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Paradoxes, Parallels and Fictions: The Case for Landlord Tort Liability under the Revised Uniform Residential Landlord-Tenant Act

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**PARADOXES, PARALLELS AND FICTIONS: THE CASE
FOR LANDLORD TORT LIABILITY UNDER THE REVISED
UNIFORM RESIDENTIAL LANDLORD-TENANT ACT**

*By Shelby D. Green**

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“If one party has a duty to perform an act, the other party has a correlative right that the act shall be performed.”¹

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I. INTRODUCTION

The common law landlord-tenant rules were fraught with paradoxes, at least for the lowly tenant, who had many burdens, but few rights. Then in the 1960s, a revolution broke out. At least that is how Professor Edward Rabin described the momentous changes in residential landlord-tenant law.² He concluded that in the revolution, the “residential tenant, long a stepchild of the law, ha[d] now become its ward and darling. Tenants’ rights . . . increased dramatically; landlords’ rights . . . decreased dramatically.”³ Like all revolutions, no one event or cause can be singled out; instead long-simmering grievances and discontent prompted the vanguard to disrupt aspects of the existing order.⁴ To be sure, changes in the rhythms of life and the migration of economic pursuits away from the land toward an industrial and urban society must have factored in, as well as the growing state of relative deprivation felt by the poor.⁵ In this vein, Professor Mary Ann Glendon, perceived the changes in landlord-tenant law as more evolutionary, the “culmination, in one area of the law, of certain long-standing trends that ha[d] transformed not only landlord-tenant law, but private law generally, over the previous half-century.”⁶

The Uniform Residential Landlord-Tenant Act (“URLTA”)⁷ was promulgated in 1973 in the midst of these shifts in public and private law and promised to harmonize the discordant voices that emerged to give legibility to the new order. Achieving harmony required not only a coherent narrative and set of rules to govern landlord-tenant law, but also one that discarded the burdensome historical legacies and would be uniformly incorporated within the new regime. While the URLTA abrogated the common law no-repair

¹ Yu v. Paperchase P’ship, 845 P.2d 158, 164 (1992), citing Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–29, 32–35 (1913).

² See Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 519 (1984).

³ *Id.* at 519.

⁴ RALPH H. TURNER AND LEWIS M. KILLIAN, COLLECTIVE BEHAVIOR 258–59 (1972).

⁵ For a discussion on the theory of relative deprivation as an impetus for abrupt social change, see RICHARD A. BERK, COLLECTIVE BEHAVIOR 49–51 (Ann L Greer & Scott Greer eds., 1974).

⁶ Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 504 (1982). This phenomenon also appeared in other areas of law, such as trade, giving rise to the Uniform Commercial Code that regulate the sale of goods, and other governmental regulations, such as minimum wage laws and workplace safety rules. See also Hiram H. Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369, 369–72 (1961).

⁷ 7B UNIFORM LAWS ANN.285 (2010).

rule,⁸ by imposing upon the landlord a duty to maintain the premises,⁹ it left undisturbed an intersecting, hence conflicting rule—landlord-tort immunity.

Because states variously adopted all or parts of the URLTA, courts have taken disparate positions on the legal and normative import of this duty—some read the duty to maintain the premises in a habitable condition quite literally, limiting it to pertain only to matters like heat and sanitation and limiting remedies to the economic losses a tenant would suffer from a breach of that duty.¹⁰

Now, 40 years later, the Uniform Laws Commission has undertaken a revision of the URLTA.¹¹ The landscape of landlord-tenant law in general should have informed the Commissioners on what to do about the no-tort-liability rule, but the most recent published draft of the revised URLTA punts.¹² It does not prescribe a rule imposing tort liability on landlords for defective or hazardous conditions, nor otherwise take a position, leaving the issue for state-by-state resolution.¹³

The Commissioners might have chosen this course out of regard for the interest in stability in the law. The “desirability and need for certainty in planning our affairs, both in their internal (professional) and external aspects, render reliance on precedent an attractive and useful doctrine.”¹⁴ Yet, in

⁸ See MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* 607 (4th ed. 1997) (“The rule was rationalized by the theory that a lease is a conveyance, a sale for the term, to which caveat emptor applied.”).

⁹ See *infra* Parts II.A.1, III.B.1, IV.A.1.

¹⁰ See *Tighe v. Cedar Lawn, Inc.*, 649 N.W.2d 520, 529–30 (Neb. Ct. App. 2002) (allocating responsibility for maintenance of well cover to tenants according to the lease agreement); *Steward v. Holland Family Props., LLC*, 726 S.E.2d 251, 259 (Va. 2012) (describing the presence of lead paint in the air which, if substantiated through fact, could establish that the defect was open and obvious); *Isbell v. Commercial Inv. Assoc., Inc.*, 644 S.E.2d 72, 74 (Va. 2007) (holding that lessee may not bring a personal injury action against tenant when complete possession is surrendered to the lessee); *True v. Fath Bluegrass Manor Apartment*, 358 S.W.3d 23, 25–26 (Ken. Ct. App. 2011) (holding that tenant’s knowledge of safety hazard barred recovery).

¹¹ National Conference of Commissioners on Uniform Laws, *Draft: Revised Uniform Residential Landlord Tenant Act* (Jun. 5, 2014), available at http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/2014am_rurlta_draft.pdf.

¹² See *id.*

¹³ *Id.* This draft provides: “Remedies available to the tenant pursuant to Section 501 are not exclusive.” *Id.* at § 110. Further, the draft continues, “thus, to the extent permitted by state law, tort remedies also may be available.” *Id.* at § 501. Whether this stance is “in shame of cowardice” (WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 2, sc. 2.) or based upon larger principles, is not evident from the draft.

¹⁴ Paul E. Loving, *The Justice of Certainty*, 73 OR. L. REV. 743, 744 n.5 (1994). Reliance on the principle of stare decisis encourages investment for productivity: “if we want farmers to plant crops in the spring, they must have some assurance that they will be free to harvest that crop for their benefit in the fall. If we want farmers to maintain an efficient and well-maintained farm, they must be assured that they will be able to continue farming.” Shelby D. Green, *No Entry to Public Lands: Towards a Theory of a Public Trust Servitude for a Way over Abutting Private Land*, 14 WYO. L. REV. 19, 74 (2014) (citing Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 AL. L. REV. 741, 748 (2007)). Stability in the law allows intelligent choice about investments of time and resources.

Justice Oliver Wendell Holmes' oft-quoted words, "it is revolting to have no better reason for a rule of law" than that it is ancient and even more so if the reasons for the rule have long since disappeared, but persists out of blind imitation.¹⁵ Indeed, it is the readiness of common law judges to abandon rules that do not serve the public, which has contributed to its survival.¹⁶ Though nominally tethered to precedent, the endlessly changing patterns of fact, politics and social relations, lead to extensions, revisions and sometimes abandonment of legal rules. In the case of landlord-tenant law, beginning in the middle of the twentieth century, the movement was more dramatic than gradual.¹⁷ Drawing a line at landlord-tort immunity was not a logical stopping point. An overt break with tort immunity is preferable and would not disturb settled expectations, since the revolution was televised.¹⁸

In this article, I show how a coherent legal narrative must capture the revolution's radical policy by abandoning the no tort liability rule, which can be done in a number of ways: an open acknowledgement that the duty to repair creates a new property right that must be enforced by a property rule or more subtly through the use of both traditional and modern tools of jurisprudence, that is, legal fictions, equitable maxims and economic efficiency analysis.¹⁹ This article proceeds with a discussion of the common law landlord-tenant law, the adoption of the implied warranty of habitability, along with the persistence of the opposing rule of no tort liability of landlords in Part II.²⁰ In Part III, I discuss the scope and coverage of the URLTA.²¹ In Part IV, I discuss the creation of a new regime using both traditional and modern tools of judicial decision-making.²² In Part V, I discuss what the duty to repair, as a new property interest, requires for its fulfillment.²³ Conclusions follow in Part VI.²⁴

II. COMMON-LAW PARADOXES

The rules of the common law were relatively simple and founded upon a logic suitable to the time.²⁵ The common law recognized and

¹⁵ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

¹⁶ See *Javins v. First Nat'l Realty Corp.*, 428 F. 2d 1071, 1074 (D.C. Cir. 1970) (abandoning the common law no repair rule); *Reste Realty Corp. v. Cooper*, 251 A.2d 268, 275 (N.J. 1969) (rejecting independence of covenant theory).

¹⁷ See Glendon, *supra* note 6, at 504.

¹⁸ See GIL SCOTT-HERON, *THE REVOLUTION WILL NOT BE TELEVISED* (Flying Dutchman Prods.) (1970).

¹⁹ See *infra* Parts IV, V.

²⁰ See *infra* Part II.

²¹ See *infra* Part III.

²² See *infra* Part IV.

²³ See *infra* Part V.

²⁴ See *infra* Part VI.

²⁵ For a thorough treatment of landlord-tenant law, see ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD-TENANT* (1980).

protected the legal interests one held in land and held little concern for the physical conditions in which a leasehold tenant lived and worked.²⁶ This was so because the law viewed the lease as a conveyance, the tenant thereby acquiring an interest in land with exclusive possession and concomitantly, exclusive maintenance responsibilities.²⁷ The rules sometimes operated paradoxically, perversely—they bound him to continue to perform his promises, even if the landlord failed to perform his;²⁸ made him subject to eviction by self-help if he failed to pay rent, but bound him to pay rent even if the buildings were destroyed by an act of God,²⁹ and bound him to repair and maintain, but made him liable if he overused the land.³⁰ It thus behooved the tenant to inspect the premises before entering into the relationship, else he took possession with whatever defects existed at the time of the lease, although such inspection was useless in the case of the modern urban tenant. Lacking handyman skills, resources or access, the urban tenant suffered the effects of peeling lead-based paint, infestation of vermin, and dysfunctional infrastructure.

While this “no-repair” rule operated ruthlessly in its pure form, it was nonetheless a default rule as a tenant with sufficient bargaining power could negotiate for a landlord’s express undertaking to repair.³¹

A. No-Repair Rule Abandoned

The no-repair rule had a certain appeal as it pertained to leases of agricultural land in which the landlord was absent and the tenant was in sole possession, but the rule persisted, without regard to its appropriateness, well after the agricultural lease ceased to be the predominant type of lease.³² It was not until fairly recently that observers who marked changes in social conditions made the case for a change in the rules, that is, that the modern

²⁶ Lesar, *supra* note 6 at 371, 373.

²⁷ FRIEDMAN *supra* note 8, at 610.

²⁸ This meant that the aggrieved party was relegated to suing for contractual relief, and in the case of the landlord, seizing and holding chattels on the land as security for rent.

²⁹ For cases discussing the common law rule, *see e.g.*, *Albert M. Greenfield & Co. v. Kolea*, 380 A.2d 758, 759–60 (Pa. 1976); *Crow Lumber & Bldg Materials Co. v. Washington Cnty. Library Bd.*, 428 S.W. 2d 758, 761 (Mo. Ct. App. 1968).

³⁰ The rule was “settled” by 1485. 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 122–23 (6th ed. 1934). An even older rule prohibited the tenant from committing waste. *Id.* The writ of waste expanded as the tenant’s right to possession grew stronger. *Id.* Eventually, in order to protect the landowner’s reversionary interest, the tenant became obligated to make repairs and was liable to eviction and damages if he failed to do so. *Id.*

³¹ *See* discussion *infra* Part II.A on the liability of the landlord for failure of this undertaking. However, the common law was literal in its application, as it treated covenants as independent, which meant the failure of a landlord to fulfill his promise to repair did not privilege the tenant to withhold rent. *See* Lesar *supra* note 6, at 369–77. Instead, the tenant had an action in damages. *See* Lesar *supra* note 6, at 369–77; *see also Reste Realty Corp.*, 251 A.2d at 276.

³² FRIEDMAN, *supra* note 8, at 610.

tenant sought housing to live in and not the land to work; that she had little ability to inspect beneath the floors or in the walls to discover hidden defects before entering into the lease.³³ One of the first courts to respond was the Wisconsin Supreme Court, which in *Pines v. Perssion*, adopted a rule that residential leases between landlord and tenant carried with them an implied warranty of habitability and fitness—a promise that the premises would be fit for human habitation.³⁴ In reaching this result, the court said:

[T]he frame of reference in which the old common-law rule operated has changed. Legislation and administrative rules, such as the safe place statute, building codes, and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common-law rule obsolete.³⁵

Pines was followed by *Lemle v. Breeden*,³⁶ and then *Javins v. First Nat'l Realty Corp.*³⁷ *Javins* is oft-cited as the case that made the definitive break with traditional concepts of landlord-tenant law.³⁸ There, the court pointed out that the expectations of the modern residential tenant showed that the no-repair rule was based on factual assumptions which were no longer true; the old common law rule that put the burden to repair on the tenant was never really intended to apply to residential urban leaseholds.³⁹ Indeed, the relation of landlord-tenant more resembled that between parties to a contract, involving mutual promises for a package of goods and services—consisting of not merely walls and ceilings, but adequate heat, light, plumbing, secure windows—than a transfer of an interest in land.⁴⁰ In construing this contractual relation, a court needed to look not only to express terms actually negotiated, but also those that should be implied based upon presumed intentions.⁴¹ In *Javins*, the court believed the parties presumed that their respective duties would include the landlord's fulfillment of obligations

³³ Actually, at least one state rejected the common law rule much earlier. In 1895, the Georgia legislature enacted a statute imposing a duty of reasonable care on landlords and providing a remedy in the form of damages for injuries resulting from a landlord's failure to keep the premises in repair. See O.C.G.A. § 44-7-14 (2014).

³⁴ *Pines v. Perssion*, 111 N.W.2d 409, 412–13 (Wis. 1961).

³⁵ *Id.* at 412.

³⁶ *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969).

³⁷ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

³⁸ See *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744, 756 (Ind. Ct. App. 1976); Olin L. Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 109 (1982).

