b) failing to choose the best when the costs of *processing* information preclude consumers from fully exploiting an optimal search strategy." Grether et al., *supra* note 194, at 279.

¹⁹⁶ Eisenberg, *supra* note 189, at 215.

¹⁹⁷ See *id.* at 216. An example of factoring information costs into the decision-making process is as follows: when "a piece of legislation will cost a taxpayer \$50.00, and the net cost of obtaining information about the effects of the legislation . . . are greater than \$50.00, no rational taxpayer will obtain the information necessary to begin to affect legislative outcomes." Macey, *supra* note 191, at 47. Professor Macey describes this type of decision making as "rational ignorance." *Id.* at 47 n.17.

¹⁹⁸ Eisenberg, *supra* note 189, at 241; see also Rabin, *supra* note 158, at 582 (noting that in form leases "[t]he key factor . . . is the existence of heavy transaction and information costs").

¹⁹⁹ See Eisenberg, *supra* note 189, at 241 (noting that to understand adequately a form contract, the signor must learn, which "will often be unduly costly," new legal terms, which have meanings that are "often . . . inaccessible to laypersons" because form contracts "are often written in exceedingly technical prose").

²⁰⁰ See *id.* The prototypical form contract containing many confusing legal terms is the insurance contract. See *id.* One can use the same rationale to assess these types of contracts in the examination of form leases. See *supra* Part III.A (describing form leases as highly technical and very confusing). This Note makes no distinction between a form lease and other types of form contracts.

²⁰¹ See Hasen, *supra* note 178, at 429. Of course, most tenants do not take their leases to attorneys prior to signing them. See Mueller, *supra* note 52, app. c at 286 (questions 4 & 5) (noting that 94% of the surveyed tenants did not consult an attorney prior to signing their current lease and that 77% have never consulted an attorney prior to signing any lease).

parse every inch of a form contract when he endeavors to "rent a car, purchase an airline ticket, enter a parking garage, or sign a car loan agreement or apartment lease."²⁰² Moreover, the dynamics of renting make signing a lease a unique contracting experience: renters usually spend days searching for an apartment to rent, find a few that appeal to them, and see the leases only after they have chosen the apartment they want.²⁰³ This time-consuming process makes it unlikely that renters will shop for favorable lease terms.²⁰⁴

The nature of the rental market makes rational ignorance even more likely.²⁰⁵ To make informed choices in light of the confusing terms of form leases,²⁰⁶ a tenant would have to both search the lease for illegal terms, which often exist within the fine print, and understand those terms. This process would consume too much time. Instead, the tenant tends to sign the lease as it stands, remaining ignorant of its terms.²⁰⁷ In so doing, the tenant will have agreed to the unenforceable provisions.²⁰⁸

The theory of rational ignorance also hampers the ability of parties to bargain. Tenants often do not bargain because they assume

²⁰² Hasen, *supra* note 178, at 429. *But see* McEACHERN, *supra* note 94, at 792 (arguing that consumers do not choose to be rationally ignorant "about decisions they make in private markets [for personal products] because they benefit directly from the knowledge acquired").

²⁰³ See Rabin, *supra* note 158, at 583 (explaining that during the apartment shopping experience, a potential tenant "rarely sees a written lease" until "he finally decides on an apartment").

²⁰⁴ See *id.* ("At this point, the prospective tenant has no ready means of shopping for lease terms. He does not know, and cannot readily find out, what types of leases other landlords are offering.").

²⁰⁵ See Kuklin, *supra* note 41, at 857 ("[I]t can be pointed out that it typically is rational to sign the agreement without full comprehension. . . . [T]he information costs and the difficulty, even futility, of dickering over the take-it-or-leave-it contract often outweigh the advantage of the potential revision . . ."); Rabin, *supra* note 158, at 582-83 (detailing the "heavy transaction and information costs" of lease signing).

²⁰⁶ See *supra* Part I.B.

²⁰⁷ See Eisenberg, *supra* note 189, at 243; Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600 (1990) ("[T]he benefit to be derived from acquiring adequate knowledge of contract terms is usually low and is likely to be far exceeded by the significant costs of acquiring that information. It is, therefore, rational for even a conscientious consumer to pay little, if any, attention to subordinate contract terms."). Professor Eisenberg describes the thought process of the rational consumer as follows:

Faced with preprinted terms whose effect the form taker knows he will find difficult or impossible to fully understand, which involve risks that probably will never mature, which are unlikely to be worth the cost of search and processing, and which probably aren't subject to revision in any event, a rational form taker will typically decide to remain ignorant of the preprinted terms.

Eisenberg, *supra* note 189, at 243.

²⁰⁸ See Hasen, *supra* note 178, at 430; *see also supra* notes 60-65 and accompanying text (discussing the strategic advantage that landlords gain from the inclusion of unenforceable terms).

that landlords will not negotiate in return, regardless of the validity of the tenants' concern.²⁰⁹ Commentators, like Judge Posner, suggest that competition will spur market forces, causing landlords to include more favorable terms in their form leases.²¹⁰ Judge Posner's conclusion works only if a large number of renters are willing to scrutinize the forms for favorable terms.²¹¹ Renters rarely engage in that type of scrutiny because of the time and energy investment required to comprehend, compare, and reject form lease terms.²¹²

Even worse for the renter, Judge Posner's competitive environment likely would decrease the number of favorable provisions in standard form leases.²¹³ For example, landlords typically compete for tenants by lowering rents or by giving perks, such as waiving the last month's rent.²¹⁴ Because renters only consider certain terms when they look for an apartment, landlords have an incentive to make those particular terms attractive. They correspondingly offset these terms, however, by making other terms unattractive, which results in an increased total cost to the renter.²¹⁵ Suppose potential tenants always

²⁰⁹ See Meyerson, *supra* note 207, at 599-600 ("Whatever benefit might be derived by the consumer who accurately understands a contract term must be further discounted by the high transaction costs of altering the term or finding a seller with a preferred term. The informed consumer knows that the seller probably will refuse to bargain." (footnote omitted)). Landlords typically do not bargain because their costs in altering their leases for one tenant exceed any possible gains, so the rational landlord will risk losing that particular, aberrant tenant to avoid "losing the cost savings of standardized forms." *Id.* at 600; see also Mueller, *supra* note 52, at 264-65 (noting that for the small number of surveyed tenants who attempted to bargain with their landlords, most met refusals or only received slight modifications of their leases). Furthermore, in this captive-buyer market, another ignorant tenant probably will be willing to lease the apartment.

²¹⁰ See *supra* notes 178-81 and accompanying text.

²¹¹ See Eisenberg, *supra* note 189, at 243 (arguing that "competition will not have this effect unless a significant number of form takers participate in this search").

²¹² See *id.* at 243-44; see also Mueller, *supra* note 52, at 256-57 (presenting empirical data indicating that most renters fail to read their lease terms because they find the language confusing or fear an inability to understand legal jargon).

²¹³ See Eisenberg, *supra* note 189, at 244 (noting that "competition [between form contract terms] is likely to degrade the quality of preprinted terms" because the sellers in the market will engage in a race to the bottom to make nonperformance terms harsher). It is also likely that the rental market would lack efficiency in this type of competitive environment because the "lack of information alters the assumption that free choice will inevitably lead to an efficient result." Meyerson, *supra* note 207, at 603. Landlords prefer this market inefficiency because they are able to draft and use forms that shift risks to the tenants. See *id.* at 605.

²¹⁴ See E-mail from Lawrence Shepard, Professor of Economics, University of California Davis, to author 3 (Oct. 20, 1997) (on file with author). Professor Shepard is an apartment owner who rents to students in Davis, California. His comments regarding the state of the rental market derive from his experiences as an apartment owner and from his knowledge as a professor of economics.

²¹⁵ For an articulation of this strategy, see Eisenberg, *supra* note 189, at 244. For example, banks understand that consumers will focus on "performance terms" like "interest rates and activity charges"; therefore, they often include undesirable terms in their banking agreements that focus on "nonperformance terms . . . such as terms detailing the con-

pay attention to the security deposit amount but do not read the rest of the lease. Knowing this trend, a landlord may decrease the amount of the security deposit and include a provision that requires the tenant to pay a fee for repairs. The landlord has an increased risk, on the one hand, because the lower security deposit may not cover all damages to his property, but he has offset this risk by charging the tenants for repairs. As soon as one landlord implements the repair charge, others will follow suit by lowering the more visible security deposit and including the repair charge provision.²¹⁶ Although the renters might think that the high visibility term benefits them, this race to the bottom actually results in less favorable form lease terms for the renters.²¹⁷ This situation becomes even less favorable for renters when the landlords start with a very high security deposit and subsequently reduce it, giving themselves a bargaining chip while still protecting their property.

