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Whatever Happened to Landlord-Tenant Law?

Gerald Korngold
New York Law School

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Gerald Korngold*

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I. INTRODUCTION

For those who came of age as law students or young lawyers in the late 1960s or early 1970s, no area of the law was more vibrant than landlord-tenant. Landlord-tenant represented the leading edge of real property law, especially when compared to other arcane and archaic areas, such as the law of seisin and future interests which were firmly entrenched in the middle ages. But more so, landlord-tenant was a prime example of the general ferment in the law, where traditional doctrinal structures were challenged and recast and a policy-based jurisprudence emerged.

During those years, the upheaval in traditional landlord-tenant law led to groundbreaking case law, a new uniform statute (the Uni-

* Dean and Everett D. And Eugenia S. McCurdy Professor of Law, Case Western Reserve University School of Law.

form Residential Landlord and Tenant Act),[1] other state legislative regimes preempting the area,[2] a new Restatement for landlord and tenant law with an articulated law reform perspective,[3] and a wealth of law review articles offering insightful doctrinal critiques and proposed revisions of the law.[4] But in a broader sense, landlord-tenant law captured the imagination of a generation of young lawyers, imbuing them with a belief that the law could indeed respond to new theoretical models and idealistic visions of social justice.

Now, a quarter of a century later, landlord-tenant law no longer occupies the center stage in real property law, let alone in the broader legal and jurisprudential arena. In recent years, we have not seen cases declaring paradigmatic shifts such as *Javins v. First National Realty Corp.*,[5] *Sargent v. Ross*,[6] and *Edwards v. Habib*.[7] The new Restatement of Property has moved on to other areas, including mortgages and servitudes. Commentators have been focusing on other areas of property law, such as the takings issue which arguably has become the leading area of inquiry in the property field and the one having the greatest impact on other areas as well. By one count, for example, the number of law review articles on the subject of landlord-tenant published during the period of 1991-1997 was only one-half the number published during 1967-1973.[8]

1. Unif. Residential Landlord and Tenant Act §§ 1.101-6.104 (amended 1974), 7B U.L.A. 427-508 (1985 & Supp. 1998)(now adopted in thirteen jurisdictions).
2. *See, e.g.*, D.C. CODE ANN. § 45-2552 (1996)(retaliatory eviction prohibited); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1998)(imposing warranty of habitability).
3. *See* A. James Casner, *Restatement (Second) of Property as an Instrument of Law Reform*, 67 IOWA L. REV. 87 (1981).
4. A sampling of this literature is cited in this article. The reform era also resulted in an important treatise, ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT (1980).
5. 428 F.2d 1071 (D.C. Cir. 1970)(implying a warranty of habitability in all leases for urban dwelling units, based on a contract theory and the District of Columbia Housing Codes).
6. 308 A.2d 528 (N.H. 1973)(declaring that landlords are under a general tort duty of care for injuries to tenants and their invitees). The holding adopted by the court in *Sargent* is one that even today is adopted only by a minority of courts. *See, e.g.*, Casey v. Estes, 657 So. 2d 845 (Ala. 1995)(following traditional rule of non-liability, subject only to common law exceptions); Trotter v. Chicago Hous. Auth., 516 N.E.2d 684 (Ill. App. Ct. 1987). *See generally* RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 17.6 (1977)(finding tort liability only where there is a breach of warranty of habitability, administrative regulation, or statutory duty); Olin L. Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 133-35 (1982)(noting the several states who aligned themselves with the holding of the New Hampshire Supreme Court in *Sargent*).
7. 397 F.2d 687 (D.C. Cir. 1968)(prohibiting eviction in retaliation for reporting housing code violations).
8. The INDEX TO LEGAL PERIODICALS for 1967-1973 shows 222 articles on landlord-tenant and eviction law. In contrast, for the 1991-1997 period there are only 110.

Notwithstanding these developments, I believe that as we head into the next century, landlord-tenant law still is alive with path-breaking theoretical battles, clashing policy perspectives, and critical societal issues. Landlord-tenant law still merits our attention on all of these levels.

This Essay will examine the broad themes of the great reforms of landlord-tenant law in the 1960s and 1970s that captured our imagination, suggest why these issues may have been eclipsed in the ensuing years, and identify the core issues in current landlord-tenant law that compels involvement by decisionmakers and commentators.

II. THE LEGACIES OF THE ERA OF REFORM

Many reforms in landlord-tenant law were achieved in the 1960s and 1970s. This section will broadly, and briefly, identify some of the key doctrinal, theoretical, and policy-based themes that emerged from that era and that received great attention from courts, legislatures, lawyers, and commentators.