³⁹ *Javins*, 428 F. 2d at 1080.

⁴⁰ *Id.* at 1074.

⁴¹ *Id.* at 1075.

under the existing housing codes.⁴² Moreover, if the general rule is that a landlord may be liable for a breach of an undertaking to repair, then it really should not matter whether the undertaking is express or implied by law.⁴³

The high courts of many other jurisdictions have followed suit⁴⁴ and urged by the courts, the legislatures of most states also have adopted laws providing for statutory warranties.⁴⁵ The warranty has been variously interpreted to require a landlord to keep the premises clean, safe, and fit for human habitation, and is generally said to be non-waivable.⁴⁶

⁴² *Id.* at 1081. The honesty of this assertion surely is questionable given general notions of self-interest that characterizes contract bargaining. Considering the circumstances of most slum tenants, the landlord-tenant relation can hardly be said to result from bargaining.

⁴³ *But see* Johnson v. Scandia Assocs., Inc., 717 N.E.2d 24, 32 (Ind. 1999). In Johnson, the Indiana Supreme Court drew a distinction between express and implied warranties of habitability for purposes of tort recovery. *Id.* It stated that where the warranty of habitability is express, consequential damages for personal injury may be available as a remedy; however, where the warranty is implied in fact, consequential damages may not be awarded because personal injury is outside the parties' contemplation. *Id.*

⁴⁴ *See* Green v. Superior Ct., 517 P.2d 1168, 1169–70 (Cal. 1974); Jack Spring, Inc. v. Little, 280 N.E.2d 208, 217 (Ill. 1972); Johnson, 717 N.E.2d at 28; Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972); Steele v. Latimer, 521 P.2d 304, 309–10 (Kan. 1974); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843 (Mass. 1973); Detling v. Edelbrock, 671 S.W.2d 265, 270 (Mo. 1984); O'Cain v. Harvey Freeman & Sons, Inc., 603 So. 2d 824, 833 (Miss. 1991); Kline v. Burns, 276 A.2d 248, 251–52 (N.H. 1971); Marini v. Ireland, 265 A.2d 526, 534 (N.J. 1970); Pugh v. Holmes, 405 A.2d 897, 900 (Pa. 1979); Kamarath v. Bennett, 568 S.W.2d 658, 660–61 (Tex. 1978); Wade v. Jobe, 818 P.2d 1006, 1010 (Utah 1991); Hilder v. St. Peter, 478 A.2d 202, 208 (Vt. 1984); Foisy v. Wyman, 515 P.2d 160, 164 (Wash. 1973); Teller v. McCoy, 253 S.E.2d 114, 123 (W. Va. 1978).

⁴⁵ Jurisdictions with statutory warranties include: ALA. CODE § 35-9A-204 (2014); ALASKA STAT. § 34.03.100 (2014); ARIZ. REV. STAT. ANN. § 33-1324 (2014); CAL. CIV. CODE § 1941 (West 2014); COLO. REV. STAT. § 38-12-503 (2014); CONN. GEN. STAT. ANN. § 47a-7 (West 2014); DEL. CODE ANN. tit. 25, § 5305 (2014); FLA. STAT. ANN. § 83.51 (West 2014); GA. CODE ANN. § 44-7-13 (2014); HAW. REV. STAT. ANN. § 521-42 (LexisNexis 2014); IDAHO CODE ANN. § 6-320 (2014); IND. CODE ANN. § 32-31-8-5 (West 2014); IOWA CODE ANN. § 562A.15 (West 2014); KAN. STAT. ANN. § 58-2553 (West 2014); KY. REV. STAT. ANN. § 383.595 (LexisNexis 2014); LA. CIV. CODE ANN. art. 2691 (2014); ME. REV. STAT. ANN. tit. 14, § 6021 (2014); MD. CODE ANN., REAL PROP. § 8-211 (LexisNexis 2014); MASS. GEN. LAWS ANN. ch. 111, §§ 127–127P, ch. 239, §§ 1–9 (West 2014); MICH. COMP. LAWS ANN. § 554.139 (West 2014); MINN. STAT. ANN. § 504B.161 (West 2014); MISS. CODE ANN. § 89-8-23 (2014); MONT. CODE ANN. § 70-24-303 (2014); NEB. REV. STAT. ANN. § 76-1419 (LexisNexis 2014); Nev. Rev. Stat. Ann. § 118A.280 (LexisNexis 2014); N.M. STAT. ANN. § 47-8-20 (West 2014); N.Y. REAL PROP. LAW § 235-b (McKinney 2014); N.C. GEN. STAT. § 42-42 (2014); N.D. CENT. CODE § 47-16-13.1 (2013); OHIO REV. CODE ANN. § 5321.04 (LexisNexis 2014); OKLA. STAT. ANN. tit. 41, § 118 (West 2014); OR. REV. STAT. ANN. § 90.320 (West 2014); R.I. GEN. LAWS ANN. § 34-18-22 (West 2014); S.C. CODE ANN. § 27-40-440 (2014); S.D. CODIFIED LAWS § 43-32-8 (2014); TENN. CODE ANN. § 66-28-304 (2014); TEX. PROP. CODE ANN. § 92.052 (West 2013); VT. STAT. ANN. tit. 9, § 4457 (2014); VA. CODE ANN. § 55-248.13 (2014); WASH. REV. CODE ANN. § 59.18.060 (LexisNexis 2014); W. VA. CODE ANN. § 37-6-30 (LexisNexis 2014); WIS. STAT. ANN. § 704.07 (West 2013); WYO. STAT. ANN. § 1-21-1202 (2014).

⁴⁶ *See, e.g.,* Hilder, 478 A.2d at 208 (holding that landlord's failure to repair sewer pipe that deposited waste in the basement, repair peeling plaster and broken window and install conventional door locks, breached warranty).

B. No-Liability Rule Retained

As the conception of the landlord-tenant relation moved from a conveyance of an interest in land to at least, in part, contract, the warranties then became a part of the bargain between the landlord and tenant, giving rise to damages to the tenant for loss of bargain or specific performance if the warranties were not fulfilled, essentially the recovery for economic losses.⁴⁷ But, if the tenant fell through a hole in the floor, could she sue to recover for her personal injury? Surprisingly, this circumstance seemed not to have been within the contemplation of many courts or legislatures as they adopted the implied warranty of habitability. Perhaps, it was thought that the implied warranty itself would displace the no tort liability rule.

In the general scheme of tort law, the breach of a duty of care has long been the indispensable predicate for tort liability. That duty might arise from a particular undertaking, a relation between the parties or from the circumstance of foreseeability. In the landlord-tenant context, the no-repair rule rested upon the early conception of a lease as a conveyance. The landlord, having no present interest in or control over the premises was not liable to the tenant or third persons for personal injury or personal property damage caused by a defect present at the transfer of possession or by defects arising during the term of the leasehold.⁴⁸ In this conception, the no-tort liability rule operated in parallel and not opposed to the no-repair rule.

This rule, like all rules, was subject to varying exceptions.⁴⁹ A landlord could be liable in tort for: dangerous conditions of which he was aware at the lease's commencement;⁵⁰ conditions in the "common areas," over which the landlord had control;⁵¹ premises leased for purposes

⁴⁷ *Id.* (describing the full panoply of contract remedies available to the tenant).

⁴⁸ See generally Browder, *supra* note 38, at 101 (citing *Old Town*, 349 N.E.2d at 753–54). Browder also believes this position partially resulted from the principle of *caveat emptor*, that is, the delivery of the possession of the premises, carried no implied warranties or other duties on the part of the landlord with respect to the condition of the premises. *Id.*

⁴⁹ *Old Town*, 349 N.E.2d at 754–55. Some of these exceptions also originated with the RESTATEMENT (SECOND) OF TORTS, which states that:

[A] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343 (1965).

⁵⁰ The exception applied if the landlord knew or should have known of the danger and a tenant, exercising due care, would not have discovered it, but if the tenant was aware of the danger, no landlord liability resulted. *Johnson v. O'Brien*, 105 N.W.2d 244, 246 (Minn. 1960); *Broughton v. Maes*, 378 N.W.2d 134, 135 (Minn. Ct. App. 1985).

⁵¹ *Nubbe v. Hardy Cont'l Hotel Sys. of Minn.*, 31 N.W.2d 332, 334 (Minn. 1948) (discussing landlord liability for the failure to maintain areas of common use); see also *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002).

involving admission to the public;⁵² where the landlord undertook to perform repairs, but executed them negligently;⁵³ and in some states, for defects constituting violations of building or housing codes.⁵⁴

The construction and application of the exceptions became more and more expansive but they did not overtake the no-repair and no liability rules.⁵⁵ As public law intervened to shift the onus of care from tenant to landlord, landlords resorted to mechanisms still available through private ordering of affairs. The shrewd, self-interested landlord would require a prospective tenant to inspect the premises before the term commenced, thereby shifting back to the tenant, the onus of defects existing at inception, as well as those arising during the term. Finding no reason to look beyond the surface, these shifts were respected by the courts.⁵⁶

C. Enter the Uniform Residential Landlord Tenant Act

The URLTA attempted to facilitate the reorientation of the landlord-tenant relation already underway. It has been officially adopted in fifteen states and enacted in part in eight more states.⁵⁷ Among other things, the URLTA provides:

⁵² *Broughton*, 378 N.W.2d at 136.

⁵³ *Id.*

⁵⁴ *Old Town*, 349 N.E.2d at 754–55.

⁵⁵ *Gradjelick*, 646 N.W.2d at 232, n.4.

⁵⁶ *See, e.g.,* *Civale v. Meriden Hous. Auth.*, 192 A.2d 548, 550 (1963) (tenant bears the risks of defects discoverable upon reasonable inspection); *see generally Note, Judicial Expansion Of Tenants' Private Law Rights: Implied Warranties Of Habitability And Safety In Residential Urban Leases*, 56 CORNELL L. Q. 489, 490 (1971) (“The tenant’s inspection was his only ‘warranty’ that the premises were suitable for their intended use.”); Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 899 (1975).

⁵⁷ For a table of jurisdictions that have adopted the U, *see* UNIFORM RESIDENTIAL LANDLORD TENANT ACT OF 1972, *Editor’s Notes, Table of Jurisdictions Wherein the Act Has Been Adopted*, 7B U.L.A. 285 (2010). They include: Alabama, Alaska, Arizona, Connecticut, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, and Washington. ALA. CODE §§ 35-9A-101 to 35-9A-603 (2014); ALASKA STAT. ANN. §§ 34.03.010–34.03.380 (West 2014); ARIZ. REV. STAT. ANN. §§ 33-1301–33-1381 (2014); CONN. GEN. STAT. ANN. §§ 47a-1–47a-20a (West 2014); FLA. STAT. ANN. §§ 83.40–83.67 (West 2014); HAW. REV. STAT. ANN. §§ 521-1–521-78 (LexisNexis 2014); IOWA CODE ANN. §§ 562A.1–562A.37 (West 2014); KAN. STAT. ANN. §§ 58-2540–58-2573 (West 2014); KY. REV. STAT. ANN. §§ 383.500–383.715 (LexisNexis 2014); Mich. Comp. Laws Ann. §§ 554.601–554.616 (West 2014); MISS. CODE ANN. §§ 89-8-1–89-8-27 (2014); MONT. CODE ANN. §§ 70-24-101–70-24-442 (2014); NEB. REV. STAT. ANN. §§ 76-1401–76-1449 (LexisNexis 2014); N.M. STAT. ANN. §§ 47-8-1–47-6-52 (West 2014); OKLA. STAT. ANN. tit. 41, §§ 101–36 (West 2014); OR. REV. STAT. ANN. §§ 90.100–90.940 (West 2014); R.I. GEN. LAWS §§ 34-18-1–34-18-57 (West 2014); S.C. CODE ANN. §§ 27-40-10–27-40-940 (2014); TENN. CODE ANN. §§ 66-28-101–66-28-521 (2014); VA. CODE ANN. §§ 55-248.2–55-248.40 (2014); WASH. REV. CODE ANN. §§ 59.18.010–59.18.430, 59.18.900 (LexisNexis 2014).

§ 2.104. [Landlord to Maintain Premises].

(a) A landlord shall:

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

* * *

(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances ... supplied or required to be supplied by him[.]⁵⁸

Section 4.101(a) of the URLTA authorizes the tenant to provide written notice to a landlord who is not in compliance with the repair obligations that the lease will terminate if the condition is not corrected.⁵⁹ Section 4.101(b) allows the tenant to recover actual damages for the landlord's noncompliance in addition to the remedies available under § 4.101(a).⁶⁰ Section 1.105 also provides for the recovery of appropriate damages by the aggrieved party and the right to bring an action to enforce the rights and obligations declared by the act.⁶¹ While safety and habitability were expressly mentioned, there was a glaring omission—the URLTA did not expressly overrule the common law principles protecting a landlord from tort liability. Was the silence deliberate or a mere oversight? One commentator, Professor Bernhardt, believes it was the latter.⁶² He believes that the drafters “were so preoccupied with getting tenants the right to repair and deduct or to stay and pay less rent (under an implied warranty theory), or to quit (under a constructive eviction theory), that they were not also worrying about what tenants could do when untenable conditions caused them personal injuries rather than economic discomfort.”⁶³ Consequently, courts have had to “guess” at legislative intent.⁶⁴

III. THREE REGIMES: INTERSECTIONS, PARALLELS AND CONVERGENCE

The URLTA and the implied warranty of habitability were new rules that radically changed the landscape of landlord-tenant relations. In this

⁵⁸ URLTA § 2.104 (1972).

⁵⁹ URLTA § 4.101(a).

⁶⁰ URLTA § 4.101(b).

⁶¹ URLTA § 1.105.

⁶² Roger Bernhardt, *Landlord and Torts*, GOLDEN GATE UNIV. (Sept. 22, 2007, 2:45 PM), <http://www.rogerbernhardt.com/index.php/ceb-columns/122-landlords-a-torts>.