Furthermore, the landlord can affect the costs surrounding the lease by adjusting both "performance" and "nonperformance" terms.²¹⁸ Performance terms are those on which a consumer will base his decision, such as the security deposit in the above example, and nonperformance terms are those that a consumer might consider insignificant, such as the fee for repairs.²¹⁹ For example, in the credit card industry, annual fees and introductory interest rates are typically performance terms, and late fees and long-term interest rates are typically nonperformance terms. Just as one deciding on a credit card often will overlook nonperformance terms, a renter only focuses on the performance terms and remains rationally ignorant about the remaining terms.²²⁰ Landlords catch the attention of tenants by making performance terms more favorable while recapturing the resulting cost by making nonperformance terms less favorable.

sequences of failing to detect and promptly report an error in the monthly statement, or the penalty for overdrawing the account." *Id.* Because consumers are not as interested in these terms, the bank can save costs by using them, and the consumer usually will remain rationally ignorant about them. *See id.*

²¹⁶ *See id.* at 244 (positing that the players in a particular market will emulate each other's performance and nonperformance contract terms).

²¹⁷ *Cf. id.* (describing the same phenomenon in the banking industry, in which banks offer low activity charges and high interest at the expense of other provisions).

²¹⁸ *Id.* at 243-44 (suggesting that each form contract contains both types of terms).

²¹⁹ *See id.* (describing and providing an example of how performance and nonperformance terms operate in a market).

²²⁰ *Cf. id.* at 244 (describing that with banking terms, customers focus on those that are performance based, but are rationally ignorant about those that are nonperformance based).

b. *Why Students Exemplify Rational Ignorance*

Students tend to avoid investing the time and energy to make informed housing decisions.²²¹ Students decide not to invest their time or their energy in this decision because they often will stay in their apartments only for a year,²²² confining the ramifications of their decisions to the short term. Students also choose ignorance because they do not consider what might go wrong.²²³ Therefore, they believe that it is unlikely that nonperformance terms will affect them.²²⁴ In addition, students who do negotiate do so to change a performance term, such as the lease length.²²⁵ Landlords often are willing to alter performance terms such as lease length in exchange for an increase in rent,²²⁶ which acts as the nonperformance term.²²⁷ Therefore, to alter the performance term, students usually decide on an apartment with rational ignorance about the nonperformance term.

Because many students do not pay for their housing or education costs themselves, they are not ultimately responsible for the financial consequences of their decision. Thus, they are willing to forego an informed rental decision. This dichotomy is perhaps the most unique aspect of the college town environment. Unlike most rental situations, in college towns the student chooses the apartment, but often either her parents or student loans pay the rent.²²⁸ This peculiar scenario tends to result in increased prices in the local rental market.²²⁹

As an additional consequence of this arrangement, renters often will remain rationally ignorant about the performance terms of their leases. To make an informed choice, one must use certain cognitive

²²¹ Cf. Grether et al., *supra* note 194, at 279 (describing consumers' tendencies to sacrifice making the best choice to reduce information processing costs).

²²² See *supra* note 99.

²²³ See *infra* Part III.B.2.

²²⁴ See Eisenberg, *supra* note 189, at 243 (describing why people choose rational ignorance concerning nonperformance terms in form contracts).

²²⁵ See Mueller, *supra* note 52, at 265 n.70 (noting that students often negotiate for shorter lease duration provisions because "many students desire an eight-month lease for the academic year"). Moreover, because most college towns are not large cities, students must leave for the summer to find work in either their hometown or a large city.

²²⁶ See *id.* at 265 ("Lease duration is the one term most conventionally surrendered by landlords in return for an increase in rent; moreover, the length of the lease can be adjusted with less material sacrifice to the lessor" (footnote omitted)).

²²⁷ See *supra* notes 98-99 and accompanying text (maintaining that rent is not always a student's primary consideration when leasing an apartment).

²²⁸ Obviously, this statement is a generalization. Not all students rely on their parents or student loans. Certainly, some work to earn money to put themselves through school. In most cases, however, students rely on their parents, on financial aid, or on a combination of the two to pay for school and related expenses, including rent.

²²⁹ See *supra* notes 97, 159 and accompanying text.

skills.²³⁰ One must analyze the chances that an uncertain future event will occur, accurately perceive the costs of that event, appreciate any potential risks, and factor all of this information into a utility calculus.²³¹ Again, the ticket buyer for a Cubs baseball game is analogous.²³² When he decides whether to attempt to buy tickets for the sold-out game from a seller on the street, he must measure the chances that the game will be rained out, predict the cost of the tickets, appreciate the risk of buying counterfeit tickets, and process these factors in his utility calculus. Rational ignorance limits cognition, interfering with this decision-making process.²³³ Moreover, in the Ithaca rental environment, students probably do not anticipate future events, perceive the costs, or appreciate the risks of a poor bargain because they are not responsible for its outcome.

2. *Undue Optimism in Ithaca*

Aside from making rationally ignorant decisions, students often fail to anticipate potential problems with their apartments or landlords. Generally, young adults are unduly optimistic²³⁴ about the prospects of encountering apartment difficulties. In other words, they are less likely to negotiate for favorable terms²³⁵ because they do not foresee problems with either their landlord or their apartment.²³⁶ Ac-

²³⁰ See Eisenberg, *supra* note 189, at 213. Professor Eisenberg notes that to make decisions in the face of uncertainty, people use their decision-making skills, which he calls cognitive abilities. See *id.*

²³¹ See *id.* For an extensive analysis of the psychology of decision making, focusing especially on decision-making errors, see Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986).

²³² See *supra* text accompanying notes 141-45.

²³³ See Eisenberg, *supra* note 189, at 213-16.

²³⁴ For a discussion of the meaning of undue optimism, see generally Colin F. Camerer & Howard Kunreuther, *Decision Processes for Low Probability Events: Policy Implications*, 8 J. POL'Y ANALYSIS & MGMT. 565 (1989) (discussing how policy makers should react when actors are unrealistic in their perceptions); Eisenberg, *supra* note 189, at 216-18 (describing the phenomenon in which people systematically make irrational decisions because they are unduly optimistic); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980) (discussing the phenomenon of unrealistic optimism).

²³⁵ See Mueller, *supra* note 52, app. c at 288, 294 (questions 18, 19 & 30) (noting that 94% of the surveyed tenants had never attempted to bargain for lower rent, 93% had never asked for a change in the prepayment of the first and last months' rent, and 82% had never asked the landlord to make any changes in the terms of the lease (other than the lease length and rent amount)). For an empirical explanation of why this situation is the case, see *supra* note 177 and accompanying text.

²³⁶ Cf. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 442-43 (1993) (demonstrating that recently married couples are aware that 50% of marriages end in divorce, but almost unanimously believe that theirs will succeed); Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 146 (1981) (demonstrating that drivers optimistically believe that they are "safer and more skillful" than other drivers). One commentator argues "that a tenant may, as a result of

cordingly, young adults generally recognize the possibility of unpleasant circumstances, but do not believe that they will fall victim to these circumstances.²³⁷

For example, Professors Lynn Baker and Robert Emery surveyed newlyweds to discern their understanding of divorce law, their perceptions of the divorce rate in the general population, and their views concerning the likelihood that their own marriages will end in divorce.²³⁸ The median age of the male participants was twenty-seven, and the median age of the female participants was twenty-five.²³⁹ Overall, the participants optimistically predicted that their own marriages would not end in divorce.²⁴⁰ Moreover, the respondents "expressed unrealistically *optimistic* views about the likely consequences should they personally be divorced, despite expressing unrealistically *pessimistic* views that divorce statutes are biased against their own gender."²⁴¹ Baker and Emery concluded that young adults likely will not investigate marriage law until a problem actually arises in their own marriage because their "systematic optimism" leads them to "consider divorce laws personally irrelevant."²⁴² Similarly, students likely will not investigate landlord-tenant law or even the provisions of their own leases until they find themselves in a dispute. A study of students' beliefs about their own driving abilities vividly illustrates how prone students can be to undue optimism.²⁴³ With a median age of twenty-two, eighty-eight percent of the surveyed students viewed themselves as better than average drivers.²⁴⁴

In general, "students tend to believe that they are more likely than their peers to experience positive events and less likely to experience negative events."²⁴⁵ One significant factor that affects students' reactions to various scenarios is their personal experience, or lack

prior experience or innate cynicism, expect that his lease will contain stringent terms to which his attention was not drawn" by the landlord. Mueller, *supra* note 52, at 257 (emphasis added). Even if a tenant is cynical about the nature of his lease terms, Mueller's speculation does not undermine the undue optimism argument. Although a tenant might be critical of his landlord's behavior during the signing, he likely will remain unrealistically optimistic about whether he will become embroiled in a landlord-tenant dispute. See Weinstein, *supra* note 234, at 818 (maintaining that students often doubt that they will become victims of any negative circumstances or occurrences).

²³⁷ See Baker & Emery, *supra* note 236, at 442-43.

²³⁸ See *id.* at 440-44.

²³⁹ See *id.* at 440 (indicating that the male ages ranged from 18 to 57 with a median age of 27, and the female ages ranged from 15 to 38 with a median age of 25).

²⁴⁰ See *id.* at 443.

²⁴¹ *Id.* at 447-48.

²⁴² *Id.* at 448.

²⁴³ See Svenson, *supra* note 236, at 144-46.

²⁴⁴ See *id.* at 146.

