Cornell Law Review

Volume 69
Issue 3 *March 1984*

Article 4

Wherefore the Landlord-Tenant Law Revolution Some Comments

Charles J. Goetz

WHEREFORE THE LANDLORD-TENANT LAW "REVOLUTION"?—SOME COMMENTS

Charles J. Goetz†

It would be impossible to deny that very great changes, rising even to the level of a "revolution," have occurred in landlord-tenant law during the past two decades. The realization that revolutionary changes arguably have occurred in almost all branches of law during that same period, however, dampens some of the impact of that observation. Nevertheless, landlord-tenant law seems to have undergone exceptional ferment. Why should this have been the case? Have the changes been sensible?

My own answers to the two preceding questions are not entirely incompatible with those of Professor Rabin, but they differ somewhat in focus and emphasis. My sense of what has transpired is admittedly handicapped by a relative newcomer's lack of breadth in legal scholarship and, more specifically, by a linkage to a shadow that has ne'er darkened the door of a property classroom. The things that piqued my interest, however, could be organized around three main themes: (1) the extent to which developments in landlord-tenant law only mirror the contemporaneous doctrinal metamorphosis of other areas such as contracts and torts; (2) the siguificance of, and rationale for, landlord-tenant law's traditional insulation from principles applied in other substantive areas of law; and (3) the role of landlord-tenant law in efficiently implementing social goals that, although arguably wrongheaded or counterproductive, are entrenched in the legal landscape. Viewing the recent developments in landlord-tenant law from those perspectives, I found little to be surprised at and less to be alarmed at than otherwise might seem warranted.

Although property law historically has been encrusted with a multitude of peculiar institutional and doctrinal features, most of property law nevertheless fits the underlying general mold of either applied contract law or applied tort law. In contract and tort, special rules have been carved out to fit the peculiar requirements of identifiable subsets of transactions and circumstances. To the extent that landlord-tenant rules differ from those of "ordinary" tort and contract, one is entitled to ask what special circumstances justify the divergence. At times, we may expect to find that the force of those circumstances has weakened either

† Joseph M. Hartfield Professor of Law, University of Virginia. A.B. 1961, Providence; Ph.D (Economics) 1965, Virginia.

because the circumstances are no longer as compelling or because intervening doctrinal or empirical developments counterbalance the original rationale. In short, special provisions that may have made sense in the past no longer do so, either because the world has changed or because we have altered our understanding of how best to work with new circumstances.

It would be nice to think that exceptional rules are constantly being reevaluated by courts and legislatures so that, if they ever outlive their usefulness, prompt abandonment would follow. A more realistic view, however, concedes that, as in physies, there exists an inertial impediment to be overcome.[1] On this theory, changes will tend not to be smooth and continuous. Rather, the changes will require overcoming certain "threshold" levels of incongruence or necessitate the occurrence of "triggering" events. Either of these phenomena is capable of motivating a thorough reassessment—and possible rejection—of traditional legal rules that had long been accepted almost uncritically.

In attempting to explain what has happened, Professor Rabin looks, in significant measure, toward what might be termed "exogenous" factors, i.e., developments outside of the narrow confines of the judicial process and legal scholarship. In particular, he attaches considerable importance to sociological factors, such as the civil rights movement and the Vietnam War, as inertia-breaking events. Although I do not reject entirely the influence of such factors, I am inclined to look more closely for "endogenous" explanations. Accordingly, it seems sensible to begin by exploring briefly the extent to which the revolution in landlord-tenant law is explicable as (1) a special case of forces operating more generally in law over the past few decades, and (2) a breakdown of some of the empirical considerations that might once have justifiably insulated property law from other substantive areas of law.