⁶³ *Id.*

⁶⁴ *Id.*

section, I discuss how far the courts believed it altered that terrain—whether it should be read as merely recasting the relation from conveyance to contract or as effacing all that stood in the way of ensuring decent, habitable, and safe dwellings.

In order to conceptualize the regimes that resulted from the URLTA's failure to take a clear position on the landlord tort immunity rule, I employ an approach developed by Professor Hohfeld in which he classified all fundamental legal relations into eight categories of "jural opposites" and "jural correlatives."⁶⁵ By "jural opposite," Hohfeld meant that one of the eight terms (or "conceptions") entails the absence or "negation" of its opposite.⁶⁶ Thus, the term "privilege" is the negation of the term "duty."⁶⁷ For example, one who has a privilege to enter upon another's land does not have a duty to remain off the land.⁶⁸ In Hohfeld's conception two "[c]orrelatives express a single legal relation from the point of view of the two parties."⁶⁹ This schema provides a useful framework for examining the duty of care vis-à-vis the immunity rule, that is, whether the two rules are intersecting, parallel, or converging. What I mean by intersecting is that the two rules by import, conflict. One nullifies or defeats the purposes of the other. In this conception, the landlord's obligation to repair obviates a right to evict a tenant for demanding repairs; it precludes a landlord's entitlement to rent when repairs are not undertaken. The availability of summary possession proceedings precludes the landlord's right to engage in self-help to evict a tenant.⁷⁰

By parallel rules, I mean that the two can co-exist alongside one another, one never nullifying, nor compromising the other. A landlord's duty to repair can co-exist with a tenant's duty to refrain from destructive, nuisance or unlawful activities on the premises.

I use converging to describe rules that have discrete parts, may overlap in points, but are able to be harmonized toward a coherent purpose. For example, a landlord's duty to repair converges with a tenant's right to recover for personal injuries, but does not protect the tenant from eviction as a result of threatening to file unrelated personal injury lawsuits.⁷¹

The discussion that follows shows that in attempting to reconcile the landlord's duty to repair with the no tort liability rule, the states have fallen

⁶⁵ Hohfeld, *supra* note 1, at 30.

⁶⁶ *Id.*; see generally Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986 (1982).

⁶⁷ Hohfeld, *supra* note 1, at 30; Singer, *supra* note 66 at 986.

⁶⁸ Hohfeld, *supra* note 1, at 32; Singer, *supra* note 66 at 987.

⁶⁹ Hohfeld, *supra* note 1, at 33–36; see also Singer, *supra* note 66, at 987.

⁷⁰ See *Jordan v. Talbot*, 361 P.2d 20, 26 (Cal. 1961); Randy G. Gerchick, *Comment, No Easy Way Out: Making The Summary Eviction Process A fairer and More Efficient Alternative to Landlord Self Help*, 41 U.C.L.A. L. REV. 759, 764, 777 (1994).

⁷¹ See *Helfich v. Valdez Motel Corp.*, 207 P.3d 552, 559 (Alaska 2009) (holding that any tort claim under the URLTA must derive from the failure of the landlord to keep the premises fit and habitable; that it is not a general tort statute).

into three regimes. In the first regime, some courts strike down one of the rules as intersecting and hence in conflict with prevailing values or legislative intent and private ordering is precluded. In the second regime, some courts allow the rules to operate in parallel to each other; a landlord's liability for breach of duty to repair is limited to economic losses. And other courts, in the third regime, find familiar points of convergence; the duty to repair supplements common law rights.

A. The First Regime: Intersection/Conflict

In this first regime, the courts have determined that the tort immunity rule intersects and conflicts with the no repair rule. In *Sargent v. Ross*, the New Hampshire Supreme Court pronounced the new rule that landlords, like all persons, “must act as reasonable person(s) under all . . . the circumstances,” impressing upon the landlord-tenant relationship general tort law principles.⁷² This ruling did not rest upon one of the traditional exceptions to caveat lessee, but was found to be the natural extension of a prior holding, which had recognized an implied warranty of habitability in the landlord-tenant relationship.⁷³

In *Sargent*, a guest of the tenant, a four-year-old child whom the tenant was babysitting, was killed in a fall from an exterior stairway leading up to the tenant's second floor apartment.⁷⁴ In a wrongful death action against the landlord, the child's mother claimed that the stairs were too steep and that the railing on the stairway was inadequate.⁷⁵ Attempting to bring the case within one of the recognized exceptions to landlord tort immunity, the plaintiff argued that the stairway constituted a common area, and that the landlord was responsible for its negligent construction and maintenance.⁷⁶ The landlord contended that the stairway was part of the leased premises, and was under the control of the tenant.⁷⁷ The court declined to decide the case based on the traditional rule and its exceptions, instead announcing that the proper standard for landlord liability was one of ordinary negligence, requiring a landlord to act as a reasonable person under all of the

⁷² *Sargent v. Ross*, 308 A.2d 528, 534 (N.H. 1973).

⁷³ *Id.* at 533; *see also* *Kline v. Burns*, 276 A.2d 248 (N.H. 1971). Other courts that have followed *Sargent* include: *Mansur v. Eubanks*, 401 So.2d 1328 (Fla. 1981); *Thompson v. Crownover*, 381 S.E.2d 283 (Ga. 1989) (duty of care based on statutory warranty of habitability); *Stephens v. Stearns*, 678 P.2d 41 (Idaho 1984) (statutory implied warranty of habitability cited); *Old Town*, 349 N.E.2d at 762; *Young v. Garwacki*, 402 N.E.2d 1045 (Mass. 1980) (reliance in part on warranty of habitability); *Turpel v. Sayles*, 692 P.2d 1290 (Nev. 1985); *Trentacost v. Brussel*, 412 A.2d 436 (1980); *Marioenzi v. DiPonte*, 333 A.2d 127, 132 (R.I. 1975); *Favreau v. Miller*, 156 Vt. 222, 591 A.2d 68 (Vt. 1991); and *Pagelsdorf v. Safeco Ins. Co. of Am.*, 284 N.W.2d 55 (Wis. 1979) (relying on implied warranty of habitability). New Hampshire is not a URLTA state.

⁷⁴ *Sargent*, 308 A.2d at 529.

⁷⁵ *Id.* at 530.

⁷⁶ *Id.* at 530–31.

⁷⁷ *Id.* at 530.

circumstances, having regard for the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.⁷⁸ Questions of control, common areas, and hidden defects were henceforth to be considered only as they “bear on the basic tort issues such as the foreseeability and unreasonableness of the particular risk of harm, but not as a bar to recovery *per se*.”⁷⁹

The court abolished specialized tests for landlord negligence because they tended to immunize individuals occupying the position of “landlord” from the “simple rules of reasonable conduct[,] which govern other persons in their daily activities.”⁸⁰ Seeing the heart of the issue, the court noted that “[t]he ground of liability upon the part of a landlord when he demises dangerous property has nothing special to do with the relation of landlord and tenant. It is the ordinary case of liability for personal misfeasance, which runs through all the relations of individuals to each other.”⁸¹ As such, “[g]eneral principles of tort law ordinarily impose liability upon persons for injuries caused by their failure to exercise reasonable care under all the circumstances.”⁸² *Sargent* thus clarified that what could be termed “landlord negligence” is simply an application of the common law principle that “[a] person is generally negligent for exposing another to an unreasonable risk of harm that foreseeably results in an injury.”⁸³ It is the duty to repair under the implied warranty of habitability that moves the landlord-tenant relation away from strict property law rules to the realm of tort law, where the breach of duty gives rise to liability.

In *Turpel v. Sayles*,⁸⁴ the Nevada Supreme Court also abandoned the common law that narrowly defined duty:

In accord with those courts which have discerned no sound policy reason in the modern social context for retaining the ancient exception for landlords or property owners from the general application of the basic principles of tort law, we find no basis for excusing the landlord in this case from the requirement that she defend the allegation that she has, through her negligence, been the cause of foreseeable injuries to the plaintiff for which she should assume

⁷⁸ *Id.* at 534.

⁷⁹ *Id.* at 531.

⁸⁰ *Sargent*, 308 A.2d at 531.

⁸¹ *Id.*

⁸² *Id.* at 530.

⁸³ *Id.*

⁸⁴ *Turpel v. Sayles*, 692 P.2d 1290 (Nev. 1985). In *Turpel*, a fire erupted in an apartment. *Id.* The plaintiff was injured when she attempted to warn and rescue the occupants. *Id.* The plaintiff claimed her injuries were caused by the negligent failure of landlord to install smoke detector devices. *Id.*

liability.⁸⁵

The Wyoming Supreme Court, in *Merrill v. Jansma*, joined the movement abandoning the rule of landlord immunity, pointing out that the imposition of the legislatively created duty to maintain property in a safe and habitable condition gives rise to a new standard of care applicable in cases involving personal injuries occurring on rental property, i.e., reasonable care under the circumstances.⁸⁶ Upon establishing that a breach of this standard proximately caused injury, the injured party is entitled to prove any damages recoverable in a personal injury claim.⁸⁷

1. Section 2.104 Duty Negates Tort Immunity

The URLTA states that have abandoned the no tort liability rule have done so on the express basis that it is inconsistent with the § 2.104 duty to maintain premises. In *Newton v. Magill*, the Alaska Supreme Court held that the traditional common law rule that a landlord is generally not liable for dangerous conditions in leased premises no longer applies in view of the legislature's enactment of the URLTA.⁸⁸ The court found it "inconsistent with a landlord's continuing duty to repair premises imposed under the URLTA to exempt from tort liability a landlord who fails in this duty" given the legislative policy reasons behind the warranty of habitability, that is, safe and adequate housing, and in recognition of the fact that tenants are unable and unlikely to make repairs.⁸⁹

Not only does the statute perforce abolish common law tort immunity rule, a landlord may also be liable under negligence *per se*. Negligence *per se* results from a violation of statute or regulation adopted as

⁸⁵ *Id.* at 1293.

⁸⁶ *Merrill v. Jansma*, 86 P.3d 270, 287 (Wyo. 2004).

⁸⁷ *Id.* at 289; *see, e.g., Gradjelick*, 646 N.W.2d at 232. However, the Minnesota Supreme Court has declined to extend this liability for injury resulting from a criminal attack on the basis that the landlord failed to install and maintain security measures. *See Funchess v. Cecil Newman Corp.*, 615 N.W.2d 397 (Minn. Ct. App. 2000), *rev'd*, 632 N.W.2d 666 (Minn. 2001).

⁸⁸ *Newton v. Magill*, 872 P.2d 1209, 1217 (Alaska 1994).

⁸⁹ *Id.* Some courts nonetheless read the statutory protections narrowly, consequently limiting the tort claims. In *Helfrich*, the Alaska Supreme Court clarified that any tort claim under the URLTA must derive from the failure of the landlord to keep the premises fit and habitable; that it is not a general tort statute. 207 P.3d at 559. There, a landlord sought to evict a tenant shortly after the tenant sued the landlord for injuries from a slip and fall on the premises. *Id.* at 554–55. The tenant alleged retaliatory eviction, but the court found that URLTA does not provide a claim for injuries in tort that are not based on rights and remedies granted the tenant under URLTA. *Id.* at 557–60. Alaska Statute 34.03.310(a)(2) therefore does not protect tenants from eviction if they threaten or file unrelated personal injury lawsuits. *Id.* at 559.

a standard of conduct.⁹⁰ In *Eddie v. Gray*, a landlord was held liable under this theory for a condition that violated the Montana Residential Landlord-Tenant Act.⁹¹ When the Edies rented a house from Gray, a stairwell light located on the landing between the upstairs and the basement was not functional.⁹² Eddie, thinking she was at the bottom of the stairs, missed the last step and fell, severely breaking her ankle.⁹³ There was disputed testimony as to whether Eddie had agreed to undertake the repair of the light, but absent a separate writing evidencing this undertaking, that duty to repair remained with the landlord.⁹⁴ As such, the violation of the statute provided the basis for negligence *per se* liability.⁹⁵

The Ohio Supreme Court, in *Shroades v. Rental Homes, Inc.*, ruled that a landlord's violation of specified statutory duties constitutes negligence *per se*, but only where the landlord knows or should know of the factual circumstances that caused the violation.⁹⁶ The court read the Landlord-Tenant Act⁹⁷ as an integrated unit: § 5321.12 allowed recovery for damages for "the breach of any duty that is imposed by law" and § 5321.04 clearly imposed a duty to repair on landlords and to do whatever is necessary to put and keep the premises in a fit and habitable condition.⁹⁸ The court concluded:

In light of the public policy and drastic changes made by the statutory scheme of [the act], we hold that a landlord is liable for injuries, sustained on the demised residential premises, which are proximately caused by the landlord's failure to fulfill the duties imposed by [§] 5321.04. We conclude that the General Assembly intended both to

⁹⁰ See RESTATEMENT (SECOND) OF TORTS § 288B (providing that violation of statute or regulation adopted as a standard of conduct is "negligence in itself," unless the violation is one of several "excused violations.").

⁹¹ *Eddie v. Gray*, 121 P.3d 516, 521 (Mont. 2005).

⁹² *Id.* at 518.

⁹³ *Id.* According to the plaintiff, the injury was so severe that she was forced to quit her job and continued to cause her pain. *Id.*

⁹⁴ *Id.* at 518–19. The Montana RLTA required the landlord to maintain in good and safe working order, all electrical, plumbing, sanitary, heating and other facilities, but also provided that the parties could agree in a separate writing that the tenant will perform specified repairs. *Id.* at 519–20.

⁹⁵ *Id.* at 520. The court stated that the RLTA was intended to protect renters, and the plaintiff was a renter; slip and falls were the sort of injury the statute was designed to prevent, and this was a slip and fall; and the RLTA was intended to regulate rental property landowners. *Eddie*, 121 P.3d at 520. The landlord's attempt to avoid liability on the basis that the tenant did not notify him of the defect was to no avail, since the court found that RLTA imposed a duty of repair upon the landlord, but did not impose a duty to notify upon the tenant. *Id.* at 521.