²⁴⁵ Weinstein, *supra* note 234, at 818 (describing the results of his study, which examined students' predictions of the likelihood of their experiencing certain positive and negative life events).

thereof.²⁴⁶ Psychologists conducted studies on students and young adults, asking them to predict their chances of experiencing certain events²⁴⁷ in light of “any personal actions, plans, or attributes that might affect their chances of experiencing the events.”²⁴⁸ Taking their personal experiences into account, the study found that students exhibited unrealistic optimism.²⁴⁹ Because personal experience significantly affects perception of risk, optimism likely will decline as one grows older and gains more experience.²⁵⁰ Students who rent apartments during college likely do so for the first time. Therefore, they do not have any experience dealing with the potential landlord-tenant problems.²⁵¹ Lack of experience and undue optimism make it very unlikely that student renters will attempt to bargain for favorable terms, allowing landlords to take advantage of them.

Regardless of the operation of the college town rental market, students do not make housing decisions as informed, rational actors. Instead, they act with rational ignorance because they are transient, generally do not pay for their own living expenses, and act with decision-making skills inferior to those possessed by adult renters. Moreover, young adults likely will not bargain with their landlords to avert risks because they are unduly optimistic about both the future in general and the chances of a dispute arising from their particular lease. These factors, along with the unique demographics of college towns, underscore the special need for changes in the rental practices in college towns like Ithaca.

²⁴⁶ See Camerer & Kunreuther, *supra* note 234, at 566 (articulating that “public perceptions are often unrealistic, in part because people lack direct experience with the risks”); Weinstein, *supra* note 234, at 813 (noting that the author correctly predicted that the correlation between personal experience and level of optimism was “statistically significant”). *But see* Svenson, *supra* note 236, at 146-47 (arguing that even those who previously had been at fault in car accidents believed that they were better than average drivers and noting that “[t]his seems to indicate that we have difficulties in learning from experience”).

²⁴⁷ The students responded to a questionnaire listing 18 positive events and 24 negative events. See Weinstein, *supra* note 234, at 810. Some examples of the positive events are as follows: liking post-graduation job, owning a house, graduating in the top third of the class, living past 80, and earning over \$40,000 in 10 years. See *id.* Some examples of the negative events are as follows: having a drinking problem, attempting suicide, suffering a heart attack, getting lung cancer, being sued by someone, being the victim of a mugging, and being sterile. See *id.*

²⁴⁸ *Id.* at 819.

²⁴⁹ See *id.* at 810.

²⁵⁰ Cf. *id.* (arguing that those “who believe, falsely, that their personal attributes exempt them from risk or that their present actions reduce their risks below those of other people may be inclined to engage in risky behaviors and to ignore precautions”).

²⁵¹ Most students do not have experience with making rental arrangements prior to attending college. *But see* Mueller, *supra* note 52, at 257 (noting that student renters often exhibit cynicism possibly because of prior renting experiences or because that cynicism is “innate”).

IV

ADOPTION OF THE DAVIS MODEL LEASE AS A SOLUTION

This Note has articulated the difficulties that renters face in Ithaca. Other authors have cataloged the problems with owner-renter relations and have recognized that "model" form leases can eliminate some of the problems inherent in the traditional form lease.²⁵² To resolve the problems in Ithaca and other college towns, this Note proposes the adoption of the Davis Model Lease ("DML") of the University of California Davis. This model lease strikes an adequate balance between owner and renter rights, so that its adoption will help to alleviate college town rental problems.

A. Ithaca Should Adopt the Davis Model Lease in a Cooperative Fashion

If Ithaca does decide to adopt the DML, it must determine how to effect that adoption. Fortunately, Ithaca can look for guidance to Davis, California, which enacted the DML. According to Fred R. Costello, Associate Director of Student Housing and Child Care at the University of California Davis, the DML emerged from the difficulties surrounding the city in the late 1960s.²⁵³ Davis faced massive rent strikes and landlord-tenant disputes during this time, prompting law students from the University to work with Costello's office and local landlords to draft what later became the DML.²⁵⁴ Although Ithaca likely does not face the risk of rent strikes, similarities between it and Davis make Ithaca ripe for the adoption of the DML.

Davis, like Ithaca, has a relatively small population.²⁵⁵ Moreover, universities stand at the core of each community and represent the dominant employer in each area.²⁵⁶ The demographic characteristics of Davis also resemble those of Ithaca—the dominant age group spans

²⁵² See, e.g., Bentley, *supra* note 41, at 857 & n.125 (explaining that the Bar Association form lease omits the jury waiver provision, indicating that "the draftsmen of the Bar Association lease did recognize the shortcomings of the traditional form lease and consciously sought to break from it").

²⁵³ See Telephone Interview with Fred R. Costello, Associate Director of Student Housing and Child Care, University of California Davis (Apr. 30, 1998) (notes on file with author). This Note relies heavily on interviews with and letters from Costello to describe both the adoption and the solvency of the DML in Davis, California. Unfortunately, scant material recounting the events that have occurred in the Davis rental market during the years since its adoption has been published.

²⁵⁴ See *id.* For a general discussion of rent strikes, see GOODMAN, *supra* note 17, at 159-69. Essentially, a rent strike "is the organized withholding of rent by the tenants of a building from the owner of the building." *Id.* at 159.

²⁵⁵ Compare *Zip Rezide: 95616 (Davis)*, Claritas, Aug. 19, 1997, available in LEXIS, Geodem Library, Ziprez File (noting that Davis has a population of 51,337), with *Zip Rezide: 14850 (Ithaca)*, *supra* note 78 (noting that Ithaca has a population of 57,617).

²⁵⁶ See Telephone Interview with Fred R. Costello, *supra* note 253.

from eighteen to twenty-four.²⁵⁷ One accurately could describe either city as having "an unusual concentration of unmarried persons 18-24 years old [who are] primarily students or young people just entering the labor force."²⁵⁸ Moreover, a majority of the students and employees of the university in Davis live near the school and rent their housing.²⁵⁹ Similarly, because of Ithaca's relative isolation, most people with a connection to either Cornell or Ithaca College live in the immediate area.²⁶⁰ Finally, the majority of renters in each locale have occupied their units for fewer than five years.²⁶¹

Following the lead of Davis, the Common Counsel of Ithaca should not impose the DML on the market. Indeed, the political influence of property owners might alter it, creating a lease that is as inequitable as the form leases they currently use.²⁶² Rather, Cornell University and Ithaca College should coordinate with student groups²⁶³ and local landlords to adopt the lease.²⁶⁴ Once they follow the DML format to draft the initial lease, the document continuously

²⁵⁷ Compare *Zip Rezide: 95616 (Davis)*, *supra* note 255 (reporting that 29.27% of the population is between the ages of 18 and 24 with a median age of 27.4 years), with *Zip Rezide: 14850 (Ithaca)*, *supra* note 78 (reporting that 28.08% of the population is between the ages of 18 and 24 with a median age of 28.4 years).

²⁵⁸ *Zip Rezide: 95616 (Davis)*, *supra* note 255; see also *supra* text accompanying notes 81-82 (discussing the high population of college students in Ithaca).

²⁵⁹ See *Zip Rezide: 95616 (Davis)*, *supra* note 255 (reporting that 59.44% of the Davis population rents its housing).

²⁶⁰ See *supra* text accompanying notes 91-94.

²⁶¹ Compare *Zip Rezide: 95616 (Davis)*, *supra* note 255 (reporting that 73.32% of the renting population has moved into their present units within the last five years), with *Zip Rezide: 14850 (Ithaca)*, *supra* note 78 (reporting that 64.31% of the renting population has moved into their present units within the last five years).

²⁶² See Bentley, *supra* note 41, at 880 ("[S]hifting the controversy over lease terms from the renting agent's office to the legislature might result in a statutory lease as inequitable and unworkable as any of the traditional forms. Tenants assumedly outnumber landlords in New York State, yet the interests of property owners are not neglected in Albany.").

²⁶³ Students probably can organize better than most other groups of tenants. See E-mail from Lawrence Shepard, Professor of Economics, University of California Davis, to author 1 (Nov. 18, 1997) (on file with author) (observing that students often are able to organize successfully into groups and effect changes in the college environment); see also Barbara Brody et al., *Students Block Traffic, Protest Housing Report*, CORNELL DAILY SUN, May 3, 1996, at 1 (reporting that "to postpone the trustee vote on [a] program house proposal . . . about 200 students obstructed crosswalks at major campus intersections").

²⁶⁴ Davis adopted the DML in a similar fashion. See Letter from Fred R. Costello, Community Housing Coordinator, University of California Davis, to Davis Community Resources 1 (May 20, 1977) (on file with author) (recounting that the DML, "which has been used extensively throughout Davis since 1969, reflects the combined efforts of many individuals, including members of [the university housing office] staff, property owners and managers, as well as student and non-student residents").

In fact, it would not hurt Cornell University to adopt the DML itself. The University "reserves the right to reassign students to any room the University chooses," even though the students sign housing contracts "for specific rooms." Brendan Sobie, 'Small Print' Abounds in Housing Contracts, CORNELL DAILY SUN, Oct. 15, 1993, at 1. Students also charge that this very provision is in fine print. See *id.* ("'It is in the small print that [the contract] isn't binding,' [one student] said." (first alteration in original)).

should evolve as various groups offer improvements.²⁶⁵ Thus, participants in Ithaca's housing market can tailor Ithaca's version of the DML to accommodate the unique rental issues of the city.