A. The Death of Feudalism: From Conveyance to Contract

Traditionally, courts and commentators viewed a lease as a conveyance of an estate in land, subject to distinct property law concepts and rules.[9] This proposition was flatly rejected in the era of reform, with courts holding that a lease is a contract for the purchase of space and services between the lessor and the lessee.[10] This notion of the lease as a contract formed the basis for many of the courts' key decisions, such as the implication of a warranty of habitability in residential leases.[11] The legacy of this reform is still seen in current decisions applying contract principles to leases, yielding different results than under traditional property rules.[12]

See 16 INDEX TO LEGAL PERIODICALS 333, 549-59 (1970); 15 INDEX TO LEGAL PERIODICALS 285, 483 (1987). This is all the more impressive since the number of indexed journals increased between those periods from 380 to 804 (comparing 1970-1973 volume of the INDEX TO LEGAL PERIODICALS to the 1997 volume). *See* 16 INDEX TO LEGAL PERIODICALS (1970); 36 INDEX TO LEGAL PERIODICALS (1996).

9. *See* SCHOSHINSKI, *supra* note 4, § 1:1.

10. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970)("[L]eases of urban dwelling units should be interpreted and construed like any other contract.").

11. *See, e.g.*, Green v. Superior Court of San Francisco, 517 P.2d 1168, 1181 (Cal. 1974)(keeping with the trend of analyzing residential houses under contract principals, the court held that a tenants duty to pay rent is "mutually dependent" on landlord's satisfaction of the implied warranty of habitability).

12. *See, e.g.*, Fox Grain and Cattle Co. v. Maxwell, 885 P.2d 432 (Mont. 1994) (awarding contract damages for breach of implied covenant of good faith and fair dealing in farm lease).

B. Emergence of Statutes

Professor Mary Ann Glendon insightfully identified a different transformation of landlord-tenant law during the 1960s and 1970s—the emergence of statutes, rather than judge-made rules, as the controlling law in residential landlord-tenant relationships.[13] After the initial pathbreaking judicial decisions, legislatures began supplanting courts as the key reform agents in the field.[14] Law reform by legislation rather than judicial decision offers certain advantages. Legislatures can engage in fact finding, fully consider an issue, and determine public policy and priorities as well as craft comprehensive solutions. In contrast, courts can only decide issues before them. Moreover, principles of separation of powers arguably require that legislatures make policy choices.[15] Landlord-tenant reform by statute presumably allowed for those benefits as well as blunting some criticism of the so-called "activist" courts.[16]

C. Residential/Commercial Dichotomy

Both courts and legislatures made key distinctions between residential and commercial tenants in crafting rules. Special protections were extended to residential tenants, including substantive rights such as the implied warranty of habitability mandating minimal standards for shelter[17] as well as procedural safeguards to prevent eviction from the home.[18] These reforms were based on still-debated assumptions that landlords possess greater economic power and skill

13. *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 503-05 (1982).

14. For example, after *Young v. Morrissey*, 329 S.E.2d 426 (S.C. 1985), rejected imposing a warranty of habitability, the South Carolina Legislature enacted S.C. CODE ANN. §§ 27-40-10 to -60 (Law Co-op. 1991) which provided a warranty for residential properties.

15. *See* Gerald Korngold, *Seller's Damages from a Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts*, 20 NOVA L. REV. 1069, 1084-87 (1996).

16. *See infra* note 19.

17. *See, e.g.*, N.Y. REAL PROP. LAW § 235-b (McKinney 1989)(requiring premises "fit for human habitation"); RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT §§ 5.1-5.6 (1976).

18. *See, e.g.*, N.Y. REAL PROP. LAW § 223-b (barring retaliatory eviction); Lindsey v. Normet, 405 U.S. 56 (1972)(striking double bond requirement for tenant appeals in eviction actions); Jordan v. Talbot, 361 P.2d 20 (Cal. 1961)(limiting landlord's use of self-help to remove defaulting tenant); Louisiana Leasing Co. v. Sokolow, 266 N.Y.S.2d 447 (Civ. Ct. 1966)(refusing to permit termination under lease for children's noises in apartment house); UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 2.101, 7B U.L.A. 453 (1985)(security deposit protections), *id.* § 4.201, 7B U.L.A. 492 (providing cure period before termination of lease). *See generally* Gerald Korngold, *Can Distraint Stand Up as a Landlord's Remedy?*, 5 REAL EST. L.J. 242 (1977)(examining the constitutionality and validity of Pennsylvania's Landlord Tenant Act which allows for the procedure of distraint).

than residential tenants and that these new doctrines would bring improvements in lower income housing.[19]

D. Trumping the Bargaining Process

As a related matter, in the era of reform, legislators and courts sometimes trumped the written lease agreement of the parties by altering and voiding terms. The jurisdiction's legal standards, judicial attitude and philosophy, and the facts of a particular case were important factors underlying such decisions.[20]