In evaluating shifts in the general rule structure of law and the abandonment of the exceptions to that general structure, it is important to have in mind some functional theory of optimal rules and exceptions. One helpful aspect of modern law and economics scholarship has been to articulate, in more rigorous, explicit and, hopefully more intelligible form, rationales for legal doctrines that arose long before the law and economics movement. Thus, recent scholarship is increasingly explicit about the role of legal rules as allocators of risks. In contract, the legal rules provide a "preformulated" set of risk allocations that the parties can—generally, but not always—alter by entering into "particularized"

---

[1] One of my own first forays into legal scholarship dealt with a rule, the penalties doctrine, that apparently had a defensible rationale historically but which in my opinion has long been anachronistic. *See* Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach,* 77 COLUM. L. REV. 554 (1977).

mutual agreements.[2] In tort, the legally supplied risk allocations are frequently more difficult to alter consensually because of such factors as high transactions costs, the difficulty of identifying the potential parties, and third-party effects. Whatever the underlying branch of substantive law, this approach leads to the thesis that the legal system should establish rules that allocate risks efficiently, because subsequent reallocation is always costly and sometimes impracticably difficult.

Exceptions to the general rules ought to be explicable either in terms of some historical fortuity or in terms of some set of circumstances that reverses the "ordinary" presumption of efficient allocation of risks. As I understand it, much of the insulation of leases from contract law is probably traceable to the need to maintain the legal fiction of a "lease" at a time when the outright sale of portions of feudal estates in the form of freeholds would have been subject to disadvantageous legal treatment. For a time, therefore, the law would have been doing no more than piercing a formal veil to arrive at the underlying reality when it treated real estate leases, usually of very long term, as "conveyances" rather than normal contracts for a package of goods and services. At that time, the "lessee" had in most economically relevant senses the powers of ownership, and thus, when viewed in their original environment, the archaic rules make a great deal of sense. The problem with this explanation is that it loses most of its relevance by the eighteenth century. Why then did landlord-tenant risk allocations take several centuries to readjust?

One possible explanation is that there are many risks for which the tenant is arguably at least as good a risk-bearer as the landlord. With respect to certain risks, the tenant has advantages as to information and immediate access or "control." Also, the costs of moral hazard that do not rise to the level of *provable* contributory negligence may be extremely significant. With respect to such risks, there would be no sound economic motivation to change the traditional allocation of responsibility to the tenant. This reasoning applies when the tenant is *as good* a risk-bearer as the landlord, and not merely when the tenant enjoys a clear comparative advantage. Even if we can identify in theory the factors that ought to give one party or the other a systematic advantage, there are practical difficulties in discriminating, whether through a rule or a lease provision, among classes of risks that will be borne by each party.

On the other hand, both theoretical and practical considerations suggest a number of broad classes of risk where the landlord will generally enjoy a cost advantage. Some of these are obvious: for example, concealed risks that the landlord is aware of but the tenant is incapable of avoiding or mitigating. Although it would be impractical to supply

---

[2] *See* Goetz & Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation,* 69 VA. L. REV. 967 (1983).

an exhaustive list of areas of presumptive landlord superiority, two should be mentioned here because their empirical importance probably has increased dramatically in the course of the twentieth century.

One of these areas involves the question of responsibility for so-called common areas. Investment in common areas by tenants is a classical case of what recent scholarship has labeled the "free rider problem." A tenant's willingness to alleviate a potentially tortious hazard or to maintain facilities ancillary to the full enjoyment of contractual benefits will be infected by the realization that such investments, although cost-effective for the tenant group collectively, are usually not optimal for the individual. The importance of large, multifamily apartment complexes has increased enormously in the past few decades. Such facilities are, of course, a classical environment for free rider and other interdependency-externality problems that can be more efficiently managed by a centralized coordinator, the landlord, than by individual tenants.

There is an analogous but less widely recognized problem related to the increasing brevity of leases and high turnover rates of tenants. Consider, for instance, a potential tort hazard such as ceiling light wiring that has developed brittle and increasingly dangerous insulation. If the responsibility for repair were allocated to the tenant, the tenant would presumably weigh the cost of the repair against the expected value of the harm avoided *during the period of his tenancy.* Because only the very small fraction of the benefits that accrues during the repairer's own tenancy will "count" in the individual tenant's cost-benefit calculus, presumably tenants will fail to make many efficient maintenance and hazard-reduction expenditures. Worse yet, unless the terms of the lease preclude it, the defect may be "fixed" by the tenant in a manner that is cost-effective for a single lease term, but for the long-term actually raises the cost of dealing with the situation.