⁹⁶ *Shroades v. Rental Homes, Inc.*, 427 N.E.2d 774, 778 (Ohio 1981). In *Shump v. First Continental-Robinwood Assocs.*, the Ohio Supreme Court extended the landlord's liability to guests of tenants. 644 N.E.2d 291, 296 (Ohio 1994).

⁹⁷ OHIO REV. CODE ANN. § 5321.04 (West 2012).

⁹⁸ *Shroades*, 427 N.E.2d at 777.

provide tenants with greater rights and to negate the previous tort immunities for landlords.⁹⁹

Considering the purposes of the statute in the first place—to protect persons using rented residential premises from injuries—this conclusion is compelling.¹⁰⁰ “There is increasing recognition of the fact that the tenant who leases defective premises is likely to be impecunious and unable to make the necessary repairs.”¹⁰¹

2. Section 2-104 Duty to Repair Resists Private Ordering

The Idaho Supreme Court, in a series of cases, construed its landlord-tenant statute not only to replace common law rules, but also to insure that the new standards would be applied, precluded private bargaining around the rights. In *Jesse v. Lindsley*, it ruled that a clause in a lease purporting to exculpate a landlord from liability for personal injuries arising from conditions in the leased property was unenforceable.¹⁰² In doing so, it traced the path of the court to its current position on landlord tort liability.¹⁰³ First, in *Worden v. Ordway*, the court declined to adopt a common law implied warranty of habitability, based on the Legislature’s enactment of a statutory warranty of habitability.¹⁰⁴ That court explained:

The Idaho legislature has already acted in this area and enacted a statutory version of the implied warranty of habitability theory. I.C. § 6-320. This Court should refrain from changing or expanding a common law rule, where the legislature has already acted in the same area.¹⁰⁵

Section 6–320 constituted a statutory version of the judicially implied warranty of habitability that was applied in *Stephens v. Stearns*.¹⁰⁶ There, the court considered the landlord’s liability where a tenant was

⁹⁹ *Id.* at 777–78.

¹⁰⁰ *Id.* at 778; *see also* *Miller v. David Grace, Inc.*, 212 P.3d 1223, 1230 (Okla. 2009) (rejecting caveat lessee and imposing a duty to maintain the leased premises, including the areas under tenant’s exclusive control and use in reasonably safe condition; and imposing liability for injuries resulting from a failure to fulfill that duty).

¹⁰¹ *Shroades*, 427 N.E.2d at 777.

¹⁰² *Jesse v. Lindsley*, 233 P.3d 1, 5 (Idaho 2008).

¹⁰³ *Id.* at 5–7.

¹⁰⁴ *Worden v. Ordway*, 672 P.2d 1049, 1053 (Idaho 1983).

¹⁰⁵ *Id.* Under I.C. § 6-320(a)(1), (2), (3) and (6), a landlord is obligated to keep the premises in reasonably waterproofed and weatherproofed condition; maintain in good working order electrical, plumbing, heating, ventilating, cooling, or sanitary facilities supplied by the landlord; maintain the premises in a manner not hazardous to the health or safety of the tenant; and maintain smoke detectors. I.C. § 6-320(a)(1)–(3), (6) (2015).

¹⁰⁶ *Stephens v. Stearns*, 678 P.2d 41 (Idaho 1984).

injured after falling in a stairway that provided access to her apartment.¹⁰⁷ The court noted that under the common law, a landlord was generally not liable to the tenant for any damage resulting from dangerous conditions existing at the time of the leasing.¹⁰⁸ However, the court stated, “[W]e today decide to leave the common-law rule and its exceptions behind, and we adopt the rule that a landlord is under a duty to exercise reasonable care in light of all the circumstances.”¹⁰⁹ The court noted, “Our embracement of this rule is further supported by our legislature’s enactment of a statutory version of the implied warranty of habitability, I.C. § 6-320.”¹¹⁰ Implicit in this stance was that this duty was intended to prevent the rental of unsafe conditions and to make landlords liable for injuries flowing from such conditions.

The Idaho Supreme Court again visited the issue in *Stevens v. Fleming*, wherein the surviving daughters of a deceased residential tenant were seeking damages from the landlord for their decedent’s death in an apartment fire.¹¹¹ The Court stated:

A landlord is required to exercise reasonable care to his tenants in light of all the circumstances. In adopting the reasonable care standard for landlords in *Stearns* . . . the Idaho Supreme Court noted by way of footnote that its holding was supported by a statutory version of the implied warranty of habitability, I.C. § 6–320. When applicable, specific statutory provisions such as the Uniform Fire Code may prove useful in delineating minimum standards which are binding upon every owner of a rented premises. Such on point code provisions provide a ready measure of the base standard of care and failure to meet such standards may be negligence *per se* if the statutes or ordinances were designed to prevent the type of harm which occurred.¹¹²

Thus, the rule derived in *Lindsley* is that a landlord must exercise reasonable care under the circumstances for the protection of his residential tenant. This includes the duty under I.C. § 6-320 to maintain the premises in a manner that is not hazardous to the health or safety of the tenant.¹¹³ To enforce the exculpatory clause would conflict with the established policy for landlords to provide safe habitation for their tenants, separate and apart from

¹⁰⁷ *Id.* at 44.

¹⁰⁸ *Id.* at 49.

¹⁰⁹ *Id.* at 50.

¹¹⁰ *Id.* at 50 n.3. (citing *Worden v. Ordway*, 672 P.2d 1049 (Idaho 1983)).

¹¹¹ *Stevens v. Fleming*, 777 P.2d 1196, 1197–98 (Idaho 1989).

¹¹² *Id.* at 1198–99 (citations omitted).

¹¹³ *Lindsley*, 1233 P.3d at 6.

the issue of whether one may recover under the specific provisions of I.C. § 6-320.¹¹⁴

B. The Second Regime: Parallels—No Tort Liability Rule Survives

Courts in the second regime find that the duty to repair can operate in parallel with tort immunity. In the end of this section, I show how the reasoning of these courts is not credibly supported by principle or logic.

In *Tolbert v. Jamison*, a rental house had only one door for ingress and egress.¹¹⁵ Two of three tenants died in a house fire, intentionally started by a third party, which blocked the only egress.¹¹⁶ The third tenant escaped through a window.¹¹⁷ Relatives of the deceased tenants brought an action against the landlords, alleging, among other things, “negligence in failing to provide appropriate ingress and egress, working fire alarms, and fire extinguishers or other extinguishing equipment.”¹¹⁸ The tenants lost on all accounts.¹¹⁹ First, the tenants failed to show any duties owed under the express terms of the lease.¹²⁰ They failed to establish any violation of any regulations requiring fire alarms and extinguishers.¹²¹ Finally, there could be no liability under Nebraska common law because a landlord does not otherwise warrant the fitness or safety of the premises; the tenant takes them as she finds them.¹²²

The court also rejected liability based on premises liability because the landlord was not in possession.¹²³ It explained that the duties of a landowner to those lawfully on the premises—to protect from harmful conditions or dangerous activities on the land, and “from accidental, negligent, and intentionally harmful acts of third parties if those acts are foreseeable”—only applied to a possessor of the land who is in occupation with the intent to control.¹²⁴ Because the landlord was not in control, there could be no liability.¹²⁵ While a landlord can be bound to use reasonable care in the maintenance of common areas over which he or she retains control and has not demised to the tenant, there were no common areas in a single-family dwelling.¹²⁶ Thus, the court found that absent a statute, covenant, fraud, or

¹¹⁴ See *Hilder*, 478 A.2d at 208; N.Y. REAL PROP. LAW §235-b (2015) (Warranty of Habitability).

¹¹⁵ *Tolbert v. Jamison*, 794 N.W.2d 877, 880 (Neb. 2011).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *id.* at 886.

¹²⁰ *Id.* at 883.

¹²¹ *Tolbert*, 794 N.W.2d at 882.

¹²² *Id.* at 885. The court engaged in a discussion of the common law because the tenants did not raise the statute until the appeal. *Id.* at 884–85.

¹²³ *Id.*

¹²⁴ *Id.* at 884.

¹²⁵ *Id.*

¹²⁶ *Tolbert*, 794 N.W.2d at 885.

concealment a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other person lawfully upon the leased property.¹²⁷ Instead, “[t]o hold an owner of leased premises liable for injuries suffered as a result of the condition of the leased premises, it must appear that the landlord had a right to present possession or present control or dominion thereover.”¹²⁸

1. Section 2.104 Duty Does Not Impact Tort Immunity

Some years earlier, the Nebraska Court of Appeals took up the question of the impact of the URLTA on the no tort liability rule. In *Tighe v. Cedar Lawn, Inc.*, the court explained that the legislature had enacted the URLTA but had since substantially modified it, including adding a provision that stated, “The obligations imposed by this section are not intended to change existing tort law in the state.”¹²⁹ The court explained that while the URLTA has provided a cause of action for damages in the event of breach of duty defined by the Nebraska landlord tenant law, a review of the entire act showed that it was designed to ensure that the premises are habitable, not to create a tort action for damages, which did not previously exist.¹³⁰ The court went on to note the policy underlying the URLTA—“in addition to making uniform, clarifying, simplifying and modernizing the law . . . to encourage landlord[s] . . . to maintain and improve the quality of housing.”¹³¹ However, the landlord’s obligation to maintain the premises focused on the landlord’s duty to maintain habitability, not on any tort duty.¹³² In fact, quite simply, the court stated that the URLTA “really is designed to assist tenants whose landlords fail to provide the basic necessities which make a dwelling unit habitable.”¹³³ Tenants were relegated to recovery of economic losses.¹³⁴ Finding no language that identified poor quality housing to harbor dangerous

¹²⁷ *Id.* One non-URLTA state has expressly retained caveat lessee by statute. In 2006, the Arkansas Legislature enacted ARK. CODE ANN. §18-16-110, stating that “[n]o landlord or agent or employee of a landlord shall be liable to a tenant or a tenant’s licensee or invitee for death, personal injury, or property damage proximately caused by any defect or disrepair on the premises absent the landlord’s: (1) Agreement supported by consideration or assumption by conduct of a duty to undertake an obligation to maintain or repair the leased premises; and (2) Failure to perform the agreement or assumed duty in a reasonable manner.” ARK. CODE ANN. § 18-16-110 (West 2014).

¹²⁸ *Tolbert*, 794 N.W.2d at 885

¹²⁹ *Tighe v. Cedar Lawn, Inc.*, 649 N.W.2d 520 (Neb. 2002) (quoting NEB. REV. STAT. § 76-1419 (2014)).

¹³⁰ *Tighe*, 649 N.W.2d at 527. Section 76-1419 requires a landlord to make all repairs and do whatever is necessary, after written or actual notice, to put and keep the premises in a fit and habitable condition. NEB. REV. STAT. § 76-1419.

¹³¹ *Tighe*, 649 N.W.2d at 527.

¹³² *Id.*

¹³³ *Id.* at 529.

¹³⁴ *Id.* at 531.

conditions, the court could find no legislative intent to give tenants remedies for injuries from such dangerous conditions.¹³⁵

The Virginia Supreme Court was equally convinced that under Virginia's version of the URLTA the statutory duty to repair did not override the common law no tort liability rule, but that the two could exist concurrently. In *Isbell v. Commercial Inv. Assocs., Inc.*, the court found the question to be one of first impression—whether the VRLTA abrogates the common law and provides a tenant with a statutory cause of action in tort against a landlord for personal injuries from violations of obligations imposed by the Act.¹³⁶ Nowhere in the statutory text was there express language creating a cause of action.¹³⁷ Nor could the court find such liability necessarily implied.¹³⁸ Instead, the court found the comments to the URLTA instructive, that is, that the counterpart to Virginia Code § 55-248.13(A)(1), “follows the warranty of habitability doctrine.”¹³⁹ As such, “warranty” was a contract duty, not a duty grounded in tort, with remedies more akin to those in an action for breach of contract as opposed to those for personal injury.¹⁴⁰ Therefore, the VRLTA imposed contractual duties on landlords, but it did not impose a tort duty with regard to the responsibility to maintain and repair leased premises under the enjoyment and control of the lessee.¹⁴¹ Neither would any contract duty undertaken by a landlord to repair leased premises under a tenant's control render a landlord liable in tort for injuries sustained by the tenant as a result of landlord's breach of covenant to make such repairs.¹⁴² Recovery for a breach of covenant is the cost of repairs, the loss suffered by the tenant after lapse of a reasonable time from giving the notice in which to make repairs,¹⁴³ or the difference between the agreed rent and the fair rental value of the premises as they were during their occupancy by the tenant in the unsafe, unsanitary, or unfit condition.¹⁴⁴

Although yet to be decided by the Kentucky Supreme Court, the court of appeals has had several occasions to consider and resolve the apparent conflict between the common law no tort liability rule and the statutory duty to repair. Each time, it has resolved the question in favor of preserving the no liability rule. First, in *Pinkston v. Audubon Area Cmty.*

¹³⁵ *Id.* at 527.

¹³⁶ *Isbell v. Commercial Inv. Assocs., Inc.*, 644 S.E.2d 72, 74 (Va. 2007). There, the tenant fell down worn and slippery stairs located inside a leased apartment. *Id.* at 73.

¹³⁷ *Id.* at 76.

¹³⁸ *Id.* at 77.

¹³⁹ *Id.* at 76.

¹⁴⁰ *Id.*

¹⁴¹ *Isbell*, 644 S.E.2d at 76.

¹⁴² *Id.* at 75.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 76. In *Steward v. Holland Family Properties, LLC*, the Virginia Supreme Court reiterated that holding and ruled that the VRLTA also did not provide a basis for a negligence *per se* liability, rejecting a claim by a child for injuries caused by lead poisoning from the paint within the rented apartment. 726 S.E.2d 251, 255 (Va. 2012).