III. THE END OF THE ERA OF REFORM

The era of reform had a profound impact both on the theory of landlord-tenant law as well as on the substantive and procedural rights of lessors and lessees. The movement for modernization of real property rules, begun in the era of the legal realists and later theorists such as Myres McDougal,[21] combined with the 1960s and 1970s view of the law as an engine for social, political, and economic change and a

19. *See* Lawrence Berger, *The New Residential Tenancy Law—Are Landlords Public Utilities?*, 60 NEB. L. REV. 707, 746-49 (1981) (arguing that the warranty of habitability may lead to inefficient repairs); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987)(arguing that the warranty of habitability improves lower income housing); Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 882 (1975)(attacking the motive in residential landlord-tenant reforms as "the moral principle of redistribution of wealth from landlord to tenant"); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984)(arguing that changes resulted from the social, political, and intellectual currents in the 1960's); Randy G. Gerchicky, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 767-68 (1994)("Contrary to the stereotype of the greedy landlord running large apartment complexes, small-scale operators dominate the private rental housing market."); Daniel P. Schwallie Ph.D., Note, *The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy*, 40 CASE W. RES. L. REV. 525 (1989-1990)(finding that governmental housing subsidies paid directly to the poor are more effective to improve lower income housing).

20. *See* N.Y. REAL PROP. LAW § 235-b(2)(McKinney 1989)(waiver or modification of warranty of habitability is void under public policy); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)(prohibiting a leasehold waiver of the warranty of habitability). *Cf.* RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.6 (1976)(allowing a waiver of warranty of habitability so long as such waiver is not unconscionable or against public policy); P.H. Inv. v. Oliver, 818 P.2d 1018 (Utah 1991) (following the restatement approach).

21. *See* Myres S. McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077, 1090-93 (1942)(attacking first Restatement of Property for perpetuating traditional, and meaningless, categorizations of property interests).

belief that government can be a positive force in people's lives,[22] powered the era of reform.

This era of ferment and fundamental change in the theory, substance, and procedure of landlord-tenant law began to ebb in the late 1970s. This was not surprising. After all, many of the key questions had been resolved, and people's attention, energy, and ambition turned to new fields. Moreover, with the shift to a legislatively dominated regime, there were fewer opportunities for breakthrough judicial decisions. The seeming intractability of the problem of substandard housing may also have discouraged new reform movements. Importantly, the 1980s saw a re-emergence of a belief in the power of the market to bring a better life. Consequently, some came to reject the legitimacy and effectiveness of judicial and legislative social programs. Additionally, other issues, such as takings and private land use regimes, took center stage in the debate among real property commentators.

IV. LANDLORD-TENANT LAW AT THE END OF THE CENTURY

It is my view, however, that critical theoretical and substantive issues remain in landlord-tenant law. Moreover, this area of the law reflects key social, political, and economic concerns facing America in the late twentieth century. A common subtext in this area is an ongoing reassessment of the costs, benefits, and legitimacy of governmental regulation of property rights. These important questions require study by a new generation of commentators and action by decision makers. I will outline these key issues—some being unresolved holdovers from the era of reform, others reflecting new social developments.

A. Contract/Conveyance Dichotomy Revisited

As discussed earlier, the era of reform characterized a lease not as a conveyance but as a contract. In recent years, it has emerged that this conceptualization is not sufficient to describe the multifaceted relationships inherent in a lease.[23]

22. For example, *Javins v. First National Realty Corporation*, 428 F.2d 1071 (D.C. Cir. 1970), valued the governmental housing code and attempted to give it greater effect. Similarly, cases barring self-help indicated a belief that judicial process provided a far better forum for resolving disputes than the private arena.

23. *See, e.g.*, Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 843 (Cal. 1985)(leases have a dual nature, incorporating features of both conveyance and contract); 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); Edward Chase & E. Hunter Taylor, Jr., *Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571 (1985); Robert H.

One recent case illustrates the slipperiness of the conveyance/contract dichotomy and the ambiguity and ambivalence of courts on the issue. In *Grant v. Detroit Association of Women's Clubs*,[24] the issue was whether a landlord-tenant relationship was created by virtue of a contract of employment. There, the occupancy of an apartment was the sole compensation of the employee who was the caretaker of a residential club. The dispute arose when the employer terminated the employment relationship and unilaterally removed the employee's belongings and changed the lock on the door. One would imagine that if a lease were a true contract, it would not matter whether there was a landlord-tenant relationship (as the employee contended) or a license (as the employer asserted). Rather, whatever the "contract" provided should control. Yet, this was a critical distinction since characterization of the relationship as a leasehold would invoke a separate set of landlord-tenant protections against eviction that would not apply with a license. Clearly, all "agreements" are not the same and, therefore, a "conveyance" of a leasehold estate does matter.