High turnover rates in leased properties exacerbate this problem. To the extent that a tenant anticipates continuing his occupancy of the premises, his investment planning horizon may exceed the length of what is nominally a single-term lease. In this respect, the increased residential mobility of the past few decades is an empirical factor that may have tipped the balance against tenant control of certain risks.

It would be difficult to resist the claim that the common law rules applicable to innkeepers support an early recognition of the practical importance of shared facilities within multiple-dwelling houses and of short-term tenancy as key factors in determining appropriate landlord-tenant responsibilities. The same historical exigencies that impacted real estate cases did not affect the innkeeper-gnest rules. Hence, those rules developed freely along more orthodox tort and contract lines. Even the early common law courts placed more substantial obligations upon innkeepers than landlords, a point that several of the leading judi-

cial opinions have recognized during the recent "revolution."[3] The courts have explicitly recognized only the common property factor and do not discuss the importance of the planning horizon. In terms of the conceptual structures used in recent scholarship, these problems share common theoretical bases.

The foregoing discussion outlined some reasons why traditional landlord-tenant law might be said to have been incongruent with an efficient set of risk-allocating rules. Furthermore, empirical developments in housing patterns suggest that this incongruence should have increased with the passage of time. Because there were arguably good reasons to motivate a change, the puzzle is why such a dramatic breakthrough occurred right after the middle of the twentieth century.

The axiom that "If it ain't broke, don't fix it" is a familiar one but, based on what has been said above, seemingly inapposite. On second thought, however, a corollary might be that "If bein' broke don't do no harm, it really ain't broke." Until recently, special lease provisions have always been a vehicle for reallocating most of the risks of the landlord-tenant relationship. Because most real property transactions already involve a detailed formal written contract, specifically reallocating risks entails negligible additional cost. I have always found amusing an anachronistic Virginia common law rule that places the risk of loss before formal transfer of title and possession on the purchaser of real property, notwithstanding strong a priori reasons to believe that the seller, while he retains possession and control, is normally a more efficient bearer of such risks. Consequently, every contract of purchase executed in Virginia incorporates a one-line proviso that "[a]ll risk of loss or damage to the property by fire, windstorm, casualty, or other cause is assumed by Seller until possession of the property is delivered to Purchaser."[4] There has certainly been no groundswell of support for abandonment of this clearly inefficient common law rule, presumably because a particularized rejection of the preformulated rule is virtually costless. In sum, irrationality may be acceptable as long as it costs you nothing.

Contrast the real property situation with the practice regarding the innkeeper-guest rules mentioned above. In principle, there is no reason why registering at a hotel might not involve signing a lengthy contractual agreement that reallocates the duties imposed under common law. Implementing this procedure, however, would probably be expensive, especially in relation to the overall size of the transaction. Hence, the

---

[3] *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 n.33 (D.C. Cir. 1970); Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 482 (D.C. Cir. 1970); *see also* Annot., 70 A.L.R.2d 621 (1960) (discussion and collection of innkeeper's duty cases).

[4] *E.g.,* Virginia Association of Realtors, Form VAR-600, para. 8 (1977) (Virginia Association of Realtors Standard Form Contract of Purchase).

pressure might well be higher in the small-transaction transient context for the law to "get it right" initially and thereby save the parties the trouble of drafting particularized agreements.