Servs., Inc., the lease did not specifically require the landlord to maintain the premises, but stated that the landlord would “make necessary repairs with reasonable promptness.”¹⁴⁵ After moving into the apartment, the tenant noticed an oily substance on the stairwell steps and discovered that the stairwell handrail was loose.¹⁴⁶ After several requests to the landlord to repair the handrail were ignored, the tenant was injured when she grabbed the handrail and it pulled from the wall.¹⁴⁷ The court recited the general law that “[i]n the absence of a special agreement to do so, made when the contract is entered into, there is no obligation upon the landlord to repair the leased premises.”¹⁴⁸ The court further stated, “[I]ikewise, a landlord will not be liable for injuries caused by defects in the leased premises unless the condition is unknown to the tenant and not discoverable through reasonable inspection.”¹⁴⁹ Since the condition was obvious and known to tenant for several weeks before she fell, the landlord was not liable.¹⁵⁰ Moreover, the court explained, “[E]ven assuming that the lease provision imposed an affirmative duty on [the landlord] to make repairs, we cannot find that [it] is liable for personal injuries arising from its breach of the agreement to repair.”¹⁵¹ Instead, liability would be limited to the cost of repair.¹⁵²

In *Miller v. Cundiff*, where a loose carpet caused a tenant’s fall in her apartment, recovery for personal injuries was denied against the landlord because the tenant was aware of the carpet’s condition when she initially walked through the apartment and at the time of her fall.¹⁵³ The court not only reaffirmed the law as recited in *Pinkston*, but also rejected the contention that the URLTA abrogated the common law, reasoning that “the URLTA was intended to supplement, not replace the common law.”¹⁵⁴ Additionally, the court pointed out that Kentucky had not adopted the URLTA on a statewide basis and “a piecemeal abrogation of the common law would violate the constitutional provisions against local or special legislation.”¹⁵⁵ *Miller* found the reasoning of other cases from other states unpersuasive, faulting them for failing to mind the principle that legislative intent to abrogate the common law must be clearly apparent and not presumed.¹⁵⁶ As it interpreted the Act, the tenant has a cause of action for the cost of repair and, said the court quite assuredly, “this result preserves the

¹⁴⁵ *Pinkston v. Audubon Area Cmty. Servs., Inc.*, 210 S.W.3d 188, 189 (Ky. Ct. App. 2006).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 190.

¹⁴⁸ *Id.* (citing *Miles v. Shauntee*, 664 S.W.2d 512, 518 (Ky. 1983)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Pinkston*, 210 S.W.3d at 190.

¹⁵² *Id.*

¹⁵³ *Miller v. Cundiff*, 245 S.W.3d 786, 787 (Ky. Ct. App. 2007).

¹⁵⁴ *Id.* at 789.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

effectiveness of the URLTA's enforcement provision, but also incorporates the common law rule.¹⁵⁷

In *True v. Fath Bluegrass Manor Apartment*, in rejecting a claim for recovery from negligent repairs, the court reviewed the rules enunciated in *Pinkston*, concluding that in Kentucky a landlord is not liable for personal injuries growing out of the failure to repair.¹⁵⁸ The court explained that as in any other contract, the breach of a repair agreement does not extend the landlord's liability beyond damages outside of the reasonable contemplation of the parties.¹⁵⁹ While a negligent repair claim is premised on the tenant's reliance on the appearance that a defect had been remedied, recovery should be available only if a repair resulted in an increased danger that was unknown to the tenant or if the negligent repair gave the deceptive appearance of safety.¹⁶⁰ The court found the facts undisputedly to the contrary.¹⁶¹

2. *A Parallel Existence Revives the Common Law Paradox*

The problem with the reasoning by these courts is that it is myopic and formal. They employ the classic form of deductive reasoning: a lease is a contract; a breach of contract gives rise to monetary damages; therefore a breach of lease entitles the tenant to monetary damages. In a valid deductive argument, the conclusion follows necessarily (conclusively, with certainty) from the premise.¹⁶² If the premises are true then the conclusion must be true also.¹⁶³ But when the argument begins with a faulty premise, then the

¹⁵⁷ *Id.*

¹⁵⁸ *True v. Fath Bluegrass Manor Apartment*, 358 S.W.3d 23, 25–27 (Ky. Ct. App. 2011). There, the court ruled that Landlord had no duty to repair loose railing on an apartment balcony, and thus was not liable for injuries sustained by a tenant who fell from the balcony, absent a showing of a reasonably foreseeable distraction that caused the tenant to fail to discover the obvious defect in the balcony, forget its existence, or fail to protect against its danger, and where tenant was aware of the defective condition of the balcony railing when he initially walked through the apartment and at the time of his fall. *Id.* at 28.

¹⁵⁹ *Id.* at 26 (citing *Dice's Admin'r v. Zweigart's Admin'r*, 171 S.W. 195 (Ky. 1914)). This holding remains a generally accepted principle for recovering damages arising from a breach of contract. See *Univ. of Louisville v. RAM Eng'g & Constr., Inc.*, 199 S.W.3d 746, 748 (Ky. Ct. App. 2005).

¹⁶⁰ *Id.* at 27.

¹⁶¹ *Id.* “[The tenants] testified that they were aware that the railing was loose because screws were missing. They further testified that after they moved in but prior to the fall, Fath had not repaired the railing. Thus, this is not a negligent repair claim. The applicable law is that a tenant takes the premises in “as is” condition and the landlord is only liable for injuries caused by defects unknown to the tenant and not discoverable through reasonable inspection.” *Id.* There was, moreover, no evidence that the tenant was distracted from his “duty to act reasonably to ensure [his] own safety, heightened by [his] familiarity with the location and the arguably open and obvious nature of the danger.” *Id.* at 28.

¹⁶² IRVING M. COPI, INTRODUCTION TO LOGIC 3–34 (4th ed. 1972).

¹⁶³ *Id.*

conclusion cannot follow.¹⁶⁴ The fallacy in the reasoning lies in the courts' conception of the tenants' interest in the contract.¹⁶⁵ If that interest were conceived more broadly—a safe place to live—then the argument collapses. Instead, their narrow conception serves not to facilitate the enjoyment of the essence of the parties' interests under the lease, but to negate them.¹⁶⁶

The starting premise also ignored the fact that the URLTA was meant as a remedial measure—to improve the sorry plight of the poor residential tenant—by giving her rights in the landlord-relation and express remedies toward their fulfillment. Those remedies should be construed to ensure not only that the tenant receive an economic value equivalent to the rent paid for the premises, but also to ensure the tenant does not suffer the effects of unsafe housing. Circumscribing the reach of the URLTA to economic losses operates to negate its remedial purposes.

The facile resolution of the tension between the statutory duty to repair and the common law no tort liability cannot be excused by the maxim to construe legislation as consistent with common law, if doing so nullifies the legislation.¹⁶⁷ Instead, statutes that are remedial, as the URLTA, rather than narrowly, should be liberally construed.¹⁶⁸ A remedial statute is one that affords a remedy, or improves or facilitates remedies already existing, for the enforcement of rights or redress of wrongs.¹⁶⁹

The statutory duty to repair should be read not only to reach conduct directly within its language, but also conduct that would thwart its essential purposes.¹⁷⁰ If we examine the duty to repair under Professor Hohfeld's schema, we see that it gives rise to a correlative right in the tenant to compel repairs.¹⁷¹ If a landlord, not fulfilling this duty also would escape liability for the consequences of this failure, surely the right in the tenant is meaningless,

¹⁶⁴ *Id.* at 147–50.

¹⁶⁵ See discussion of cases *supra* Part III.B.1.

¹⁶⁶ See discussion of cases *supra* Part III.B.1.

¹⁶⁷ This rule arose at a time when the common law was viewed as the perfection of wisdom and attempts by the English Parliament to alter it were viewed with suspicion. See generally R. Perry Sentell, Jr., *Statutes in Derogation of the Common Law: In the Georgia Supreme Court*, 53 MERCER L. REV. 41 (2001); see also 3 NORMAN J. SINGER, SUTHERLAND, STATUTORY CONSTRUCTION § 61.01 (5th ed. 1992).

¹⁶⁸ SINGER *supra* note 167, at § 61.03.

¹⁶⁹ *Ayers-Schaffer v. Solomon*, 461 A.2d 396, 399 (R.I. 1983); *Esposito v. O'Hair*, 886 A.2d 1197 (R.I. 2005); *Kentucky Ins., Guar. Ass'n v. Jeffers*, 13 S.W.3d 606, 609 (Ky. 2000) (“[A] remedial statute must be so construed as to make it effect the evident purposes for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty.”); *Martin v. Indiana*, 774 N.E.2d 43, 45 (Ind. 2002) (“When a remedial statute is involved, a court must construe it to effect the evident purpose for which it was created.”) (internal quotations and citations omitted).

¹⁷⁰ See *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 438–39 (1968) (The Thirteenth Amendment meant to eradicate all badges and incidents of slavery and thus statutes passed pursuant to the amendment could reach even private discrimination).

¹⁷¹ See Hohfeld *supra* note 1.

for he would have suffered the circumstances that the right was designed to insure against. Awarding monetary damages will not fulfill that right any more than the right to be free from racial discrimination is fulfilled by money damages, and not by compelling the rental. Otherwise, the right (to live where one chooses) is entirely frustrated. If the landlord holds the only key to a safe place to live, the tenant's expectation in safety and well-being cannot be fulfilled by money damages in the amount of reduction in the value of the premise.

These courts read the rules as if they each operated in their own defined universes, with the inevitable consequence that overarching policy may be relegated to the perimeters.¹⁷² Since the one does not overrule the other, technically both can apply to each circumstance, but practically, the old rule cancels out the new.

C. Convergence: No Tort Liability Rule Qualified by Statutory Requirements

In this third regime, the courts have declined to wholly abrogate common rules, but strive to harmonize them, based upon compelling policy and legislative intent. *Davis v. Campbell* is an example of clever reasoning to find a credible synthesis between the common law and statutory imperatives.¹⁷³ There, in a rental house, "heat transmitting through chimney bricks in a fireplace caused a fire that destroyed the house."¹⁷⁴ To hold the landlord liable in negligence, it was necessary to show knowledge of the defective condition, but at the time, neither the tenant, nor the landlord had experienced any problems with the fireplace and neither was aware that its condition presented a fire hazard.¹⁷⁵ While acknowledging that the state's landlord-tenant law did not abrogate the common law rule of negligence that required knowledge of the hazard by the landlord, the court pointed out that the state statute created statutory duties that gave rise to liability that was distinct from common law negligence.¹⁷⁶

1. Section 2.104 Duty Can Be Harmonized with Tort Immunity

Essentially, the court ruled in *Campbell* that the common law existed alongside the Oregon Residential Landlord and Tenant Act (ORLTA).¹⁷⁷ This meant that a tenant may bring a statutory claim under the ORLTA, a common-law negligence claim, or both.¹⁷⁸ With respect to the statutory

¹⁷² See cases cited in text accompanying notes 115–161.

¹⁷³ *Davis v. Campbell*, 965 P.2d 1017 (Or. 1998).

¹⁷⁴ *Id.* at 1018.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1021.

¹⁷⁸ *Id.*

claim, the court held the fact that the legislature did not incorporate elements of common-law negligence into the statute did not preclude them; instead, it indicated its intent that tenants' remedies under the act not be conditioned upon proof of such elements.¹⁷⁹ As such, the court would not read into the act a requirement that the landlord have actual or constructive knowledge of an unsafe condition in order to be liable for personal injury to the tenant if the condition otherwise fell within the statutory duty.¹⁸⁰

The Washington Court of Appeals, in *Tucker v. Hayford*, also applied common law principles governing personal injury claims in the landlord-tenant relationship while simultaneously allowing claims for personal injuries by tenants based upon the Washington Residential Landlord-Tenant Act.¹⁸¹ In reaching this result, the court emphasized that the provision of the Washington act taken from the URLTA authorized the tenant to bring an action in an appropriate court for any remedy provided under the act *or otherwise provided by law*.¹⁸² These two jurisdictions found that rather than displace the common law, the URLTA created a regime that could converge with the common law and offer better protection to tenants.

IV. WRITING THE NEW PARADIGM

In this section, I discuss how the momentum of the revolution, rather than being exhausted, can continue on to what I believe is its logical end, that is, imposing tort liability upon landlords for failure to fulfill the duty to repair, through strategic tools for legal analysis. While the URLTA was an overt change in the law on the duty of the landlord to repair, law often moves more covertly. A *sub silentio* movement is often necessary to preserve the semblance of stability, but move nonetheless, in order to do justice in cases not fairly resolved within the old regime. A variety of strategic tools have long been at the court's disposal for this movement *sub silentio*, including the

¹⁷⁹ *Campbell*, 965 P.2d at 1020.

¹⁸⁰ *Id.* at 1019; *see also* *Humbert v. Sellars*, 708 P.2d 344 (Or. 1985) (but for certain exceptions—which were not applicable in the case—a landlord is not liable to a tenant or any others who have entered onto the premises for harm caused by any condition that was present when the tenant took possession).

¹⁸¹ *Tucker v. Hayford*, 75 P.3d 980, 984–85 (Wash. Ct. App. 2003). In adopting this position, the Washington Court of Appeals, definitively rejected an earlier ruling, *Dexheimer v. CDS, Inc.*, 17 P.3d 641 (Wash. Ct. App. 2001), that declined to find tort liability, instead limiting tenants to those remedies specifically enumerated in the Act, including reduction in rent, repair and deduct and termination of the lease. *Tucker*, 75 P.3d at 985. It also seemed to obviate the circuitous method of establishing a claim for personal injury outlined in *Lian v. Stalick*, 25 P.3d 467 (Wash. Ct. App. 2001). *Tucker*, 75 P.3d at 984. In *Lian*, the court found that the Residential Landlord Tenant Act (“RLTA”) could not support an award for personal injury damages, but that the RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT, § 17.6 (1977) provided such a remedy where tenant could show the landlord failed to repair a dangerous condition found to constitute a breach of habitability under RLTA. 25 P.3d 467, 474–75 (Wash. Ct. App. 2001).