Moreover, the court stated that a landlord-tenant relationship is created "when the owner of the estate conveys to another a portion of his interest for a term less than his own."[25] Such a statement appears to endorse the conveyance concept of a lease. Yet, the intent of the parties—the hallmark of contract—was the key in deciding there had actually been a conveyance.[26] Thus, the supposed dichotomy between a conveyance and contract is not as sharp as it might have been imagined in the 1960s.[27] Indeed, more scholarly and judicial work is necessary to articulate a model of the landlord-tenant relationship that does not rely on buzzwords like "contract" and "conveyance."

B. The Triumph of the Market?

As discussed above, reform decisions were generally not bothered by trumping the agreement of the parties.[28] Now, however, there are conflicting currents on this issue in the cases. Sometimes the agreement struck in the marketplace is respected, while on other occasions it is superseded.

Thus, the market is ascendant in some landlord-tenant arenas. The recognition of a lease as a "contract" has resulted in rules of law

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

24. 505 N.W.2d 254 (Mich. 1993).
25. *Id.* at 258.
26. *See id*; RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 1.2 cmt. a (1977)(whether relationship was created depends on the "intention of the parties").
27. Professor Glendon did indeed note early on that leases had long had contractual aspects. *See* Glendon, *supra* note 13, at 503-05.
28. *See supra* note 19 and accompanying text.

founded on intent and expectations. Parties have been freed from archaic and sometimes senseless doctrines.[29] Various theories, generally collected under the rubric of freedom of contract, support the enforcement of the exact terms of the lease agreement: free market allocation of goods and services best serve the public interest; parties rely on the written contract; results should be predictable to the actors; and moral considerations require that people should be bound by their undertakings.[30] This ascendancy of market-based rules is most clearly seen in commercial lease cases.[31]

On the other hand, the terms of residential lease agreements are sometimes still superseded by the law, rejecting the parties' contract. For example, courts refuse to enforce agreements that are "unconscionable." Factors showing unconscionability include a relative lack of bargaining power or sophistication; absence of meaningful alternatives due to standardized lease provisions or a shortage of alternative housing; or lease terms that unreasonably favor one party.[32] Lease provisions have also been voided for violating public policy.[33] Finally,

29. For example, many courts have reversed the old rule and require mitigation of loss in the context of landlord-tenant law. *See* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.203(c) (amended 1974), 7B U.L.A. 495 (1985 & Supp. 1998)("If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental."); *see also* John A. Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U. L.Q. 1213 (1983). Similarly, a tenant is now relieved from an obligation to pay rent upon sudden destruction of the premises. *See, e.g.*, N.Y. REAL PROP. LAW § 227 (McKinney 1989 & Supp. 1998); N.C. GEN. STAT. § 42-12 (1994).

30. *See* Korngold, *supra* note 15, at 1078-80.

31. *See, e.g.*, Waldbaum, Inc. v. Fifth Ave. of Long Island Realty Assocs., 650 N.E.2d 1299 (N.Y. 1995)(finding that in commercial lease, tenant must comply with terms in order to avoid default); Albert M. Greenfield & Co. v. Kolea, 380 A.2d 758 (Pa. 1977)(holding that under contract principles, no liability for rent when premises are destroyed).

32. *See, e.g.*, Vance v. Villa Park Mobilehome Estates, 42 Cal. Rptr. 2d 723 (Ct. App. 1995)(finding neither procedural nor substantive unconscionability in pass through charges under lease); Nylen v. Park Doral Apts., 535 N.E.2d 178, 184 (Ind. Ct. App. 1989)(finding that $2 a day late fee was not unconscionable even though lease was standardized and favored the landlord since the agreement was not one that "no sensible person not under delusion, duress or in distress would make, and that no honest and fair person would accept"); North Am. Inv. Co. v. Lawson, 854 P.2d 384 (Okla. Ct. App. 1993)($60 monthly late penalty on residence with monthly base rental of $150 was unconscionable); *see also* RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.6 (1977)(allowing parties to a lease to contract around legal obligation of landlord with respect to condition of leased property as well as the remedies available to tenant for breach so long as agreement is not unconscionable or against public policy).

33. *Compare* Crawford v. Buckner, 839 S.W.2d 754 (Tenn. 1992) (exculpatory clause in residential lease is void as contrary to public policy), *with* Bedrosky v. Hiner, 230 Neb. 200, 430 N.W.2d 535 (1988)(exculpatory clause in negotiated commercial lease was enforceable).

written residential leases are sometime superseded by consumer regulation legislation.[34]

Consequently, there is ambiguity on the respect to be accorded to written agreements. This conflict between market and interventionist paradigms in landlord-tenant law requires ongoing examination.