One possible answer to the puzzle of why the law did not change earlier, therefore, is that there was no need; the "actual" legal obligations written into leases presented a reasonably efficient set of risk allocations, even if the black letter law did not. The result would be a classic instance of the "Coase Theorem" at work.[5] I have no empirical evidence at hand to support this hypothesis,[6] but it would be surprising if it were not generally true. Specifically, one would expect to find that, much prior to the cases cited by Professor Rabin, leases commonly expanded on the landlord's common law duties with respect to such issues as repair and maintenance of common areas. Further, if this hypothesis of substantial "contracting out" were shown to be incorrect, what should we make of that evidence? It is, after all, widely recognized that profit-making incentives that cause the market to adjust appropriately tend to accompany most efficiency-enhancing arrangements.

Before going any further, I wish to disclaim any notion that the "invisible hand" of the marketplace solves all problems, even abstracting from the usual distributional qualifications. In particular, the third-party effects of housing choices have often been recognized. Indeed, one of the earliest practical applications of the Prisoner's Dilemma game theoretic model was to rationalize the imposition of mandatory housing and health codes.[7] Many housing attributes affect the value and enjoyment of adjacent properties through what economists have long analyzed as "externalities." Traditional nuisance law concerns the most egregious of the negative external effects, but it does not adequately address either the external costs that fall short of nuisance or the failure to provide external benefits. Hence, codes providing for mandatory minimum standards are one means of addressing market-failure problems. Such provisions would, of course, serve no purpose if individual parties could contract out of the imposed obligations. The standards encompassed under this rationale, however, include only those the effects of

---

5 Subject to the limitations presented by transactions costs, parties will bargain their way from a nonoptimal to an optimal set of liabilities. *See* Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960).

6 In the limited time available to write this comment, I was able to examine the strueture of long-term (20 years plus) leases for commercial property (large office buildings) in New York City during the mid-1950s. Unfortunately, both the circumstances and the internal content of these leases make it plain that they fit essentially the "conveyance" mold of the old agrarian leases. For instanee, the lessee is even given the right, subject to certain review by the lessor, to tear down the original building and replace it with a new one. Not surprisingly, such leases *explicitly* confirm most of the rights and duties asserted by the traditional common law.

7 *See* Davis & Whinston, *The Economics of Urban Renewal,* 26 LAW & CONTEMP. PROBS. 105, 107-10 & n.5 (1961).

which would "spill over" property lines; the landlord can effectively internalize externalities flowing among rental units subject to the control of a single owner.

Even absent third-party or externality problems, the bargaining process itself may be defective. Interest in problems of alleged "unconscionability" or imbalance in bargaining power has increased in the last several decades.[8] Because the housing market is a competitive one, a relative bargaining power analysis explains little about the structure of landlord-tenant agreements. More interesting, in my view, is the hypothesis of systematic information bias on the part of consumers.

One of the rationales for the recent extension of strict liability in tort reflects a concern for information bias.[9] According to this hypothesis, there are identifiable classes of risky products for which consumers systematically underestimate the associated risks. Hence, these products are, in effect, "underpriced" and consequently overconsumed. Imposition of strict liability, the argument goes, causes producers with superior information and experience to incorporate the correct cost of the hazard into the product and thus give the appropriate signals to consumers. Carried into the landlord-tenant context, a similar argument would explain the imposition of nonwaivable duties on the landlord. If these benefits were waivable, the argument would assert, consumers would systematically undervalue the benefits and refuse to "purchase" them by foregoing the landlord's offer of lower rent in exchange for waiver.[10]

It has been customary, as indicated above, to couch the consumer misinformation argument in terms of misperception of objective facts about the state of the world and the consequences (either beneficial or detrimental) associated with certain exposures. Equally problematical is the average layman's understanding of the real content of the legal rights that he either retains or bargains away, especially when a multipage standard form lease is involved. Too little attention has been paid to the issue of whether there is the equivalent of "informed consent" and, if not, what the legal policy response should be. Recent contract law has, in any event, provided protections to consumers affected by

---

8 There is voluminous legal literature on these issues. *E.g.*, Epstein, *Unconscionability: A Critical Reappraisal,* 18 J.L. & ECON. 293 (1975); Schwartz, *Seller Unequal Bargaining Power and the Judicial Process,* 49 IND. L.J. 367 (1974); *see also* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389-90, 161 A.2d 69, 86 (1959) (quoting Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 COLUM. L. REV. 629, 633 (1943)).