¹⁸² *Tucker*, 75 P.3d at 985.

process of distinguishing the *ratio decidendi* of cases,¹⁸³ resort to equitable principles¹⁸⁴ and the employment of legal fictions.¹⁸⁵

A legal fiction is a device that facilitates “shape shifting” in the law, superficially remaining the same while the substantive meaning slowly changes.¹⁸⁶ Sometimes the change is synthetic, that is, the alterations comprise embellishments or refinements to an essentially unchanged core. Sometimes the alterations radically upset existing understandings. As Professor Maine once explained, that term, “legal fiction” signifies:

[A]ny assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.... It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present.¹⁸⁷

Fictions are prominent in property law—constructive delivery for gifts, constructive possession of animals upon the land; the unity of person in husband and wife for the tenancy by the entirety; constructive notice from recorded instruments.¹⁸⁸ While on appearance, they may seem like devices for obfuscation or trickery, they are in actuality valuable devices for adding flexibility in the law and for addressing the problems generated when rules clash with the demands of individual justice.¹⁸⁹

¹⁸³ REGINALD WALTER MICHAEL DIAS, JURISPRUDENCE 140–48 (5th ed. 1985).

¹⁸⁴ Equity intervened to moderate the sometimes harsh impacts of the law. During its early history, it operated in parallel to the legal system, equity operating on the person, leaving the law intact. PETER CHARLES HOFFER, *THE LAW’S CONSCIENCE* (1990). Two familiar maxims of equity are that equity regards substance, not form and equity abhors a forfeiture. *Id.* at 11. These have played a substantial role in the reshaping certain property interests. In the case of land sale contracts, on the vendee’s breach, rather than suffering forfeiture of all that was paid as well as the land, courts regarded the relation as mortgagor/mortgagee requiring the vendor to foreclose the vendee’s interest. *Skendzel v. Marshall*, 301 N.E.2d 641, 645 (Ind. 1973); *Bean v. Walker*, 95 A.D.2d 70, 74-75 (4th Dep’t. 1983)

¹⁸⁵ LON FULLER, *THE ANATOMY OF LAW* 52 (1976).

¹⁸⁶ See Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 2–3 (1990).

¹⁸⁷ HENRY S. MAINE, *ANCIENT LAW* 21–22 (17th ed. 1901).

¹⁸⁸ See generally John V. Orth, *Fact & Fiction in the Law of Property*, 11 GREEN BAG 2D 65 (2007).

¹⁸⁹ *Id.* at 75. Professor Orth states: “The Rule of Law, humanity’s best effort so far to produce justice on a regular basis, requires rules, but because of their rigidity and generality, rules can produce injustice in individual cases.” *Id.* at 79.

A. Fictions in Landlord-Tenant Law

In landlord-tenant law, legal fictions are both ancient and modern.¹⁹⁰ An example of an ancient fiction is constructive eviction. At early common law, even though a landlord did not physically enter and remove the tenant from the premises, he could yet be found to have evicted the tenant, constructively, if he created conditions (such as noise, soot, or flooding) that unreasonably interfered with the tenant's use and enjoyment of the premises.¹⁹¹ A modern fiction is the treatment of an otherwise peaceable entry by the landlord to evict, in a tenant's absence, but done without permission, as "force and violence" under unlawful detainer statutes.¹⁹² Indeed, the re-characterization of the landlord-tenant relationship by courts and by the URLTA, from one grounded solely in property law, to one more in contract with the attendant reciprocal rights and liabilities is in large part a fiction.¹⁹³ Given the circumstances of the parties to the typical lease, the glaring unequal positions—the poor, unsophisticated and unsuspecting tenant on the one side and the shrewd landowner on the other—the notion that the result is a bargained-for exchange borders more on fantasy than reality.¹⁹⁴

¹⁹⁰ Indeed, the exceptions to caveat lessee, discussed *supra* at text accompanying notes 49 to 55 can be conceived as fictions, to the extent that they depart from the literal circumstances of the parties positions.

¹⁹¹ *Reste Realty Corp.*, 251 A.2d at 274–75.

¹⁹² *Talbot*, 361 P. 2d 20; *Berg v. Wiley*, 264 N.W. 2d 145 (Minn. 1978).

¹⁹³ A central distinction between contract and property is that with contract, the parties are free to create legally enforceable interests, largely as they see fit, with limited legal constraints. In contrast, with property, the law enforces only those interests that conform to a determined set of forms, not recognizing novel forms or incidents. See Thomas W. Merrill & Henry G. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000). These principles, however, cannot be taken to mean that contract and property rules are forever fixed and do not respond to social, political and economic imperatives. Indeed, if we trace the history of contract law, we see the movement from the equitable conception of contract to the will theory and laissez-faire. See Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366 (1921); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 574–75 (1933). Under the equitable conception, contracts were evaluated for their intrinsic fairness. The will theory of contract held that the law of contract gives expression to and protected the will of the parties, because the will is something inherently worthy of respect. Indeed, only if their wills were somehow manifested in the exchange would a contract be said to be formed, such that at the end of the eighteenth century to the beginning of the nineteenth, the idea arose that there must be a meeting of the minds for a valid enforceable contract. The will became the source of all the terms of the contract, so much so that the only source of the implied terms which might be read into a contract was the will of the parties. *Id.* at 576–77. So too, has the conception of property rights moved from Blackstone's "despotic dominion" to one embodying social obligations. See Gregory Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 754 (2009).

¹⁹⁴ See discussion, *infra* Part IV.A.1 on the adoption of the implied warranty of habitability. Other new rights include the right to process before eviction, the right to have the security deposit held in segregated, interest-bearing account, the right to have the landlord mitigate damages and the right to assign the lease absent expressed reasonable grounds by the landlord. See, e.g., Lesar, *supra* note 6; see also David A. Super, in *The Rise and Fall of the*

In any case, by this new conception, the relation became shaped almost as much by implied terms—those based upon what the courts described as the presumed intentions of the astute, self-interested everyman—as by express terms or fixed rules. These presumed intentions, though, were infused with various public policy—particularly the need to address the social evil of slums.¹⁹⁵ This gave rise to, among other things, the implied warranty of habitability, creating a right to a habitable dwelling during the lease term.¹⁹⁶ Thus, through legal fictions, the fundamental characteristics and outward form were retained—the respective interests of landlord and tenant, types of tenancies recognized, how created, how terminated—and the relation of landlord and tenant *inter se* in the post revolution era, was radically transformed.

1. The Fiction of Control from the Duty to Repair

A legal fiction of control can be employed to overrule the landlord tort immunity rule. It seems that the rule rested in large part upon the fact of an absence of control by the landlord over the leased premises. Under the theory of premises liability, a landlord has a duty to maintain property he controls in a reasonably safe manner, else be liable to those who are injured while in the area under his control.¹⁹⁷ The converse of this rule is that a landlord is not generally liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant. The tenant

Implied Warranty of Habitability, 99 CALIF. L. REV. 195, 418 (2011). The public housing tenancy emerged to give tenants security and control. See Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security and Control*, 43 CATH. L. REV. 681, 720 (1994).

¹⁹⁵ At the height of this “revolution,” one commentator put forth the notion of making “slumlordism” a tort, giving a cause of action to the tenants in slum properties. See Joseph L. Sax & Fred J. Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 875 (1966).

¹⁹⁶ Yet many have questioned the success of the implied warranty in improving the housing conditions of the poor. See Super, *supra* note 194, at 389 (suggesting that the warranty has largely failed to achieve any meaningful improvement in housing conditions, largely because of the slowing of the general anti-poverty movement occurring during the same era, including the lack of a coherent, broadly accepted set of goals, the lack of agreement on the causes of poverty, and the loss of sympathy for the poor. There was also a general failure to provide the practical infrastructure, the procedural and institutional steps for the assertion of rights); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 514–18 (5th ed. 1998) (asserting that housing code enforcement leads to a substantial reduction in the supply of low-income housing coupled with a substantial rise in the price of the remaining supply; ordinances designed to protect tenants by giving them more procedural rights in the event the landlord tries to evict them, by entitling tenants to withhold rent if landlords fail to make repairs required by the lease, by requiring landlords to pay interest in security deposits have the same effect as code enforcement); *but see* Duncan Kennedy, *The Effect of the Warranty of Habitability on Low-Income Housing: “Milking” and Class Violence*, 15 FL. STATE U. L. REV. 484, 486–88 (1987) (selective enforcement of implied warranty could increase supply more than it decreases it, thus reducing rent levels for poor tenants).

¹⁹⁷ See, e.g., *Bokis v. Champion Fin. Corp.*, 608 F. Supp. 585, 587 (D. Okla. 1985).

had remedies against the landlord if his peaceable possession was disturbed and if injuries occurred in the common areas under the landlord's control.¹⁹⁸

With the adoption of the implied warranty of habitability, the landlord-tenant relation was re-characterized as a contract, with ongoing, mutual obligations. The tenant was to pay rent and refrain from waste and the landlord in return, was to give possession and to repair as noticed. The landlord's new relation with the tenant contemplated that degree of control and interest in the premises, ostensibly within the exclusive possession of the tenant, as necessary to maintain the premises. The duty places the landlord in the premises and the premises under his control. The duty gives the landlord the right and obligation to exercise dominion, even though not exclusive, over the premises. The duty therefore becomes a proxy for the control required under the common law for landlord liability.¹⁹⁹ Employing a

¹⁹⁸ The rule in some states is that a landowner is not liable for injuries to an invitee from a patent defect in the premises pre-existing the arrival of the invitee and of which the invitee knew or had the means of knowing equal to the landowner. *Johnston v. Ross*, 590 S.E.2d 386, 387 (Ga. Ct. App. 2003); *Roth v. Wu*, 405 S.E.2d 741, 742 (Ga. Ct. App. 1991). The courts have made clear that a landlord may not hide behind this principle to avoid statutory duties. This means that when a defect is in violation of a duty created by statute or administrative regulation, a landowner, nevertheless may be liable for injuries to third parties. *Watts v. Jaffs*, 455 S.E.2d 328, 329 (Ga. Ct. App. 1995); *Crownover*, 381 S.E.2d at 285 (plurality) (recognizing important public policy in favor of preventing unsafe residential housing; landlord may be liable in tort for violation of duties created by housing codes or other legislation).

¹⁹⁹ *Giacone v. Hous. Auth.*, 51 A.3d 352, 357 n.4 (Conn. 2012) (“[I]t is the landlord’s control over the space, not its control over the potential danger, that gives rise to liability.”). A “proxy” is a form of legal fiction. The Black’s Law Dictionary’s definition of “proxy” is relatively narrow—“one who is authorized to act as a substitute for another.”—suggesting a volitional act by both the giver of the authority and the one acting. BLACK’S LAW DICTIONARY 1346 (9th ed. 2009). In legal reasoning and decision-making, the term has taken on much broader meaning and is used in much broader contexts. The term has come to connote a substitution of one thing for another, to achieve a particular result, much like a legal fiction. See *United States v. Microsoft Corp.*, 253 F.3d 34, 87–88 (D.C. Cir. 2001) (in determining the existence of an illegal tying arrangement, “consumer demand test [for separate products] as a rough proxy for whether a tying arrangement may, on balance, be welfare-enhancing and unsuited to per se condemnation;” allows the avoidance of direct inquiries into the efficiencies of a bundle, instead, the easy to administer proxies used for net efficiency); *Johnson v. California*, 543 U.S. 499, 512 (2005) (using “race as proxy for gang membership...society as a whole suffers); *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (“ancestry can be a proxy for race”); *Wilkins v. Gaddy*, 130 S.Ct 1175, 1179 (2010) (“injury as a proxy for force”); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1321 (7th Cir. 1992) (“increase in travel time as a proxy for reduction in consumer surplus”); *Archie v. City of Racine*, 847 F.2d 1211, 1220 (3d Cir. 1988) (“recklessness is a proxy for intent”); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1119 (8th Cir. 1994) (“pension status, or in a similar situation, another empirically correlated factor, may be a ‘proxy’ for age in the sense that an employer may suppose a correlation between the two factors”); *Riddle v. McLouth Steel Prods. Corp.*, 485 N.W.2d 676, 694 n.38 (Mich. 1992) (“Caniff thus illustrates the use of ‘duty’/‘no duty’ as a proxy for facts strong enough either to bar recovery as a matter of law under traditional contributory negligence doctrine, or that the absence of a warning would not have been a proximate cause of plaintiff’s injuries, because he probably would have ignored a warning anyway.”).

“fiction” of landlord control over the premises based upon a duty to repair, at least against unsafe conditions, is no different from the fiction of constructive eviction.

2. *The Fiction of the Rational Actor*

Another fiction, although not generally recognized as such, that of the “rational actor” can be used also to overrule the no tort liability rule. The rational actor is a character at the center of economic theory.²⁰⁰ The dogma of economic theory is that law should be analyzed not as a system of coercion, but as a system of implicit norms,²⁰¹ that legal analysis should focus not on justice, but on efficiency.²⁰² Normative economics,²⁰³ prescriptive, judgmental,²⁰⁴ asks two questions: should efficiency be the goal of law and if so, how should the law be reformed to best serve that goal.²⁰⁵

On the first inquiry, few would disagree that the study of economics, that is, the study of human behavior as a relationship between ends and scarce resources which have alternative uses,²⁰⁶ is important in devising rules for the allocation of resources. However, embracing normative economic theory should only be done after an examination of some of its flaws. Economic theory asks us to evaluate the market choices based upon whether

²⁰⁰ T.S. Ulen, *Rational Choice Theory in Law and Economics*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* 790, 791 (B. Bouckaert and G. DeGesst eds., 2001).