Both Cornell and Ithaca College then should send copies of Ithaca's DML to all enrolled students during the summer and suggest that they rent only from owners who use it. This measure will increase the likelihood of its use because owners who fail to use it may lose tenants. Advocates of the DML's adoption could seek widespread owner use, thereby enabling it to alleviate rental problems in Ithaca.

B. Adoption of the Davis Model Lease Will Help Alleviate Ithaca's Rental Problems

1. *The Davis Model Lease Departs from Traditional Form Leases*

The DML is quite straightforward. Unlike the typical form lease, which is disorganized and riddled with fine print,²⁶⁶ the DML is reader-friendly. It provides seven initial provisions—"A" through "G"—and thirty-two additional terms.²⁶⁷ The lease uses the terms "owner" and "resident," presenting them always in uppercase letters.²⁶⁸ The initial sections list the parties' names and addresses, the term of the lease, the rent in both total and monthly amounts, the address to which the resident must send the rent, and the total sum due at the commencement of the lease.²⁶⁹ The initial provisions also include a section specifying the procedures for the payment and return of the resident's security deposit and a section governing utilities.²⁷⁰

The drafters of the DML's provisions aimed for straightforwardness and clarity. While the DML resembles most form leases in that it looks like a legal document, its terminology is simple and it defines its terms internally. For example, the provision detailing security deposits instructs that the owner is entitled to retain a portion of the security deposit for any damage, unless it results from "reasonable use and

²⁶⁵ Davis has revised the DML six times. See Letter from Fred R. Costello, Manager of Community and Student Family Housing and Child Care Services, University of California Davis, to Davis Area Apartment Owner 1 (Oct. 22, 1987) (on file with author) (noting that the DML has "undergone six revisions" and that "[i]n each instance, a concerted effort has been made to balance the interests of both landlords and tenants and to develop a document acceptable to all parties").

²⁶⁶ See *supra* notes 70-77 and accompanying text.

²⁶⁷ See DAVIS MODEL LEASE, *supra* note 12.

²⁶⁸ See *id.* The use of these terms alone is a marked departure from the typical "landlord" and "tenant," which arose in feudal times when the tenant was subservient both in rights and in stature to the lord of the land. See Letter from Fred R. Costello to Davis Community Resources, *supra* note 264, at 1 (noting that the terms landlord and tenant "date[] back to feudal times"); *supra* Part I.

²⁶⁹ See DAVIS MODEL LEASE, *supra* note 12, §§ A-C, E.

²⁷⁰ See *id.* §§ D, F.

wear," which it explains "may be understood to mean the gradual deterioration resulting from use, lapse of time, and the operation of the elements, in spite of RESIDENT's care."²⁷¹ By providing a definition of "reasonable use and wear," the DML forewarns both parties about what kind of damage applies against the security deposit. It also establishes the initial condition of the apartment by requiring the completion and signing of an inventory within three days of the move-in date, and it reminds both parties to complete and sign the statement promptly "in order to minimize disputes over the return of the security deposit."²⁷² Another example of the DML's internal definition structure concerns the first provision, which both defines joint and several liability and instructs the resident to choose her housemates carefully.²⁷³ This clarity distinguishes the DML from other linguistically confusing form leases.²⁷⁴

In contrast to the typical form lease, the DML contains neither unenforceable provisions that seek to confuse residents nor hidden provisions that provide leverage to the owner.²⁷⁵ First, the lease adopts the English Rule,²⁷⁶ under which the owner must deliver actual possession of the premises within three working days of "the commencement of [the] lease."²⁷⁷ If a delay occurs, regardless of whether it is the owner's fault, the resident may terminate the lease or demand that the owner provide comparable accommodations in exchange for the tenant's payment of rent.²⁷⁸ Second, the DML does not include the demand for jury waiver or the infamous agreement not to counterclaim.²⁷⁹ Third, although the resident must obtain the owner's

²⁷¹ *Id.* § D.

²⁷² *Id.* § 5 ("Both OWNER and RESIDENT are reminded of the importance of the prompt signing of this inventory statement, in order to minimize disputes over the return of the security deposit.")

²⁷³ *See id.* § 1. The language of that section reads as follows:

The language "joint and several" means that if more than one person has signed this lease as a RESIDENT, then each of the RESIDENTS and the RESIDENTS collectively are fully responsible for fulfilling (including full payment of rent) all of the conditions of this lease, except where expressly otherwise agreed. Thus, it is the RESIDENTS' duty to select as their CO-RESIDENTS persons who will fulfill their respective "share" of the obligations contracted for under this lease.

Id.

²⁷⁴ *See supra* Part I.B.

²⁷⁵ *See supra* notes 41-46 and accompanying text.

²⁷⁶ *See supra* note 25 (distinguishing the English Rule for delivery of possession from the American Rule).

²⁷⁷ DAVIS MODEL LEASE, *supra* note 12, § 3.

²⁷⁸ *See id.* § 4.

²⁷⁹ In addition to waiving the right to a jury, form leases often strip tenants of their legal right to counterclaim, typically with the following language: "It is further agreed that if the Landlord commences any summary proceeding, the Tenant will not interpose any counterclaim of whatever nature or description in any such proceeding except as permitted by statute." BERGER, *supra* note 46, § 5.1, at 241 (quoting a standard form lease).

consent for a sublease or assignment,²⁸⁰ the lease explicitly provides that the "OWNER may not unreasonably withhold consent to such a sublease or assignment."²⁸¹ Fourth, if the owner sells the property, the lease protects the resident by freeing the original owner from his obligations only if the new owner "fulfill[s] the terms, covenants, and conditions of this lease."²⁸² Fifth, the owner can enter the premises only upon "24 hours written notice," save in cases of emergency.²⁸³ Finally, the owner remains liable for all injuries that take place on the premises that are not the fault of the resident.²⁸⁴ Similarly, the resident bears no liability for any injury that arises from the owner's fault.²⁸⁵ Each of these provisions protects the resident from the practices of unscrupulous owners.

The DML also attempts to equalize lease terms. It does not leave the resident to search through legal books and their supplements to discover the enforceability of a term.²⁸⁶ For example, the DML specifies that "[i]n the event of any legal action concerning this lease, the *losing party* shall pay to the *prevailing party* reasonable attorney's fees and court costs."²⁸⁷ Although this provision still places the resident in the risky position of gambling to prevail in a lawsuit, it at least comports with the law.²⁸⁸ For example, section 234 of New York's Real Property Law provides that when a lease contains a provision requiring the resident to pay legal fees if he has breached, the lease also must require the owner to pay the fees if he has breached.²⁸⁹ While most form leases prescribe a waiver of this section—even though such a waiver "shall be void as against public policy"²⁹⁰—the DML recognizes the requirements of this type of law and embraces them.

The DML contains a provision for mediation²⁹¹ that, with slight modification, will increase the ability of the parties to resolve conflicts without resorting to the courts, thereby improving the renter's success

²⁸⁰ State law inconsistently addresses whether one may enforce "silent consent clauses" that do not mention any reasonableness requirement. See Martha Wach, Note, *Withholding Consent To Alienate: If Your Landlord Is in a Bad Mood, Can He Prevent You from Alienating Your Lease?*, 43 DUKE L.J. 671, 672 (1993) ("The [silent consent clause] issue has been litigated in most of the states over several decades, leaving an unsettled area of law." (footnote omitted)).

²⁸¹ DAVIS MODEL LEASE, *supra* note 12, § 13(c).

²⁸² *Id.* § 24.

²⁸³ *Id.* § 10.

²⁸⁴ See *id.* § 22.

²⁸⁵ See *id.*

²⁸⁶ See *supra* text accompanying notes 47-50.

²⁸⁷ DAVIS MODEL LEASE, *supra* note 12, § 27 (emphasis added).

²⁸⁸ See N.Y. REAL PROP. LAW § 234 (McKinney 1989).

²⁸⁹ See *id.*

²⁹⁰ *Id.*

²⁹¹ See DAVIS MODEL LEASE, *supra* note 12, § 16. This is not the first proposal for mediation in landlord-tenant disputes. See David M. Ebel, *Landlord-Tenant Mediation Project in Colorado*, 17 URB. L. ANN. 279 (1979) (describing the landlord-tenant mediation project

in dispute resolution.²⁹² Section 16 allows the parties to submit any dispute to mediation, but does not require that the parties resolve their disputes through that method.²⁹³ Unfortunately, the DML fails to define mediation, leaving a resident wondering what to do in a dispute.²⁹⁴ It is important to inform the parties about what mediation entails and where they can locate mediation services. The lease should state clearly where and at what phone number the parties can find a mediation service. For example, the New York State Legislature has established Community Dispute Resolution Centers²⁹⁵ to provide this voluntary service to disputing parties, but many people remain unaware of this possible solution.²⁹⁶ If the disputing parties learn of the location and function of a mediator, they will enhance their ability to resolve their dispute without resorting to legal action.