9 *See* Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal,* 24 STAN. L. REV. 439, 463 (1972); Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort,* 1974 UTAH L. REV. 661, 694; McKean, *Products Liability: Trends and Implications,* 38 U. CHI. L. REV. 3, 41-42 (1970).

10 *See generally* Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis,* 27 U. PA. L. REV. 630 (1979) (focusing primarily on contracts, but also summarizing and citing relevant economies literature).

waivers or limitations of contractual liability.[11]

The "information defects" rationale for the imposition of nonwaivable conditions on contracts is a form of paternalism that allegedly "saves" the consumer from what he would recognize as an "error" if he were only smarter or better-informed. This form of paternalism is at least conceptually consistent with the goal of conforming the results to the tastes and preferences of the parties concerned, subject of course to the underlying economic constraints and trade-offs. The rationale involved is basically an empirical one and is at least conceptually refutable. It is only a short step, however, from this form of paternalism to that which rejects the preferences themselves as wrongheaded: anyone, however well informed, who is willing to trade off rat infestation for $\$X$ a month lower rent is an "incompetent" or "irrational" decisionmaker and needs protection from the consequences of his own inept behavior. This second and much stronger form of paternalism gives carte blanche to promoters of codes, mandatory minimum standards, and nonwaivable rights because there is no objective way to rebut the rationale's main premise.

I shall not explore in any greater detail the relevant aspects of the doctrinal ferment in contract and tort law that occurred both before and contemporaneously with the landlord-tenant law upheaval. That task surpasses the boundaries of this brief comment and, moreover, is one for which others have greater expertise. The few examples given above will nevertheless suffice to make several points that are relevant to the restructuring of landlord-tenant law. First, new contract, tort, and "market intervention" doctrines inevitably raised the question of their applicability to landlord-tenant law and, impliedly, of the rationality of the whole existing body of law. Second, some of these doctrines seemed to support—rightly or wrongly—the refusal to enforce bargains in fact made (e.g., waivers), and others supplied a rationale for mandatory duties and other forms of interference with unfettered freedom of contract.

Fresh issues of "applicability" were raised repeatedly during the period in question. To what extent does "unconscionability" apply to landlord-tenant bargains? Absent any explicit agreement, who is responsible for common areas in rental properties? Should strict or "no fault" liability be applied to landlord tort duties? It is hard to imagine how courts could answer these and dozens of other similar landlord-tenant questions—many of which are described in Professor Rabin's survey—without squarely confronting the rationales and arguments developed for the same or analogous issues in other areas of substantive law.

At least implicitly, if not explicitly, developments in other branches of law seemed to incorporate such notions as optimal risk-bearing, trans-

11 *See* U.C.C. §§ 2-302, -314, -316, -715, -719 (1977).

actions costs, and externalities. Evaluating these developments for possible applicability in the landlord-tenant environment would understandably be conducted in the same terms. Once that process began, the insularity of property law and its incongruence with the mainstream of related twentieth-century law would also become increasingly apparent. Hence, I hypothesize, the "crack" in the facade of traditional property law was triggered in part by the necessity to reconcile it logically with new and vigorous developments in other related areas of law. Once the wall had been breached, it would have become increasingly difficult to sustain the notion that there should be a separate law of "landlord-tenant contracts" or "landlord-tenant torts," unless the special rules could be rationalized in terms of identifiable factors that are peculiar to the landlord-tenant relationship, rather than to mere tradition. This would explain the pressure on other antiquated landlord-tenant doctrines such as the independence of convenants, the no-apportionment rule, and the absence of a duty of mitigation. Finally, I am intrigued by the hypothesis that the crumbling of landlord-tenant law's peculiar procedural structure—which, in effect, had traditionally denied the tenant low-cost, practical self-help remedies—infused certain tenant rights, such as a landlord's duty to repair, with real value for the first time,[12] thus increasing the degree of *practical* concern over these matters.