²⁰¹ Ugo A. Mattei et al., *Comparative Law and Economics*, in *ENCYCLOPEDIA OF LAW & ECONOMICS* 505, 507 (B. Bouckaert and G. DeGesst eds., 1999), available at <http://encyclo.findlaw.com/0560book.pdf>. It is said that the foremost policy of the tort law is to deter harmful conduct and to ensure that innocent victims of that conduct will have redress. Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 861–62 (Mo. 1993) (en banc). “Cognate principles of equity and economic efficiency also inform that policy: that the costs of pervasive injury . . . shall be borne by those who can control the danger and make equitable distribution of the losses, rather than by those who are powerless to protect themselves.” *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 176 (Mo. Ct. App. 1988).

²⁰² Ugo Mattei, *supra* note 201, at 507.

²⁰³ In contrast, the school positive economics seeks to identify a legal rule and then make one or more descriptive statements about the economic effects of that rule. Herbert Hovenkamp, *Positivism in Law & Economics*, 78 *CALIF. L. REV.* 815, 821 (1990). Judge Richard Posner was perhaps the earliest chronicler for the positivists. In *Law & Economics*, he reviewed 1500 appellate court decisions to test his theory of negligence, concluding that they confirmed his hypothesis that the “dominant function of the fault system [was] to enervate rules of liability that if followed will bring about . . . the efficient—the cost-justified—level of accidents and safety.” Richard Posner, *ECONOMIC ANALYSIS OF LAW* 33 (1973). It was not significant to Judge Posner that the courts did not speak in terms of efficiency, because in his view, the true grounds of decision are often concealed, rather than illuminated by the characteristic rhetoric of judicial opinions. *Id.* at 18.

²⁰⁴ Jon D. Hanson & Melissa R. Hart, *Law and Economics*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 311 (Dennis Patterson ed., 1996).

²⁰⁵ It seems that today’s legal economists most commonly inquire into the effects of different policies (the first positive issue) and recommend reforms in light of those effects (the second normative issue). Hanson & Hart, *supra* note 204, at 312.

²⁰⁶ LIONEL ROBBINS, *AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE* 1–2, 16 (1932).

they produce an efficient result. This is a request that society cannot indulge without some hesitation, for efficiency is an ambiguous concept; it cannot be determined apart from its situational context.²⁰⁷ Although common terms are used with facility in the economics literature, there is yet no universality, since markets, which economics strive to assess, are subjective. As such, they are determined and must be evaluated through interpretative and representational techniques, which include references to many non-economic considerations, such as the humanities, ethics, culture, community, and aesthetics.²⁰⁸ This means that the analysis derived from economic theory is contested as market transactions are constrained and influenced by an individual's experiences, position and frame of reference within the community.²⁰⁹ The imperatives of cultural references in turn means that notwithstanding the cogency of the economics of the housing market—its components, barriers to entry, pricing—economics cannot obviate the burden of exercising our normative judgments about the effects (on availability, costs, and condition) of the choices made in the market.²¹⁰

Equally concerning about the application of economic theory to resolve legal issues is the centrality of the rational actor, by which the merits of all market transactions are measured. Economic theory posits that the rational actor, who with all else being equal, will chose that course that will maximize his gain or profit and that course is the one that is the most efficient. Economic analysis presumes the capacity to determine the different importance that individuals ascribe to different things and arranges them in a certain order.²¹¹ But, underneath the dogma, there are a host of improbable assumptions, only through which a market actor, rational in guise, but fictional in import, emerges.²¹² Indeed, observers of human nature see that

²⁰⁷ ROBIN PAUL MALLOY, *LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING* 59 (2004). Professor Malloy makes that law and markets can be profitably analyzed in relation to on another; that legal reasoning in market transactions cases should be informed not only by regard for what he believes is the ambiguous concept of efficiency, but equally by normative views that are guided by considerations of ethics and culture. *Id.* at 56, 64.

²⁰⁸ *Id.* at 59, 60–61.

²⁰⁹ *Id.* at 30.

²¹⁰ *Id.* at 100.

²¹¹ James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 *LAW AND HIST. REV.* 275, 289 (1997).

²¹² ROBBINS, *supra* note 206, at 75–78. Economic analysis rests upon a series of assumptions, some contested, some not. ROBBINS, *supra* note 206, at 77. They include that the parties are rational, pursuing consistent ends by efficient means and are perfectly informed of the costs involved; transaction costs are zero or low; both parties are risk neutral, that is, they care only about the expected value of an option; the expected value of a risky situation is the absolute magnitude of the risk, should it occur, multiplied by the probability that it will occur (as distinguished from risk averse persons who care not only about the expected value, but also about the absolute magnitude of the risk); the parties know the legal rules. ROBBINS, *supra* note 206, at 87–89. The extent to which these assumptions affect the economic models

many actors are not rational in their choices, that is, some act or refuse to act out of sentiment, both good (sympathy) and bad (spite), and that most are narrowly and ruthlessly self-interested and would chose that course offering the greatest prospect for gain, even if others are harmed in the wake of the pursuit of self-aggrandizement.²¹³ This self-interested actor stands in stark contrast to the fictional rational, efficiency-seeking actor admired in economic theory.

The landlord at common law more resembled the self-interested actor as he sought maximum profits, by putting all the risks of harm onto the tenant and the law had long enabled him to do so by the no-repair rule. It is only by imposing a duty to repair that the landlord became a rational, efficiency-seeking actor.²¹⁴ The better-maintained premises could command a higher rent. But, if the landlord's liability for failing to perform this duty is limited to the diminution in value to the tenant, an amount that is likely to fall well short of the cost of paying for injury to the tenant, the rational, efficient-seeking landlord once again becomes the self-interested actor.²¹⁵

depend variously upon their degree of plausibility and relevance. ROBBINS, *supra* note 206, at 93. *See also* Hackney, *supra* note 211, at 289.

²¹³ Indeed, this seems to be a defining principle of macroeconomics, the law of supply and demand; prices rise in tandem with demand and not any changes in the intrinsic quality of the goods offered for sale. Consider instances of price gouging after major weather events. For critiques of the rational actor theory, *see* RICHARD BARNES, PROPERTY RIGHTS AND NATURAL RESOURCES 44–46 (2009).

²¹⁴ Where the entitlement is placed affects transactions costs. If the onus of repairing is on the landlord, he need not coordinate with other parties (except to give notice as to when repairs will be undertaken) and thus will choose the least costly method. On the other side of this dynamic is that transactions costs (e.g., holdouts) can result in inefficient choices, wasting scarce resources and causing a divergence between self-interest and public interest.

²¹⁵ The urban landlord and tenant dilemma fits neatly within Ronald Coase's classic paradigm, the farmer and the rancher. *See* Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2 (1960). The rancher and the farmer are on neighboring properties; and as the size of the cattle herd is increased, so is the damage to the farmer's crops. *Id.* at 2–3. On the premise that transactions costs are zero, Coase concluded that costs would be internalized and production maximized. *Id.* at 3. This was so under two relevant legal regimes: liability for crop damage and no liability for crop damage. *Id.* at 5–8. Under the regime of liability, the rancher would not necessarily forgo additional cattle production in order to avoid liability but would add cattle as long as the liability costs were not greater than the additional value of production. *Id.* at 5–6. Coase concluded that an efficient, social wealth maximizing, production allocation would result if the court were to simply assign property rights. *Id.* at 7. He theorized that regardless of who has the legal right, they will bargain to the most efficient result. *Id.* at 8. That is, the party with the right will accept an amount at least as large as the injury she would otherwise suffer to permit the other party to continue with his wrongful conduct. *Id.* at 7. At the same time, the other party, in order to continue with his wrongful conduct, will pay the party with the right an amount up to his opportunity costs in ceasing the wrongful conduct. *Id.* If the liability costs (what the party with the right would demand) are greater than opportunity costs (what the other party would forego by altering his conduct and under which would offer to pay some amount), then the other party will pursue the course involving the lower cost, that is, avoiding liability in the first place to the other party with the right. *Id.*

On the other side of the landlord-tenant dynamic, is the self-interested tenant, who seeks a decent dwelling at the lowest cost. The rational tenant may make a calculated decision to forego improvements in the quality of the premises if the costs of decent housing leave little or no money for food, clothing and other necessities of life. This decision cannot be characterized as one being made by a rational actor, but one who acts out of economic duress. If the latter, then the decision cannot be regarded as efficient, much less, socially desirable under a normative review, which as I stated earlier, must accompany any economics analysis.

Placing the burden of repair on the landlord will not relieve the tenant of all responsibility in the care and safeguard of the premises. If the cost of avoiding destructive conduct in the premises and of giving notice to the landlord of defects is less than the injury that would be suffered by an unrepaired defect and the risks that the landlord may not have funds or insurance to compensate him for injuries, the tenant will act responsibly and give notice of defects when they first are noticed and usually less costly to repair. In other words, *ex-ante* precautions may be superior to *ex-post* liability or injury. To put liability upon a landlord for injuries only when he fails to act reasonably under all the circumstances, including requiring knowledge of dangerous conditions, will put the onus on the tenant to alert the landlord to defects.²¹⁶ This makes sense if we accept that the rational tenant would opt not for recovery of monetary damages after an injury, but a safe dwelling throughout the tenure.

On the second inquiry, that is, how should the law be reformed to accomplish the end of efficient results, I say that a rule imposing tort liability on landlord for failing to use reasonable care to maintain the premises in a safe condition is required. There are existing references already in the law to support this position, particular Judge Learned Hand's famous formulation of the negligence standard in *United States v. Carroll Towing Co.*²¹⁷ A

In the landlord-tenant context, if the cost of routine maintenance is less than the cost of a personal injury judgment, the landlord will provide regular maintenance. In this instance, the landlord will also seek to spread the burden of any liability by monitoring the tenant's behavior as well as by contracting for insurance, which by transforming a potential loss of some absolute amount into premiums equal to the expected value of the loss, allows the insured to behave as if he was risk neutral. The big difference in the landlord tenant context is that transactions costs are not zero and the odds of the parties bargaining over rights are as fictional as the rational, efficiency-seeking landlord. While this qualification seems to severely undercut the predictive value of the Coase Theorem, it is nonetheless an important way of organizing legal reasoning and argument based upon references to externalities and transactions costs.

²¹⁶ "In negligence, we evaluate the degree of one's negligence not by an isolated review of conduct, but with reference to a community standard and an expectation of reasonable care." MALLOY, *supra* note 207, at 229. Similarly, in contract, "we interpret the terms of an agreement with reference to industry standards, course of dealing, and reasonable community expectations." *Id.*

²¹⁷ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). There, the defendant, Carroll Towing Co., was readjusting a loose line of barges moored in New York

defendant should be deemed negligent and the plaintiff partly culpable, whenever the cost to the party of preventing an accident is less than the expected cost of the accident.²¹⁸ If the burden (B) is less than probability of an accident occurring times the extent of the projected harm (PL), then the additional or marginal investment in accident prevention will have positive net returns in terms of a marginal reduction in expected accident costs.²¹⁹ By holding a party liable for whom the burden is less than PL, the law will encourage efficient investments in accident prevention, that is, the law will induce parties to internalize their externalities.²²⁰

Much of law can be understood as an attempt to compel individuals to take into account externalities. Society as a whole is better off, in economic and psychic terms when people behave in ways that avoid or at least minimize harm from accidents.²²¹ Treating landlords as the rational, efficiency actor and exposing them to tort liability when they do not internalize externalities is the normatively efficient rule that will prevent accidents and lead to safe dwellings. The rational actor will respond to incentives and disincentives—fines, penalties, damages—which will be considered in making rational decisions.²²² A legal rule that requires specific conduct and that carries clear consequences, if normatively accepted, will result in predictable responses when people act rationally.²²³

harbor. *Id.* at 171. One of the barges, the Anna C, broke loose and crashed into a tanker. *Id.* The tanker's propeller damaged the hull of the Anna C, and she sank. *Id.* The plaintiff, the owner of the Anna C sued Carroll Towing Co., for damages. *Id.* The question before the court was whether the tug owner, who had been deemed negligent at trial, could avoid paying the damages to the owner of the Anna C. *Id.* The defendant argued that the barge owner was partially to blame for the accident because he failed to keep a bargee on board. *Carroll Towing Co.*, 159 F.2d at 171. Judge Learned Hand agreed. *Id.* at 172.

²¹⁸ Judge Hand devised a pithy algebraic formulation for this conclusion: the probability of the accident occurring (P); the gravity of the resulting loss or injury if an accident occurs (L); and the burden of precautions adequate to avert the accident (B). *Id.* at 173. He found that the barge owner was contributorily negligent because the cost of leaving a bargee on the barge (B) was less than the probability of a loss (P), times the severity of the loss (L). *Id.* at 173–74.

²¹⁹ *Id.*

²²⁰ Externalities are costs that an actor's actions impose on others but does not consider in the calculation of his costs of acting. See BARNES, *supra* note 213, at 42.

²²¹ *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1118 (N.J. 1993) (holding that real estate brokers have a duty to warn prospective purchasers of hazards known and revealed by reasonable inspection undertaken for purposes of the open house). “Whether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk the opportunity and ability to exercise care, and the public interest in the proposed solution.” *Id.* at 1115.

²²² MALLOY, *supra* note 207, at 145.

²²³ *Id.*

B. Fictions that Impede Change

While fictions normally operate to advance the law, old conceptions can frustrate change when they continue to be employed indiscriminately even after they have strayed far from their original mission. That is the case in the landlord-tenant context where the anticipated benefits from the movement from property to contract is frustrated by the ancient conception of contract as being tied to economic losses alone. Accordingly, courts that deny recovery for personal injury from a breach of the implied warranty of habitability, focus on the “warranty” part of that duty to repair, relying upon what is asserted as essential differences between contract and tort; that remedies for contract aim to ensure the non-breaching party the benefit of his bargain to compensate for economic losses, that consequential damages involving injury to person or property are generally not within the contemplation of the parties at contracting.²²⁴ The economic loss rule prevents a party from claiming economic damages in a negligence claim absent physical property damage or bodily injury.²²⁵ Economic damages are damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss or profits—without any claim of personal injury or damage to other property.²²⁶ The general idea behind the doctrine is to prevent dissatisfied buyers from using tort law to recover losses that were or should have been protected against through contract law.²²⁷

The economic loss rule loses credibility by the convergence of contracts and torts. Though nominally distinct, they have a common history and share many current functions, such that the boundaries between these two areas have long-since blurred.²²⁸ Indeed, contract arose out of tort—the ancient cause of action of *assumpsit*, which was derived from the medieval notion of liability,²²⁹ based upon the idea that the failure to perform a

²²⁴ *Scandia Assocs., Inc.*, 717 N.E.2d at 32 (in the case of implied, as opposed to, express warranty).