C. Property Rights and Governmental Regulation

Since the 1980s, there has been revitalized interest by courts and commentators in the takings issue, focusing on the extent of permissible governmental regulation of property interests.[35] This conflict has been played out as well in the landlord-tenant area, most notably in the arena of rent controls. For example, some states and municipalities regulate the amount of rent that a landlord may receive from a tenant. Early rent control legislation was often a reaction to escalating prices due to wartime shortages.[36] In contrast, current rent regulation was passed in the era of landlord-tenant reform of the 1960s and 1970s.[37]

Various arguments have been advanced to support rent controls. They include: given a declining stock of affordable housing, unless there are rent controls, the poor will be paying a very high proportion of their income for rent, and middle income tenants would be subject to extreme fluctuations in rents;[38] rising rents in areas becoming gen-

34. *See* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT. §§ 1.101-6.104 (amended 1974), 7B U.L.A. 430-508 (1985 & Supp. 1998).

35. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994)(developing nexus requirement); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)(requiring nexus between regulation and governmental purpose); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)(approving damages for inverse condemnation). For a sample of the commentators, see Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1; Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995 (1997); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

36. *See* Block v. Hirsh, 256 U.S. 135 (1921)(illustrating Washington, D.C. rent controls imposed due to World War I shortages). New York City's current and powerful rent regulation stems from World War II. *See Residential Rent Control in New York City*, 3 COLUM. J.L. & SOC. PROBS. 30, 32-34 (1967).

37. New York City's current system stems from 1969 legislation. *See* Stephen Dobkin, *Confiscating Reality: The Illusion of Controls in the Big Apple*, 54 BROOK. L. REV. 1249, 1254 (1989). In the 1970s approximately 100 municipalities in New Jersey adopted rent controls. *See* Kenneth K. Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement*, 28 HASTINGS L.J. 631 (1977). As of 1986, over 200 American municipalities have adopted some form of rent control. *See* ANTHONY DOWNS, URBAN LAND INSTITUTE, RESIDENTIAL RENT CONTROLS: AN EVALUATION 12 (1988).

38. *See* W. Dennis Keating, *Commentary on Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 1223, 1224 (1989).

trified will cause homelessness since current tenants will not be able to afford increased rentals;[39] rent controls protect a tenant's interest in his or her home, and that interest deserves protections greater than those extended to commercial property;[40] and landlords who bought properties subject to rent controls knew the limitations facing their properties and in any case receive a reasonable return.[41] Under these views, rent controls bring social gains with acceptable costs.

In contrast, rent controls are challenged as improper governmental regulation on two levels. First, it is claimed that such legislation is a taking requiring compensation,[42] although courts typically reject that approach.[43] Second, rent control is occasionally attacked as bad policy. Much like the takings discussion, the debate about the social benefits and costs of rent control reflects the conflict between proponents of governmental intervention and advocates of the free market.

Moreover, opponents claim that rent controls result in a decreased supply of rental housing since they limit return on capital and discourage investment;[44] rent controls effect a nonconsensual transfer of wealth from landlords to tenants and often help more affluent, rather than lower income, tenants;[45] and owners will let property fall into disrepair since they do not receive adequate returns to justify increased costs.[46] Taken together, these critics maintain that rent controls exact an unacceptable cost on individual owners and exacerbate, rather than help, housing shortages and the problem of substandard housing.

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39. *See* Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835, 1838-39 (1988).

40. *See* Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 359-62 (1986).

41. *See* Curtis J. Berger, *Home is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 BROOK. L. REV. 1239, 1241-43, 1246-47 (1989).

42. *See* Timothy L. Collins, *"Fair Rents" or "Forced Subsidies" Under Rent Regulation: Finding a Regulatory Taking Where Legal Fictions Collide*, 59 ALB. L. REV. 1293 (1996); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 742-59 (1988); R.S. Radford, *Why Rent Control Is a Regulatory Taking*, 6 FORDHAM ENVTL. L.J. 755 (1995).

43. *See, e.g.*, Dawson v. Higgins, 588 N.Y.S.2d 93 (Sup. Ct. 1992), *aff'd*, 610 N.Y.S.2d. 200 (App. Div. 1994)(finding that city rent control regulation which prohibited landlords from evicting tenants of 20 years or more for personal use and occupancy did not effect a physical taking).

44. *See* Epstein, *supra* note 42, at 767-70. Furthermore, prices for exempt units in a generally regulated rent market are higher than what they would be in an unregulated market. *See* George Fallis & Lawrence B. Smith, *Uncontrolled Prices in a Controlled Market: The Case of Rent Controls*, 74 AM. ECON. REV. 193, 199 (1984).