The DML has additional shortcomings as well. As with the mediation clause, however, slight modifications in the lease can overcome them. Several provisions create overarching bans on various activities. For instance, without the owner's written consent, the tenant cannot accommodate an overnight guest for "more than three (3) nights during any consecutive fifteen (15) day period,"²⁹⁷ nor can the tenant keep pets.²⁹⁸ These provisions create problems because they do not define the penalties for breaches, enabling the owner both to argue that the resident breached a "substantial obligation" and then to terminate the lease.²⁹⁹ A better provision would give the owner the authority to terminate the lease if the resident violates a certain standard

started in Colorado in the hope of alleviating the burden on the court system and of fairly solving landlord-tenant disputes).

²⁹² See Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 107 (asserting "that tenants as a whole are better off mediating than they are either negotiating without a third-party neutral or going before a judge").

²⁹³ See DAVIS MODEL LEASE, *supra* note 12, § 16. This provision reads as follows:

In the event that OWNER and RESIDENT are unable to resolve any dispute or claim arising out of this rental agreement, either party may submit the dispute to any or all established methods of mediation, such as those offered by the Davis Community Mediation Service. This provision shall not be construed or interpreted to constitute an arbitration clause requiring arbitration, nor as the sole or exclusive remedy to both parties.

Id.

²⁹⁴ See Zev J. Eigen, *Voluntary Mediation in New York State*, DISP. RESOL. J., Summer 1997, at 58, 59 (pointing out that most laypeople do not know what Alternative Dispute Resolution and mediation are or how they work outside of "business or employment-related" settings).

²⁹⁵ See N.Y. JUD. LAW §§ 849-a to -g (McKinney 1992).

²⁹⁶ See Eigen, *supra* note 294, at 59.

²⁹⁷ DAVIS MODEL LEASE, *supra* note 12, § 21.

²⁹⁸ See *id.* § 23.

²⁹⁹ See *L.H. Estates Co. v. Bartholomew*, 163 N.Y.S.2d 762, 764 (App. Term 1957) (holding that the installation of a washing machine by the tenant constituted a breach sufficiently substantial to warrant eviction).

of behavior.³⁰⁰ Moreover, the provision for security deposits allows the parties to fill in the amount.³⁰¹ A better provision would fix the amount at "one month's rent" to keep unscrupulous owners from gouging residents or from using security deposits to entice residents into a bad bargain.³⁰² These improvements would increase the DML's effectiveness for protecting the rights of residents.

2. *The Davis Model Lease Addresses Ithaca's Rental Problems*

The DML will help alleviate the concerns that this Note has enumerated.³⁰³ First, the DML provides a better alternative to the form leases that Ithaca owners currently use. In Davis, the use of the lease grew rather quickly because large owners became involved early and others followed.³⁰⁴ According to Costello, eighty-five percent of the owners in Davis used the DML in 1993.³⁰⁵ The DML uses the terms "resident" and "owner," removing the stigma that is "traditionally associated with the landlord-tenant relationship."³⁰⁶ In addition, its architects designed the provisions of the DML to prevent problems that might arise—"the required beginning inventory, end-of-term inspection, and mediation service are oriented toward crisis prevention and problem solving."³⁰⁷ The DML also gives owners the power to collect a fee for late rent and to deduct from security deposits for cosmetic repairs such as "painting, carpet cleaning, laundering of drapes, etc. when necessitated by the tenants' failure to take proper care of the premises."³⁰⁸ Costello has described the general success of the DML:

³⁰⁰ See Bentley, *supra* note 41, at 866. The lease that Bentley's article proposed had a similar provision:

"Tenant covenants that he shall not commit or permit a nuisance in the premises, that he shall not maliciously or by reason of gross negligence substantially damage the premises, and that he shall not engage in conduct such as to interfere substantially with the comfort and safety of Landlord or of other tenants or occupants of the same or another adjacent building or structure."

Id. (quoting the South Brooklyn Legal Services lease).

³⁰¹ See DAVIS MODEL LEASE, *supra* note 12, § D.

³⁰² See *supra* text accompanying notes 214-16.

³⁰³ The DML has benefited both Davis and other college communities that have adopted it. See Letter from Fred R. Costello, Off-Campus Housing Coordinator, University of California Davis, to Hank Fisher et al., Board of Directors, DAOMA 1-2 (June 14, 1974) (on file with author) (describing the success of the DML in Davis and of similar leases in other college towns).

³⁰⁴ See Telephone Interview with Fred R. Costello, *supra* note 253.

³⁰⁵ See *id.*; see also Letter from Fred R. Costello to Davis Area Apartment Owner, *supra* note 265, at 1 ("Historically, [the DML has] enjoyed broad-based community support from property owners and managers, residents, tenant advocacy organizations, City Council members, and the Davis Police Department.").

³⁰⁶ Letter from Fred R. Costello to Davis Community Resources, *supra* note 264, at 1; see *supra* note 268.

³⁰⁷ Letter from Fred R. Costello to Davis Area Apartment Owner, *supra* note 265, at 1.

³⁰⁸ Letter from Fred R. Costello to Hank Fisher et al., *supra* note 303, at 2.

Apart from its credibility as a legal document, which has served this community well since 1969, the Model Lease has become a symbol of cooperation, trust, and equitable leasing practices which stands without parallel. It has become the model for similar efforts in other college communities throughout the country and the focal point of our amicable relationship in the past.³⁰⁹

The widespread adoption of the DML also will bring uniformity to dispute resolution, helping both the building department and the courts deal with owner-resident disputes.³¹⁰ On the whole, the DML's designers and keepers have fashioned it to address the unique issues facing college towns such as Ithaca.

Second, the DML will address Ithaca's problems by tempering the effects of monopolistic competition on the market. Within the system of monopolistic competition, in which owners attempt to distinguish their property,³¹¹ the DML removes the lease as a bargaining tool, forcing owners to compete with each other through lower rental prices, better maintenance, and more lavish space.³¹² It will change the dynamic of the rental market by giving residents a fair lease and by facilitating an amicable, cooperative, and trustful relationship with the owners, creating adequate leverage for residents to negotiate reasonable rent.³¹³ In other words, if the owner and the renter actually bargain over the price of the apartment, each likely will act more fairly during the negotiation if their relationship is amicable and trustful.³¹⁴

³⁰⁹ *Id.*

³¹⁰ See Letter from Fred R. Costello to Davis Area Apartment Owner, *supra* note 265, at 1 ("Local attorneys and judges are familiar with these documents. Consequently, it reduces ambiguity regarding interpretation of rights and responsibilities."); see also Interview with Kathleen Decker, *supra* note 9 (explaining that the use of a uniform lease would substantially bolster her ability to deal with renter complaints).

³¹¹ See *supra* notes 155-57 and accompanying text.

³¹² Cf. Eisenberg, *supra* note 189, at 244 (articulating that to compete with each other, banks will use the terms of the contract on which people focus to attract customers with visible incentives and then take advantage of them with hidden costs). If the owners cannot use the terms of the lease to compete with each other or to distinguish themselves, they will have to turn to more substantive means of competition such as lower rent or higher quality apartments.

³¹³ See Letter from Fred R. Costello to Hank Fisher et al., *supra* note 303, at 2 (arguing that the DML has become a "symbol" of cooperation and trust and has created an "amicable relationship" in Davis between the owners and the renters); cf. GOODMAN, *supra* note 17, at 4, 18 (urging that tenants change their attitudes about the hopelessness of their situation, which will empower them to organize and protect their rights). The DML will help renters not to see themselves as powerless, which will give them the courage to bargain for fair rent.

³¹⁴ Cf. Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 40 (1987) (emphasizing that "there are occasions where parties to a negotiation bristling with hard-bargaining opportunities reach agreement without using deception"). The most likely place to find this type of nondeceptive bargaining is in those negotiations "among people who have special reasons to care about each other's welfare—families and friends." *Id.* Although it is possible that one would negotiate without deception only because of a long-standing relationship, in which one party concedes in the short term in order to gain

If the parties decide to bargain for the open terms under the DML, this atmosphere of trust will "lower[] the transaction costs" by eliminating mutual suspicion.³¹⁵ In addition, an amicable relationship will result in better performance of lease terms by each party. Owners would be less concerned that tenants will damage their apartments,³¹⁶ leading owners to reduce rent. Furthermore, by defining the term "reasonable use and wear"³¹⁷ and requiring owners to "supply residents with a policy statement explaining their interpretation of 'reasonable use and wear' as it applies to their rental property,"³¹⁸ the DML will reduce ambiguity concerning what repairs the owner can apply against the security deposit. Finally, by way of comparison, the ratio between the average rental rate and the average home value is

benefits in the long term, Professor Peters believes that a party might negotiate this way for different reasons. *See id.* at 41. For example, a husband might choose to go to a certain restaurant that his wife likes, even though he does not want to go there, because his "wife's happiness is immediately valuable to [him]." *Id.* Professor Peters recognizes that this type of bargaining probably will vary "depend[ing] on the relationship of the parties," but he concedes that "there is no reason to think that altruism cannot be found in dealings between total strangers." *Id.* While the owner-renter relationship obviously is not as close as the familial relationship, how one bargains appears to depend in part upon his feelings toward the other party at the onset of the negotiations. *See, e.g.,* Carlton J. Snow, *Building Trust in the Workplace*, 14 HOFSTRA LAB. L.J. 465, 485-91 (1997) (arguing that parties can arrive at better collective bargaining agreements if they enter negotiations trusting each other).