I am not sure to what extent, if at all, Professor Rabin would disagree with any of the above, but I am not, at least on the evidence thus far presented, disposed to let pass unchallenged what is apparently a contention shared by a number of property commentators that landlord-tenant law has generally gone *beyond* other related branches of law. For example, Professor Donahue, in a survey of recent landlord-tenant developments, rejects the upheaval as attributable to the new application of contract law principles and asks, by way of illustration, "where do we find any counterpart [in contract law] to the implied covenant to repair which lies at the heart of so many recent cases and legislation?"[13] In the same vein, Professor Rabin cites the result in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[14] apparently as an exceptional extension of tort responsibility.

My impression is that a multitude of very similar holdings can be found in fact situations analogous to *Kline.* Certainly the supposed black letter rule that one is not responsible for the supervening criminal acts of others has always been an oversimplification, as evidenced by the torts

12 *See* Donahue, *Change in the American Law of Landlord and Tenant,* 37 MOD. L. REV. 242, 245-51 (1974).

13 *Id.* at 257-58.

14 439 F.2d 477 (D.C. Cir. 1970).

casebook chestnut *Hines v. Garrett,*[15] in which a conductor was found liable for the rape of a woman walking back through a bad neighborhood because he failed to let her off at the correct stop. Immediately prior to the "revolution" under discussion here, in a case quite analogous to *Kline,* a court held a tour operator liable for the unlawful action of southern roughnecks who entered a tour bus and attacked several black tourists.[16] In fact, other branches of tort law seem to go far beyond *Kline* in finding tort liability even where there is no identifiable special relationship between the defendant and the plaintiff. Thus, in the much-publicized *Tarasoff* case, a psychiatric counselor was held liable for not warning a patient's fiancée of the patient's expressed intent to attack her.[17]

Affirmative responsibility to mitigate the wrongful acts of others is, in essence, the same problem as the "duty to rescue."[18] Although courts have never imposed such duties as a *general* rule, they have always carved out exceptions whenever they found a justifying "special relationship." The existence of a contractual relationship, such as that between landlord and tenant, arguably creates such a relationship because the market places the landlord in a position to "charge" for the benefits he provides to the tenant under his "protective" duty.[19] Hence, it seems misleading to suggest that *Kline* is inconsistent with ordinary tort law.

In like manner, Donahue's query about the existence of an implied duty to repair within contract law is also misleading precisely because it states the issue in terms of a general duty. There is, of course, no general implied duty to repair in contract (assuming that the performance tendered was initially conforming). It is siguificant, however, that courts will recognize such a duty in most contractual situations that are comparable to the landlord-tenant situation. An example that comes to mind is that of the lease contract for a rental car. When I searched for a recent car rental contract, I frankly expected to find an explicit war-

---

15 131 Va. 125, 108 S.E. 690 (1921).

16 Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5th Cir. 1959); *see also* Stachnievicz v. Mar-Can Corp., 259 Or. 583, 488 P.2d 436 (1971) (duty of tavern owner to his paying customers).

17 Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 13 Cal. Rptr. 14 (1976). I do not mean necessarily to suggest that *Tarasoff* has been widely followed, but the cases cited and the reasoning in the court's opinion are instructive.

18 *See generally* Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism,* 7 J. LEGAL STUD. 83 (1978) (economic model predicting when and how law will intervene to save rescuers).

19 The importance of a bargaining relationship in the enforcement of promises is treatcd in Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract,* 89 YALE L.J. 1261, 1274-88 (1980). In this article, a misleading (unfulfilled) promise is analyzed as the effective equivalent of a tort. *See also* Goetz & Scott, *supra* note 2 (analyzing affirmative postcontractual duty to warn).

ranty to repair. Such was not the case.[20] Most of the readers of these comments will know from experience, however, that a de facto warranty of that nature operates in practice throughout the rental car industry. In the unlikely event that litigation resulted over the matter, I have no doubt that most courts would formally imply such a warranty where it is not expressly made. Besides creating extraordinary duties applicable to certain subsets of transactions, contract law similarly carves out exemptions from general duties, such as the duty to mitigate,[21] when special circumstances exist.