45. *See* DOWNS, *supra* note 37, at 1-2.

46. *See id.* at 4.

This conflict over rent controls, reflecting the current battle over the proper extent of governmental controls on private property, continues with vigor. One court recently lamented the ongoing dispute:

> In the ten years since Berkeley passed its rent control ordinance, it has engendered more than its share of litigation. In many cases, including this one, it is difficult to disentangle the actual legal issues—if any—from the morass of political invective, ad hominem attack, and policy argument in which they are buried. It seems as if individual landlords challenge every regulation every time it is applied, while the Berkeley Property Owners' Association commandeers every individual challenge and turns it into an attack on the "true character" of the entire rent control scheme and its adherents. The Board's intransigence in the face of these challenges and attacks more than fulfills the landlords' expectations and sets the stage for a new round of litigation.
>
> This really ought to stop. It is perhaps time for landlords to resign themselves to rent control; it appears to be here to stay. No one in the foreseeable future is going to make a killing in residential rentals in Berkeley. Repeated piece-meal attack on the ordinance will not bring back the good old days, but only waste time and money and continue to polarize the community. Likewise, it is probably time for the rent board to recognize that what one journalistic wag has facetiously called the People's Republic of Berkeley is in fact a city in a state in a nation with a functioning market economy, governed by a Constitution which guarantees landlords a fair return on their investment.[47]

The opponents of rent control, however, have had recent victories, such as the passage of a statewide initiative to end rent controls in Massachusetts.[48] The battle over rent controls, however, remains to be settled in the future.

D. Personal Choice and Social Values: Religion, Family, Fair Housing and Other Issues

It is fair to say that the 1980s and the 1990s saw a resurgence of proponents of "traditional" values in America. This has led to a sharpened debate between liberal and conservative views on a wide array of personal choices and social issues.

Landlord-tenant law at the end of the twentieth century has been an important battleground for these forces. In one series of cases, the face-off has been between religious belief and personal autonomy. These cases involve landlords who refuse to lease to unmarried couples because the landlords oppose sex outside of marriage. Some cases have applied state fair housing laws and found that the landlord's refusal violates the prohibition of discrimination based on "mar-

47. *See* Searle v. City of Berkeley Rent Stabilization Bd., 271 Cal. Rptr. 437, 444 (Ct. App. 1990), *review denied and the Supreme Court ordered that the opinion not be officially published.*

48. Question 9 was approved in 1994. *See* 1994 Mass. Adv. Legis. Service 282 (Law Co-op). The Massachusetts legislature enacted the Rent Control Prohibition Act in 1994. *See* 1994 Mass. Adv. Legis. Service 282 (Law Co-op)(codified as amended at MASS. GEN. LAWS ANN. ch. 40P, §§ 1-5 (West 1998)).

ital status."[49] Other courts have refused to apply such statutes to cohabitants.[50] Although the courts deciding these cases state that they are engaging in statutory interpretation, the underlying social policy debate is never far from the surface. Consider, for example, the statement of one court in upholding a landlord's refusal to rent to an unmarried couple:

> There are certain moral values and institutions that have served western civilization well for eons. This generation does not have a monopoly on either knowledge or wisdom. Before abandoning fundamental values and institutions, we must pause and take stock of our present social order: millions of drug abusers; rampant child abuse; a rising underclass without marketable job skills; children roaming the streets; children with only one parent or no parent at all; and children growing up with no one to guide them in developing any set of values. How can we expect anything else when the state itself contributes, by arguments of this kind, to further erosion of fundamental institutions that have formed the foundation of our civilization for centuries?[51]

Personal autonomy and family issues have taken center stage in other recent landlord-tenant matters. In *Braschi v. Stahl Associates Co.*,[52] the New York Court of Appeals held that where two men were permanent life partners and the one holding the lease to their apartment died, the survivor was a "family member" of the deceased tenant and, thus, protected from eviction under the city's rent control laws. The court found:

> [t]he term family, as used [in the regulation], should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.[53]

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49. *See, e.g.*, Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996)(finding no violation of landlord's rights to religious freedom under federal law or state constitution); *see also* Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699 (1995); Kelley D. Eckel, Comment, *Legitimate Limitation of a Landlord's Rights—A New Dawn for Unmarried Cohabitants*, 68 TEMP. L. REV. 811 (1995); Scott A. Johnson, Note, *The Conflict Between Religious Exercise and Efforts to Eradicate Housing Discrimination Against Nontraditional Couples: Should Free Exercise Protect Landlord Bias?*, 53 WASH. & LEE L. REV. 351 (1996); Matthew J. Smith, Comment, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1077 (1992);.