³¹⁵ G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 255-56 (1991) ("The cost savings that trust can yield are too great to ignore when evaluating potential contracting partners during the negotiation process. It becomes vitally important, therefore, for parties to signal their willingness and ability to foster trust." (footnote omitted)); *cf.* Snow, *supra* note 314, at 485 (noting that in the context of collective bargaining "[a] practical incentive for labor-management parties to develop a relationship of trust is that it makes more sense economically than distrust").

³¹⁶ *Cf.* Snow, *supra* note 314, at 493-94 ("A relationship of trust encourages parties to be creative in drafting and administering an agreement and encourages workers to perform their duties as effectively as possible. Where there is trust, workers are more inclined to seek the most productive way of doing a job." (footnote omitted)). Indeed, Professor Snow reports "that a relationship of trust within the workplace contributes to the success of the business. There is better health, less absenteeism and a more spirited commitment to the mission of the enterprise." *Id.* at 487 (footnote omitted). Although the analogy between the owner-renter and employer-employee relationships is not perfect, Professor Snow's observations support the general notion that people who trust one another are more likely to cooperate than those who do not.

³¹⁷ *See supra* notes 271-72 and accompanying text; *see also* Letter from Fred R. Costello to Davis Community Resources, *supra* note 264, at 2 (stating that "owners will be required to supply residents with a policy statement explaining their interpretation of 'reasonable use and wear'").

³¹⁸ Letter from Fred R. Costello to Davis Community Resources, *supra* note 264, at 2. In addition, the owner must supply "a statement indicating whether or not carpets have been cleaned, drapes laundered, and walls painted in preparation for resident occupancy," which will help foster the atmosphere of trust. *Id.*

lower in Davis than in Ithaca, demonstrating the influence of the DML on the market.³¹⁹

Third, the DML will impact the Ithaca market by solving the problems of rational ignorance and undue optimism. Rationally ignorant decision making allows landlords to use form leases with profitable nonperformance lease terms, allowing them to compete on performance lease terms without fear of reprisal.³²⁰ If all owners use the DML, they could not gouge the resident with nonperformance terms because they would use the same prewritten lease, which does not contain hidden nonperformance clauses. In addition, a renter's undue optimism will not undermine his success in potential conflicts because the DML's provisions provide adequate warning to the renter of his obligations, thereby allowing the renter to negotiate realistically. Kathleen Decker, Rental Housing Specialist for the Ithaca Building Department, confronts landlord-tenant disputes daily and is confident that this lease would solve many of the problems facing college towns by bringing fairness and uniformity to the rental market.³²¹

CONCLUSION

Ithaca faces a perpetual and escalating crisis in its rental market. A limited supply of decent apartments impacts both the student and nonstudent populations by inflating rents and by forcing renters to live in substandard apartments. Moreover, the use of standard form leases containing unenforceable provisions exacerbates the inequality in bargaining power, especially given the rational ignorance and undue optimism of the renting population. A legitimate solution to these problems is the adoption of the DML, which augments the rights and remedies available to residents, eliminates inequitable bargaining, and improves the economics of the market. If Ithaca landlords began using the DML, the words "sign here" finally would become a welcome invitation to an amicable leasehold.

³¹⁹ Compare *Zip Reside: 95616 (Davis)*, *supra* note 255 (reporting that in Davis the median gross monthly rent is \$573 and that the median home value is \$230,854), with *Zip Reside: 14850 (Ithaca)*, *supra* note 78 (reporting that in Ithaca the median gross monthly rent is \$508 and that the median home value is \$137,824). It may appear that the median rental value in Ithaca is less than that in Davis, but that is not the case. By using the median home value as a determinant for real estate costs, one can calculate the premium one must pay in Davis to buy the same type of house they could buy in Ithaca. In Davis, the median home value is 67.5% higher than it is in Ithaca, most likely due to the marked difference in weather patterns between the two college towns. Thus, a house that would cost \$100,000 in Ithaca would cost \$167,500 in Davis. One would expect the difference in median rental value to be similar, but it is not. Davis only has a 12.8% premium on rental property. This discrepancy either means that Ithaca's rental rates are too high or that Davis's are too low. Either way, a disparity exists.

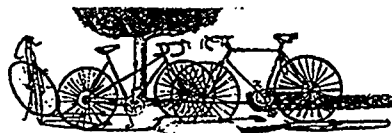
³²⁰ See *supra* note 215-17 and accompanying text.

³²¹ See Interview with Kathleen Decker, *supra* note 9.

APPENDIX
DAVIS MODEL LEASE

WARNING!

Reproductions may be altered.
Sign original leases ONLY



DAVIS MODEL LEASE

Approved by ASUCD, and the UCD GSA Community Housing Listing Service

THIS IS A LEASE FOR THE RENTAL OF REAL PROPERTY IN CONSIDERATION FOR A SUM OF MONEY ACCORDING TO THE TERMS SPECIFIED BELOW:

In consideration of the rents reserved below, the OWNER does hereby lease, demise, and let unto the RESIDENT the premises described below. Both the OWNER and the RESIDENT agree to keep, perform, and fulfill the covenants, conditions, and agreements expressed below.

The OWNER of the leased premises (or the person authorized to act for and on behalf of the OWNER) for the purpose of service of process and for the purpose of receiving and accepting all notices and demands is:

Name and Address _____ Phone _____

The person authorized to manage the premises is:

Name and Address _____ Phone _____

The RESIDENTS are:

Print Name Permanent Home Address Home Phone

A. ADDRESS: The location of the premises is: _____ Davis, California, 95616. Unit No. _____

B. TERM: The term of this lease is _____ beginning _____, 19 _____, and terminating _____, 19 _____.

C. RENT: The total rental price for the term of the lease is \$ _____ payable in monthly installments of \$ _____ due in advance on the _____ day of each month. The rent shall be considered late on the _____ day of each month. The rent is to be paid to _____ at the following address: _____.

The OWNER shall have the right to assess a service charge (not to exceed \$30.00) at the rate of \$10.00 for each five-day period, beginning on the 5th day after the due day, for which the rent remains unpaid after the due date, such service charge being necessitated by the additional administrative costs involved. Late fees may be avoided by informing the OWNER on or before the due date and mutually arranging for an alternative payment date.

D. SECURITY DEPOSIT: RESIDENT is required to deposit with OWNER the sum of \$ _____ as a security deposit. OWNER may deduct from the security deposit such amounts necessary to cover any defaults in the faithful performance by the RESIDENT of the terms, covenants, and conditions of the agreement. The cost of maintenance and repairs (including painting, cleaning of carpets, and laundering of drapes), when due to reasonable use and wear, shall be assumed by the OWNER. It is the duty of the RESIDENT to return the premises to their condition at the commencement of the lease, reasonable use and wear thereof excepted. Reasonable use and wear may be understood to mean the gradual deterioration resulting from use, lapse of time, and the operation of the elements, in spite of RESIDENT's care.

(1) Attached hereto and incorporated herein by reference is a policy statement outlining those items to be cleaned and properly maintained in order for the RESIDENT to receive a full refund of the security deposit. OWNER will obtain at least one RESIDENT's signature on this statement before the lease is signed. At the time of occupancy, OWNER shall further provide RESIDENT with a statement outlining whether or not carpets have been shampooed, drapes have been laundered, and walls have been painted in preparation for RESIDENT occupancy.

(2) In the absence of any material breach of this lease by RESIDENT, RESIDENT will receive interest in the security deposit in the amount of five (5) percent per annum for the term of the lease, which shall be added to any refunded portion of the security deposit.

E. TOTAL SUM DUE PRIOR TO OR ON COMMENCEMENT OF LEASE:

First Month's Rent \$ _____ Last Month's Rent \$ _____

Security Deposit \$ _____ Total \$ _____

Other Deposit (Specify) \$ _____

By optional and mutual agreement between OWNER and RESIDENT, RESIDENT agrees to pay the _____ (\$ _____) in installments according to the following schedule:

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F. UTILITIES: Charge for utilities connected with the premises shall be paid by OWNER with the exception of _____ which shall be paid by RESIDENT.

G. MISCELLANEOUS. (1) This lease incorporates and is subject to Paragraphs 1 through 32 attached hereto, which are hereby referred to and incorporated as if set out here at length. (2) This lease constitutes the sole agreement between the parties, and no additions, deletions, or modifications may be accomplished without the written consent of both parties, except as provided in Paragraph D above, and in Paragraph 17, "Rules and Regulations." Any oral representations made at the time of executing this lease are not legally valid and therefore are not binding on either party. (3) The words "OWNER" and "RESIDENT" as used herein include the plural as well as the singular. (4) If RESIDENTS are minors, then their parents or legal guardians guarantee and agree to perform all of the terms, covenants, and conditions of this lease by affixing their signatures below. (5) RESIDENTS hereby designate _____

as the RESIDENT to receive notice and hereby state that service of notice on such person shall be deemed to be service on all RESIDENTS. (6) Designated RESIDENT hereby acknowledges receipt of an executed copy of this lease, and the RESIDENTS, if more than one, agree that they will be jointly and severally bound thereby.