In short, I see the dominant theme of the last twenty years as little more than the (arguably overdue) integration of landlord-tenant law into the mainstream of contract and tort law. What is not entirely clear to me, however, is the extent of this integrative process. Just as there are special subsets of contract and tort law, we might retain certain distinctive rules for landlord-tenant relations. Focusing exclusively on the "revolution" has perhaps distracted us from considering what special rules should be retained or created in the light of the very principles that triggered the "revolution."

Commenting briefly on some of the more infamous features of the "revolution," although I do not find *Javins* and its progeny wholly indefensible in theory, I share with others the practical assessment that it represents an unfortunate and mischievous policy even for those it presumably was intended to benefit.[22] I am troubled by the relevance or probative value of much of the evidence cited by Professor Rabin. In particular, I am puzzled by the suggestion that the "mainstream" prediction of consequent worsening of housing conditions for the poorest tenants has been empirically refuted. I would never have regarded mainstream analysis as necessarily predicting a deterioration in absolute

---

20 The following is the only relevant paragraph in a Hertz Corporation Standard Form Rental Agreement, form 1700 (3/81) (emphasis in original):

> 2. VEHICLE REPAIRS WARRANTY DISCLAIMER
> Vehicle is Lessor's property. This agreement is a contract for the use of the bailed vehicle only. While vehicle is on rental to Customer, Customer is not Lessor's agent for any purpose. Any service to or replacement of a part or accessory to Vehicle during the rental must have Lessor's prior approval. Customer acquires no rights other than the right to use Vehicle in accordance with this Agreement. LESSOR MAKES NO WARRANTY OF ANY KIND, NATURE OR DESCRIPTION, EXPRESS OR IMPLIED, AS TO THE MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY VEHICLE COVERED BY THIS AGREEMENT.

I do not read this provision as expressly disclaiming a duty to repair.

21 *See* Goetz & Scott, *supra* note 2.

22 *See, e.g.,* Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor,* 82 YALE L.J. 1175 (1973). *But see* Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar,* 82 YALE L.J. 1194 (1973); Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy,* 80 YALE L.J. 1093 (1971).

conditions, but only a shortfall from what otherwise would have occurred, measured in welfare terms and not in the physical character of the housing.

Even assuming arguendo that *Javins*-type rules represent bad policy, it does not follow that the courts have implemented these policies irrationally (from their own perspective). Thus, I am not perplexed by what Professor Rabin characterizes as the misapplication of a contract-type remedy to a fictional contract. Admittedly, the remedial approach chosen is overcompensatory, but so are treble damages for antitrust violations. One need only view these remedies as part of a private enforcement scheme to regard them as at least arguably appropriate for their intended purpose. In spite of the new legal codes and their seemingly harsh remedial provisions, my personal experience suggests that in many areas landlords continue knowingly to incorporate unenforceable provisions in rental agreements. To the extent that tenants are not well-informed on the law, these provisions exert an in terrorem effect that benefits landlords. Query whether such practices should also be subject to punitive damages?[23]

Finally, I agree with the broad outlines of Professor Rabin's analysis of rent control and condominium conversion laws as involving little other than the capture, by coalitions of tenants, of short-term redistributive gains through the political process. I would point out only that similar reallocations have occurred widely throughout the United States economy since the 1940s, both in the form of price-limiting schemes and direct allocations. The treatment of oil and gas resources, for instance, presents an interesting parallel.

---

23 I have been unable to find any landlord-tenant cases that address this point squarely. Similar practices, however, appear to be used by insurance companies when particular exclusions have been held unenforceable by state courts. *See* Richards v. Allstate Ins. Co., 693 F.2d 502 (5th Cir. 1982) (awarding $375,000 in punitive damages to single plaintiff with actual damages of $2,500).