50. *See* State *ex rel.* Cooper v. French, 460 N.W.2d 2 (Minn. 1990); County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993).

51. State *ex rel.* Cooper v. French, 460 N.W.2d at 11.

52. 543 N.E.2d 49 (N.Y. 1989).

53. *Id.* at 53; *see* Paris R. Baldacci, *Pushing the Law to Encompass the Reality of Our Families: Protecting Lesbian and Gay Families from Eviction from Their Homes—Braschi's Functional Definition of "Family" and Beyond*, 21 FORDHAM URB. L.J. 973 (1994); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991); Mary F. Gardner, Note, Braschi v. Stahl Associate Co.: *Much Ado About Nothing?*, 35 VILL. L. REV. 361 (1990). *See gener-*

Civil rights statutes beginning in the 1960s, have also altered the landlord-tenant relationship. Federal statutes bar discrimination based on race, religion, gender, disability, or having children.[54] Current landlord-tenant law also reflects difficult issues of race relations and divergent views on how to achieve racial justice, mirroring those that we face as a larger society.

For example, in *United States v. Starrett City Associates*,[55] the United States Attorney General brought an action under the Fair Housing Act claiming that Starrett City, a housing development consisting of 46 high rise buildings and 5,881 apartments, improperly used racial quotas to limit the racial composition in the project to 64% white, 22% African-American, and 8% Latino residents. As a result, qualified non-white applicants were denied leases. *Starrett City* defended its use of quotas as necessary to maintain a racially integrated community and to prevent "white flight." The court of appeals held that the quotas violated the Fair Housing Act's prohibition of racially discriminatory practices and refused to analogize the use of quotas to valid affirmative action plans since the use of racial distinctions was not temporary in nature with a defined goal as a termination point. This case reflects a struggle to balance the societal goal of integration and the harm imposed by the quota on the individuals who were rejected as tenants—a struggle which continues to resonate today.

As illustrated, issues of personal autonomy, social values, and fair housing emerge in current landlord-tenant cases. We should expect that this debate will be ongoing as the law reflects a changing society.

E. Lead Paint: Environmentalism, Habitability, and the Market

In the years after the emergence of the implied warranty of habitability and increased tort liability of landlords in some jurisdictions,[56] the problem of child lead paint poisoning in older rental housing has persisted. Thus, lead paint poisoning is a major focus of the continuing and evolving battle over substandard rental housing. Moreover,

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ally Gerald Korngold, *Single Family Use Covenants: For Achieving A Balance Between Traditional Family Life and Individual Autonomy*, 22 U.C. DAVIS L. REV. 951 (1989)(discussing single family use covenants in light of current changes in American family life).

54. *See* Fair Housing Act of 1968, Pub. L. No. 90-284, Title VIII § 804, 82 Stat. 83 (codified as amended at 42 U.S.C. §§ 3601-31 (1994)); *see also* Jancik v. Dep't of Hous. and Urban Dev., 44 F.3d 553, 554 (2d Cir. 1995)(rental advertisement for "mature person" discriminated against families with children); James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989).

55. 840 F.2d 1096 (2d Cir. 1988).

56. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072-75 (D.C. Cir. 1970); Sargent v. Ross, 308 A.2d 528, 534 (N.H. 1973).

the lead paint debate reflects the often competing environmental spirit of the late twentieth century and the renewed respect for property rights.[57]

It is generally accepted that lead paint poses a serious health problem.[58] Many jurisdictions, however, do not have statutory or case law making landlords liable for personal injuries due to lead poisoning, and others have rejected liability on various grounds.[59] Moreover, those courts and legislatures that have made lead paint injury actionable often differ on the extent and theory of liability. Thus, some jurisdictions have statutes that specifically authorize a cause of action for personal injuries due to lead poisoning.[60] In others, judicial decisions permit a cause of action for personal injuries based on the breach of a lead abatement statute that does not include an express private right of action.[61] Other courts rely on a breach of the warranty of habitability as a basis for an action for injuries due to lead paint poisoning.[62] Finally, those that find liability differ as to whether it is on a strict liability, negligence per se, or negligence standard.[63]

57. For another intersection of environmental law and landlord-tenant, see PAUL GOLDSTEIN & GERALD KORNGOLD, REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE 877 (3rd ed. rev. 1997)(discussing liability of lessors and lessees under CERCLA, 42 U.S.C.A. § 9607(a)).

58. *See* Daniel G. Levan, Note, *Landlord Liability for Lead Poisoning of Tenant Children Caused by Defects in the Premises*, 70 U. DET. MERCY L. REV. 429, 430-31 (1993).