The parties hereby bind themselves to this lease by their signatures affixed below on this _____ day of _____, 19 _____.

OWNER or AGENT, _____

RESIDENTS:

- 1. _____
- 2. _____
- 3. _____
- 4. _____

(all blanks should be filled in or lined out)

ADDITIONAL TERMS OF LEASE

1. JOINT AND SEVERAL LIABILITY DEFINED. The RESIDENTS are jointly and severally liable. The language "joint and several" means that if more than one person has signed this lease as a RESIDENT, then each of the RESIDENTS and the RESIDENTS collectively are fully responsible for fulfilling (including full payment of rent) all of the conditions of this lease, except where expressly otherwise agreed. Thus, it is the RESIDENTS' duty to select as their CO-RESIDENTS persons who will fulfill their respective "share" of the obligations contracted for under this lease.

2. BREACH PRIOR TO LEASE COMMENCEMENT. Once this lease has been executed, if at any time prior to the commencement date set forth in this lease, any RESIDENT gives written notice that s/he intends not to perform the terms of this lease, OWNER may then elect to:

- (i) terminate this lease and hold all of the RESIDENTS liable for actual damages incurred by the breach. OWNER must attempt to mitigate damages by making reasonable efforts to relet the premises and reduce damages. In any event said damages shall not exceed an amount greater than the sum of two (2) months' rent.
- (ii) not terminate this lease and hold remaining RESIDENTS jointly and severally liable for all the terms of this lease.
- (iii) not terminate this lease and hold those RESIDENTS not giving said notice liable for the rent stated herein, reduced proportionately by an amount equal to the defaulting RESIDENTS' share of the rent remaining to be paid.

3. DELAYED OCCUPANCY. If OWNER cannot deliver possession within a grace period of three (3) working days from the commencement of this lease, RESIDENTS may declare this lease null and void, and all money previously paid shall be refunded to RESIDENTS. If the delay is due to construction or repair work, the grace period shall be extended an additional three (3) working days. During the grace period OWNER must, at RESIDENTS' option, and after the grace period OWNER may, at RESIDENTS' option, provide the prospective RESIDENTS with reasonable temporary accommodations. RESIDENTS shall remain responsible for payment of rent unless they elect not to accept temporary accommodations. In such event the rent covering the period between commencement of the lease and possession of the premises shall be deducted from the next rent payment. In addition, OWNER shall be liable for any actual damages incurred by RESIDENT as a result of delayed occupancy. The term of this lease shall not be extended by any delay

in delivery of the premises.

Any election by the RESIDENTS to void this lease must be made prior to possession. In such event, OWNER shall have the right to charge RESIDENTS a prorated amount of rent for temporary accommodations, received by RESIDENTS at OWNER'S expense.

4. FAILURE TO DELIVER PREMISES. In the event of OWNER'S inability to deliver the premises under the terms of the lease, OWNER may, at RESIDENTS' option, provide RESIDENTS with comparable or better accommodations at an equivalent rental rate. Otherwise OWNER shall void the lease and refund all money previously paid by RESIDENTS, plus actual damages not to exceed an amount greater than the sum of two (2) months' rent.

5. BEGINNING INVENTORY. At the time RESIDENT takes possession of the premises, OWNER shall provide RESIDENT with an inventory statement. RESIDENT shall indicate on the statement the condition of the premises and their furnishings and decorations. Both OWNER and RESIDENT shall sign and receive an executed copy of the inventory statement within three (3) days of the date of taking possession. When RESIDENTS return possession of the premises to OWNER, they shall return the premises and the furnishings and decorations in the same condition as when received, reasonable use and wear thereof excepted. Both OWNER and RESIDENT are reminded of the importance of the prompt signing of this inventory statement, in order to minimize disputes over the return of the security deposit.

6. END OF TERM INSPECTION. (a) When possession of the premises is returned to OWNER, OWNER and RESIDENT shall conduct a joint inspection of the premises and the furnishings and decorations.

(b) RESIDENT must within one (1) week prior to vacating the premises, arrange a mutually convenient time during OWNER'S normal business hours for the inspection; failure to do so or to attend at the arranged time will relieve OWNER of any obligation to make an inspection in RESIDENT'S presence.

(c) OWNER may use the Davis Model Inventory and Inspection Form or reasonable facsimile for the purposes of this inspection. On the form, both OWNER and RESIDENT must describe what they believe to be the damage and harm caused by RESIDENT'S improper maintenance. Both OWNER and RESIDENT shall sign and receive an executed copy of the inventory statement.

(d) Within three (3) weeks after RESIDENT vacates, OWNER will deliver to RESIDENT a check in the amount of the security deposit (plus any interest due therein) minus any deductions for damages in excess of reasonable use and wear, and further, minus any other deductions for failure on the part of RESIDENT to perform under the lease, as provided for under *California Civil Code 1950.5*. In the event any deduction is made, OWNER shall furnish RESIDENT with an itemized statement accounting for the use of the unrefunded portion of the security deposit, including a detailed itemization of labor and materials. The bad faith retention of the security deposit may subject OWNER to liability, per *California Civil Code 1950.5*, for up to \$600 in damages in addition to any actual damages.

7. REPAIRS AND MAINTENANCE. OWNER shall place the premises in good repair and condition fit for human habitation, as defined under *California Civil Code 1941*, before RESIDENT begins to occupy the premises, and shall keep the premises and the building in good repair during the term of this lease. OWNER shall do the same in regard to the common areas of the building. If OWNER fails to maintain the premises in a habitable condition, RESIDENTS may exercise their rights to repair and deduct pursuant to *California Civil Code 1942*.

RESIDENTS agree to exercise reasonable care in the use of the premises and to keep areas under their control free from dirt, trash, and filth. RESIDENTS also agree not to litter or damage the common areas of the building. The cost of repairs caused by RESIDENTS, their guests, or persons under their control shall be paid for by RESIDENTS; otherwise, the cost of repairs shall be paid by OWNER. All repairs shall be made within a reasonable time.

8. HABITABILITY. (a) If through any natural or extraordinary force or because of the negligence of a third person, the premises are rendered uninhabitable, this lease may be terminated at the election of either party. If the lease is so terminated, then all prepaid rents and refundable security deposits shall be refunded to RESIDENT.

(b) Subparagraph (a) above shall be inoperative if OWNER either restores the premises to a habitable condition or provides in substitution thereof comparable housing to RESIDENT within fifteen (15) days after the date the premises were rendered uninhabitable. If substitute housing is not provided and OWNER elects to restore the premises, the RESIDENT shall be entitled to a pro-rated reduction of rent for the period during which the premises were uninhabitable.

9. SERVICE OF NOTICE. (a) All written notices or demands hereunder shall be served either personally or by mail.

(b) Any notice or demand to OWNER may be given at the address first shown above.

(c) Any notice or demand to RESIDENTS may be given to them at the leased premises. Service by OWNER on the RESIDENT, as heretofore mentioned in Section G (5), shall be deemed to be service on all RESIDENTS hereto. If such RESIDENT cannot be located through the reasonable efforts of the OWNER, service on any one or more of the RESIDENTS hereto shall be adequate.

10. ENTRY. Pursuant to *California Civil Code 1954*, OWNER may enter the dwelling unit only in the following cases:

(i) in case of emergency;

(ii) to make necessary or agreed repairs, decorations, alterations, or improvements; supply necessary or agreed services; or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, residents, workers, or contractors;

(iii) when RESIDENT has abandoned or surrendered the premises;

(iv) pursuant to court order; or

(v) with RESIDENT'S consent.

Except in cases of emergency or when RESIDENT has abandoned or surrendered the premises, or unless RESIDENT consents at the time of entry, entry may not be made other than between the hours of eight in the morning and eight in the evening, and only after giving 24 hours written notice of the intent to enter to RESIDENT. Any RESIDENT receiving said notice or giving consent shall inform other RESIDENTS. If any, of proposed entry, OWNER shall not abuse the right of access or use it to harass RESIDENT.

14. REMEDIES AND DAMAGES ON BREACH OF LEASE. (a) In the event RESIDENT defaults in the performance of any term, covenant, or condition of this lease, OWNER may, in addition to any other rights or remedies OWNER may have, elect to declare the lease forfeited and proceed to recover possession of the premises in summary proceedings for unlawful detainer or in an ejectment or other possessory action. If OWNER pursues an unlawful detainer action, OWNER must serve RESIDENT with a three-day notice pursuant to *California Code of Civil Procedure 1161*. OWNER may not remove anyone forcibly from a dwelling; only a peace officer, acting upon court instruction may do so.

(b) If RESIDENT breaches the lease by abandoning the premises before the end of the term, or if RESIDENT'S right to possession is terminated by OWNER because of RESIDENT'S breach of the lease, OWNER may declare the lease terminated and may recover from RESIDENT such amounts as provided for under *California Civil Code 1951.2*.