59. *See, e.g.*, Dunson v. Friedlander Realty, 369 So. 2d 792 (Ala. 1979)(rejecting liability because it was not foreseeable that little children would eat paint chips); Ankiewicz v. Kinder, 563 N.E.2d 684 (Mass. 1990)(defense of comparative fault is available since child's parents failed to adequately supervise); Brown v. Marathon Realty, Inc., 565 N.Y.S.2d 219 (App. Div. 1991) (finding that landlord did not have notice, either actual or constructive, of lead paint problem in apartment unit).

60. *See, e.g.*, MASS. GEN. LAWS ch. 111, § 100 (1996); *see also* CONN. GEN. STAT. § 47a-8, repealed by the Connecticut legislature, 1994 Conn. Pub. Acts 220, § 11, apparently since the legislature disagreed with the strict liability interpretation that courts applied to the legislation. *See* Hardy v. Griffin, 569 A.2d 49 (Conn. Super Ct. 1989).

61. *See, e.g.*, Juarez v. Wavecrest Management Team Ltd., 672 N.E.2d 135 (N.Y. 1996)(recognizing a private tort action based upon provision in city administrative code which required landlords to ameliorate hazardous levels of lead-based paint).

62. *See, e.g.*, Richwind Joint Venture 4 v. Brunson, 645 A.2d 1147 (Md. 1994)(liability for injury sustained as a result of lead exposure based on implied warranty of habitability).

63. *See* Gore v. People's Sav. Bank, 665 A.2d 1341, 1354-56 (Conn. 1995)(holding that legislature not courts should impose strict liability standard); Bencosme v. Kokoras, 507 N.E.2d 748 (Mass. 1987)(strict liability, based on statute); Juarez v. Wavecrest Management Team Ltd., 672 N.E.2d 135, 141 (N.Y. 1996)(negligence theory); *see also* RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 17.6 (1977)(breach of statute creates negligence per se).

In contrast, some jurisdictions only provide for solutions other than personal liability. These might include an abatement obligation enforced by fines, or subsidy programs to encourage abatement.[64] The federal Residential Lead-Based Paint Hazard Reduction Act of 1992 requires disclosure of lead paint hazards by sellers and lessors but does not void contracts where disclosure is not made nor does it allow damages for resulting personal injuries.[65]

The reluctance of legislatures and courts to find a general tort liability for personal injuries despite the compelling evidence of the danger of lead paint, reflects the sharp conflict of major principles. Clearly, liability would effectuate the goals of compensation and prevention of future injury that is the hallmark of tort liability. Judicial and legislative resistance can be traced to theories similar to those used to oppose the warranty of habitability; namely, landlords will abandon properties rather than going through the expensive abatement that avoidance of tort liability would require.[66] Moreover, the apparent magnitude of the lead paint problem and the asserted large costs of abatement[67] may dissuade decisionmakers from imposing liability.[68]

The variety of state-based lead paint statutes and cases underscores the fact that there is no commonly accepted scheme for solving the lead paint problem. There has been no universalized reform like those in the 1960s and 1970s for other areas of landlord-tenant law. There is still a need, therefore, for an ongoing public debate over the costs and benefits of abating lead paint through strict liability, negligence, disclosure, government abatement programs, or fines, and on the question of whether legislatures or courts should impose the solution.

V. CONCLUSION

Landlord-tenant law is alive and well as we end the twentieth century, some thirty years after the era of the great reforms in this area

64. *See* Martha R. Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46 (1990); Jennifer Tiller, *Easing Lead Paint Laws: A Step in the Wrong Direction*, 18 HARV. ENVTL. L. REV. 265 (1994).

65. *See* 42 U.S.C.A. §§ 4851, 4852d (1992).

66. *See supra* note 19.

67. *See generally* LeVan, *supra* note 58, at 430-31 (discussing the need for landlord liability in the case of children exposed to lead).

68. *See* Michele Gilligan & Deborah Ann Ford, *Investor Response to Lead-Based Paint Abatement Laws: Legal and Economic Considerations*, 12 COLUM. J. ENVTL. L. 243, 288 (1987). This view, however is questionable since property buyer may have already received a discounted price because of the presence of lead paint and some repairs may not be that costly. *See* Lucy A. Billings, *Development of Safety Procedures for Abatement of Lead-Based Paint*, 25 CLEARINGHOUSE REV. 1540 (1992).

of the law. Key social, economic, and political currents battle in current landlord-tenant cases and legislation. Important substantive issues, such as rent controls, conflicts between choices of tenants and beliefs of landlords, and the abatement of lead paint hazards, remain to be settled. Moreover, theoretical puzzles, such as the nature of a lease and the battle between the free market and governmental regulation, are yet to be solved. There is much work remaining for a new generation of commentators and decisionmakers.