OWNER must attempt to mitigate damages by making a reasonable effort to relet the premises and reduce actual damages. OWNER shall be conclusively presumed to have made a reasonable attempt to locate a replacement resident if OWNER places an advertisement for this purpose in a local newspaper for three (3) consecutive days within every two-week period thereafter and lists the vacancy with the University of California, Davis Community Housing Listing Service.

(c) In the event of a breach by OWNER of any material term of this lease, RESIDENT shall have such legal remedies as may be available, including those provided for under the *California Civil Code*.

15. LEASE RENEWAL. OWNER is not required to renew this lease at the end of the term. After furnishing RESIDENT with the terms of the new lease, OWNER may request RESIDENT to sign an *Option to Lease* at any time. OWNER may not, however, require RESIDENT to sign a renewal lease prior to one hundred (100) days before commencement of the lease.

If RESIDENT has reason to believe that the renewal rate is unjustified, then upon RESIDENT'S request, OWNER or OWNER'S AGENT agrees to confer with RESIDENT regarding the renewal rate. Such conference must be requested within ten (10) working days of renewal rate notification, and OWNER agrees to comply within five (5) working days of receiving the request. In the event that a lease is not signed as a result of this conference, RESIDENT may initiate mediation according to the Rent Mediation provision of this lease (Paragraph 16). Mediation must be requested by RESIDENT within five (5) working days of the conference with OWNER. All parties agree to expedite mediation and OWNER agrees not to offer the premises to any other prospective resident for at least ten (10) days following such request for mediation.

16. MEDIATION. In the event that OWNER and RESIDENT are unable to resolve any dispute or claim arising out of this rental agreement, either party may submit the dispute to any or all established methods of mediation, such as those offered by the Davis Community Mediation Service. This provision shall not be construed or interpreted to constitute an arbitration clause requiring arbitration, nor as the sole or exclusive remedy to both parties.

17. RULES AND REGULATIONS. Existing rules and regulations of OWNER with respect to the premises shall be signed by all RESIDENTS, attached hereto, and incorporated by reference as if fully set forth. Other rules and regulations may be adopted by OWNER after the signing of this lease but shall have a legitimate purpose, not be arbitrary nor unequally enforced, nor work a substantial modification of RESIDENT'S rights. Such new rules and regulations will not take effect until at least two (2) weeks after notice to all RESIDENTS. In any event, such other rules or regulations shall not conflict with the terms and conditions of this lease.

18. HOLDING OVER. RESIDENT is not to remain in the premises beyond the date agreed upon as the expiration of this lease except with the written consent of OWNER; RESIDENTS who vacate the premises on the termination date set forth in this lease shall not be responsible for RESIDENTS who do not so vacate.

19. MANAGEMENT. RESIDENT shall receive written notice

11. **AUTOMATIC TERMINATION.** This lease shall terminate with regard to any RESIDENT who:

(i) dies;

(ii) becomes so ill that s/he withdraws from school;

(iii) is involuntarily inducted into the military service.

Under (i) and (ii) above, RESIDENT must provide OWNER with written notice and upon request may be required to furnish reasonable verification of the facts justifying termination.

Termination under this paragraph shall not in any way affect the liability of the remaining RESIDENTS under the lease except that their joint and several liability shall no longer apply to the former RESIDENT'S share of the rental obligation during the thirty (30) day period following written notice. Any termination under this paragraph shall not affect the right of the remaining RESIDENTS to the refund of their portion of the security deposit at the end of this lease. However, there shall be no return or reduction in the amount of the security deposit as long as the lease is not terminated as to all of the RESIDENTS, hereunder.

Within fifteen (15) days of such automatic termination, OWNER by mutual agreement with remaining RESIDENTS, may:

(i) request remaining RESIDENTS to assume full rent or quit and terminate this lease; or

(ii) provide comparable but proportionately smaller housing in substitution for the leasehold premises, which property is to be leased by RESIDENTS on the same terms and conditions except that the rental is to be reduced as provided in subparagraph (iii) immediately below; or

(iii) permit remaining RESIDENTS to retain possession of the leasehold premises for the rental stated herein, reduced proportionately by an amount equal to the former RESIDENT'S share of the rental otherwise remaining to be paid until a suitable replacement can be found. In such event RESIDENTS with the help of the OWNER shall make a reasonable effort to find a suitable replacement. OWNER and RESIDENTS shall be presumed to have made a reasonable attempt to locate a new RESIDENT if they place an advertisement for this purpose in a local newspaper for three (3) consecutive days within every two-week period thereafter and also list the vacancy with the University of California, Davis Community Housing Listing Service.

If at the end of fifteen (15) days mutual agreement has not been reached, OWNER shall have the option to choose one of the above alternatives, in which case the remaining RESIDENTS will have fifteen (15) day to comply.

12. **JOB TRANSFER TERMINATION.** If RESIDENT is transferred beyond a forty (40) mile radius of Davis by an employer for whom RESIDENT is employed full-time at the commencement of the lease, and said employer will not accept liability for RESIDENT'S share of this lease, this lease shall terminate. Termination shall occur only after RESIDENT has given OWNER ninety (90) days written notice for dwelling complexes of four (4) or fewer units or thirty (30) days written notice for dwelling complexes of five (5) or more units. Liability of remaining RESIDENTS shall be determined using Paragraph 11 (i), (ii), or (iii). If at the end of the notice period, mutual agreement has not been reached, OWNER shall have the option to elect one of the above alternatives, in which case remaining RESIDENTS have fifteen (15) days to comply.

13. **SUBLEASE OR ASSIGNMENT.** (a) RESIDENT shall not sublease or assign this lease, or any interest therein, without first obtaining the written consent of the OWNER.

(b) In the event OWNER releases any of the RESIDENTS hereunder without securing a replacement RESIDENT, the remaining RESIDENTS shall no longer be jointly and severally liable for the departing RESIDENT'S share of the rent remaining to be paid.

(c) Notwithstanding any other provision contained in this paragraph, OWNER agrees to give consent to a sublease or assignment, if the prospective RESIDENT is determined by the OWNER to be a person generally desirable as a RESIDENT. OWNER may not unreasonably withhold consent to such a sublease or assignment. The remaining RESIDENTS will exercise good faith and reasonableness in accepting a new RESIDENT.

Within fifteen (15) days of any change in managers, agents for receipt of rent, and/or OWNERS (or agents authorized to act for OWNER). Such notice will include names, addresses, and phone numbers of such persons.

20. **NOISE AND NUISANCE.** RESIDENT agrees not to make any excessive noise or nuisance such as will disturb the peace and quiet of neighbors. OWNER agrees to maintain peace and quiet in those areas of the building which are subject to OWNER control.

21. **VISITATION AND GUESTS.** RESIDENT may have occasional overnight guests without notice to or consent of OWNER. The number of guests shall not exceed two (2) at any time regardless of the number of RESIDENTS. The same overnight guest may not stay more than three (3) nights during any consecutive fifteen (15) day period, except with the written permission of OWNER.

22. **LIABILITY FOR INJURY.** RESIDENT is not liable in any way for the death or injury to any person or property caused by or through the fault of the OWNER. OWNER is not liable in any way for the death or injury to any person or property caused by or through the fault of RESIDENT.

23. **PETS.** Pets are not allowed in the premises or other portions of the building except upon the written consent of OWNER.

24. **OWNER'S CONVEYANCE.** If during the term of this lease OWNER shall sell his/her interest as OWNER in the building or premises, then from and after the effective date of the sale, the former OWNER shall be released and discharged from any and all obligations and responsibilities under this lease, provided that the new OWNER agrees to fulfill the terms, covenants, and conditions of this lease.

25. **COMMON FACILITIES.** RESIDENT may use all recreational, laundry, and study facilities on the premises subject to posted regulations.

26. **USE.** The premises are to be used exclusively for lawful residential purposes.

27. **LEGAL FEES.** In the event of any legal action concerning this lease, the losing party shall pay to the prevailing party reasonable attorney's fees and court costs to be taxed by the court wherein such judgment shall be entered.

28. **ALTERATIONS.** RESIDENT shall not make, or cause to be made, any alterations of the said premises or their contents without first obtaining the written consent of OWNER.

29. **PARKING.** All vehicles are to be parked solely in those areas designated by OWNER. No charge shall be made for parking unless otherwise stated in this lease.

30. **WAIVER.** Any waiver, by either party hereto of any breach of any provision of this lease, shall not be deemed to be a continuing waiver or a waiver of subsequent breach of the same or a different provision of this lease.

31. **CONDEMNATION.** If any part of the premises shall be taken or condemned for a public or quasi-public use, this lease shall thereupon terminate. All compensation awarded upon such condemnation or taking shall go to OWNER and RESIDENT shall have no claim thereto. RESIDENT hereby irrevocably assigns and transfers to OWNER any right to compensation or damages to which RESIDENT may become entitled during the term hereof by reason of the condemnation of all, or a part of the demised premises. RESIDENT shall, however, have the right to a refund from OWNER of any unused portion of the security deposit as well as a full refund of any advanced rents.

32. **COVENANTS AND CONDITIONS.** Each term and each provision of this lease by either party shall be construed to be both a covenant and a condition.