²²⁵ *Radarowicz v. Ohlendorf*, 441 N.E. 2d 324, 327 (Ill. 1982); *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536–37 (Fl. 2004); *BRW, Inc. v. Difficy & Sons, Inc.*, 99 P. 3d 66, 72 (Colo. 2004).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See generally Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 417 (2010); *Howard ex rel. McIntyre v. Phila. Hous. Auth.*, 816 A.2d 1204, 1211–12 (Pa. Commw. Ct. 2003); *Beese v. Nat’l Bank of Albany Park*, 403 N.E.2d 595, 599 (Ill. Ct. App. 1980) (refusing damages for personal injury due to the “economic and social consequences” involved).

²²⁹ If one undertook to perform an act, but performed it poorly, then the one who relied upon the undertaking and suffered damage at the hands of the other could recover for those injuries. THEODORE F.T. PLUNKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 638–39 (5th ed. 1956). A breach of promise was viewed as a form of deceit—a tort. The first part of the cause of action was an allegation that defendant undertook to do something—the predicate for the deception, but that the undertaking was performed badly, in which case, the plaintiff brought an action in trespass on the case (a claim based on a narrative of special facts and

promise was a form of deceit.²³⁰ In other words, when the common lawyers sought relief for their clients who had been wronged, but not through force and violence, which was required for a trespass action, they devised “trespass on the case,” a form of trespass under special circumstances. The vehicle became more or less an empty vessel for all sorts of relief, eventually leading to assumpsit, which in time transmogrified into contract.²³¹

Modern contract and tort law differ only on a fundamental level in the sense that in contract, one willingly undertakes an obligation to perform in a certain way, whereas in tort, the law requires an actor to behave in a way so as to avoid injury to another to whom the actor owes a duty or those to whom injury from the actor’s conduct is foreseeable.²³² Tort liability focuses at first upon the actor. Is she engaged in an activity likely to cause harm? Is the harm to the plaintiff foreseeable? If so, the actor has a duty to use reasonable care. The template fits exactly the landlord-tenant relation. The landlord is an actor, providing premises for the tenant. It is foreseeable that the act of permitting an un-inhabitable condition to exist is likely to cause harm, unless the landlord exercised reasonable care.

Even though the law made distinctions between types of recovery—under the theory of tort, for injury to person or property²³³ and contract, for reliance interest and economic losses,²³⁴ at bottom, the aim of awarding “damages, whether it is for breach of contract or for a tort, is so far as possible, to put the victim where he would have been if the breach or tort had not taken place.”²³⁵

The line between contract and tort blurs even more where the state has chosen to regulate the relation between the parties by imposing obligations. This intervention was based upon the recognition that because housing markets do not lend themselves to conditions of perfect competition, the law of landlord-tenant relations could not be left to operate under market forces alone.²³⁶ The barriers to entry are formidable; the persistent mismatch

circumstances) for deceit caused by the failure to perform the undertaking. *Id.* at 372–73. Professor Plunknett states that “While the relation might have been fundamentally contract, yet, it was being forced into the form of tort simply because the action of covenant could only be brought upon a deed under seal.” *Id.* at 638. He explains further, “But it must not be imagined that this is the story of the slow dawn of the idea of contract in the minds of common lawyers. They knew quite well what a covenant was, but they deliberately resorted to this juggling with trespass because they felt unable to sustain an action of covenant without a deed.” *Id.*

²³⁰ *See id.*

²³¹ PLUNKNETT, *supra* note 229.

²³² Lonegrass, *supra* note 228, at 414.

²³³ *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 5–6 (5th ed.1984).

²³⁴ *See id.*

²³⁵ Chronister Oil Co. v. Unocal Ref. & Mktg., 34 F.3d 462, 464 (7th Cir. 1994).

²³⁶ *See* Rabin, *supra* note 2 at 517–20, 540–49 (describing the conditions urging the revolution in landlord-tenant law, including persistent shortages and obstacles to new construction).

between availability and demand are urged by changes in the economy at large;²³⁷ and the complexity of housing development precludes quick responses.²³⁸ Where true market conditions are out of sync with the theoretical model, then governmental intervention becomes necessary to facilitate the coordination of public and private interests. Thus, if the aim of the regulation involves more than simply ensuring the bargain, but in the case of landlord-tenant, to insure safe and decent housing as the state determines, then relegating parties to traditional contract remedies nullifies the corrective mission of the regulation.²³⁹ In the landlord-tenant context, it really should not matter whether the landlord is liable because he failed to fulfill his warranty duties or is otherwise negligent, so long as the tenant's injuries can be traced somehow to the landlord's failure to fulfill a duty, which if it had been performed would have avoided the injury.

Recently, the Massachusetts Supreme Judicial Court in *Scott v. Garfield* has forthrightly recognized the tort aspects of the warranty.²⁴⁰ The court explained that the implied warranty of habitability as it had developed in its decisions was a “multi-faceted legal concept that encompasses contract and tort principles, as well as the state building and sanitary codes.”²⁴¹ Although the warranty itself arises from the residential leasing contract between landlord and tenant, the court has imposed a legal duty on the landlord, in the form of an implied agreement, to ensure that the dwelling complied with state building and sanitary codes throughout the lease.²⁴² At the same time, the warranty sounds in tort as a tenant may recover damages for personal injuries caused by a breach of the warranty.²⁴³

²³⁷ See Bruce A. Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor*, 80 YALE L.J. 1093, 1102–06 (1971) (describing market disequilibrium leading to need for intervention).

²³⁸ Rabin, *supra* note 2, at 558–62.

²³⁹ The other concern reflected in courts' reluctance to find tort liability for breach of warranty, pertained to the standard for determining liability: strict liability or negligence. Liability for breach of contract is imposed in the absence of fault, whereas liability in negligence requires a failure to act as a reasonable person under the circumstances, i.e., it requires not simply that harm resulted, but that the harm came from the failure of the actor to use care to avert foreseeable injury. By imposing liability on landlords only upon a finding of fault as in all negligence cases, the concern is eliminated.

²⁴⁰ *Scott v. Garfield*, 912 N.E.2d 1000, 1005 (Mass. 2009); see also *Whetzel v. Jess Fisher Mgt. Co.*, 282 F.2d 943, 946 (D.C. 1960) (finding housing regulations to create legal rights and duties enforceable in tort by private parties).

²⁴¹ *Scott*, 912 N.E.2d at 1005

²⁴² *Id.* (citing *Crowell v. McCaffrey*, 386 N.E.2d 1256, 1261 (Mass. 1979)); *Doer v. New Bedford Hous. Auth.*, 630 N.E.2d 248, 253 (Mass. 1994) (minimum standards of warranty of habitability measured by applicable state building and sanitary codes); *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973) (“This warranty (insofar as it is based on the State Sanitary Code and local health regulations) cannot be waived by any provision in the lease or rental agreement.”).

²⁴³ *Id.* (citing *Crowell*, 386 N.E.2d at 1261); see, e.g., *Henderson v. W.C. Haas Realty Mgt.*, 561 S.W.2d 382 (Mo. Ct. App. 1977); *Dwyer v. Skyline Apts., Inc.*, 301 A.2d 463 (N.J. Super. Ct. 1973), *aff'd*, 311 A.2d 1 (N.J. 1973); *Rivera v. Selfon Home Repairs &*

The Restatement takes the position that breach of a warranty of habitability may expose the landlord to tort liability in negligence. It states that a landlord is subject to tort liability if the landlord fails to exercise reasonable care to repair a dangerous condition located on the leased premises, if the existence of the dangerous condition violates an implied warranty of habitability, and if the tenant, or someone on the premises with the tenant's permission, is thereby harmed.²⁴⁴ In advocating this position, a reporter's note to the Restatement states:

Once it has become socially and judicially accepted that the implied warranty of habitability imposes a duty on the landlord to provide his tenant with housing which does not subject the tenant to unreasonable danger of harm, it will be difficult to insulate the landlord from tort liability when his failure to meet his duty results in injury to the tenant or one on the leased property with his consent. It would be disconcerting if the tenant who fell through the rotten floor of his kitchen could withhold rent until the hole was repaired, but could not recover for the personal injury he had sustained. The tort liability of the landlord in this situation serves the deterrent, compensatory, and loss distribution functions of tort law.²⁴⁵

Imp. Co., 439 A.2d 739 (Pa. Super. 1982); *see also* Antwaun A. v. Heritage Mutual Ins., 596 N.W.2d 456, 468 (Wis. 1999) ("A tenant's claim for breach of the implied warranty of habitability is a breach of contract claim for contractual damages. An injured parties' claim for personal injuries is a tort claim in negligence for compensatory damages. Such claims may coexist, they may be caused by the same act, and they may be owned by the same party if it is the tenant who was injured. It is not the breach of warranty, however, that gives rise to the cause of action for the personal injury. Instead, it is the negligent act or omission."). While the court had earlier found that where a tenant seeks to recover for economic loss under the warranty of habitability, the applicable standard is one of strict liability, rather than negligence, which would require that the landlord have notice of the defect, it determined that it had left open the question whether, when a tenant seeks to recover for personal injuries caused by a breach of warranty, the standard is one of negligence. *Berman & Sons v. Jefferson*, 396 N.E.2d 981, 983–86 (Mass. 1979).

²⁴⁴ RESTATEMENT (SECOND) OF PROPERTY, LAND, & TEN. §17.6 (1977).

A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:

- (1) an implied warranty of habitability; or
- (2) a duty created by statute or administrative regulation.

Id. The term "physical harm" contained in § 17.6 has been interpreted to include harm to land and chattels as well as harm to the person. RESTATEMENT (SECOND) OF TORTS § 7.3 (1965).

²⁴⁵ RESTATEMENT (SECOND) OF PROPERTY § 17.6, Reporter's Note 8 (1977).

On the same plane is the Uniform Commercial Code. It expresses the policy that merely compensating a plaintiff for the lost value of the product may not make the plaintiff whole, but that in some cases, additional—consequential—damages may be in order. Section 2-715(2) defines consequential damages to include:

- a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- b) any injury to person or property proximately resulting from any breach of warranty.²⁴⁶

The Restatement and the UCC get it right, by seeing the underlying objectives of the rules and that they can only be fulfilled if recovery is not limited to economic losses alone.²⁴⁷

V. A NEW PROPERTY RIGHT IN TENANT ENFORCED BY A PROPERTY RULE

The use of a legal fiction creates the illusion that nothing has changed, when in fact, the world is spinning; a transformation has occurred. Fictions ask not only that we suspend belief that a change has occurred, but also that we accept a new concept. The natural human tendency is to resist change, for it is destabilizing; unknown, untested, portends evil. One defense to change at least in property law was the *numerus clausus* principle.²⁴⁸ But, it was not the fear of evil that led to the *numerus clausus* principle, but rather the effects of change. If things change, new things must be learned, new cautions adopted and new forms invented. *Numerus clausus* thus has drawn lines around the *categories* of property interests—the fee simple, the life estate, the lease, although not around the more physical aspects or characteristics of *ownership rights*.²⁴⁹ The latter can be limited, carved up

²⁴⁶ U.C.C. § 2-715 (1977). See *Ford Motor Co. v. Reid*, 465 S.W.2d 80, 84–85 (Ariz. 1971) (discussing expanded damage recovery); *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116, 1119 (Okla. 1978) (recovery for personal injuries despite contractual limitation on remedies); see also Robert J. Williams, *Getting What You Bargained For: How Courts Might Provide a Coherent Basis for Damages That Arise When Remedies Fail of Their Essential Purposes*, 5 VA. L & BUS. REV. 131, 142–43 (2010) (discussing the tension between freedom of contract and unconscionability when parties purport to limit remedies for breach of contract).

²⁴⁷ *Beacon Residential Cmty. Ass'n. v. Skidmore, Owings & Merrill LLP*, 327 P.3d 850, 859 (Cal. 2014) (architects not in privity with unit owners, owe a duty of care and can be liable for negligent design).

²⁴⁸ Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3–4 (2000).

²⁴⁹ See *id.*

and consumed in an almost unlimited number of ways.²⁵⁰ Over the centuries, the attributes and advantages of ownership have expanded and contracted in response to living conditions, environmental concerns, as well as evolving notions of fairness. In the landlord-tenant context, an owner lacks the right to exclude prospective purchasers and renters based upon handicap or race.²⁵¹ An owner may not rent a space smaller than 400 square feet without compliance with building and housing codes.²⁵² An owner may not charge rent above a level set by the government. On the other side of each of these limitations is a correlative right in the tenant.

With the implied warranty of habitability, the legislatures and courts have created a new property right in the tenant—to be free of hazardous conditions—while simultaneously contracting the landlord’s right—to lease property in “as is” condition. As an owner has the duty to repair, the tenant has the right to habitable and safe dwelling.

Though of only relatively recent origin, few doubt that this right goes to the essence of the tenancy, as much as the right to exclusive possession of the premises for the term. Resort to public law to confer this right was necessary because it was unlikely that the parties would have bargained for this allocation—the transaction costs and unequal positions of the parties are too great to overcome.²⁵³ The question remains as to how should the tenants’ new right to a habitable dwelling be enforced or protected. Most courts and statutes afford a tenant affirmative relief—right to compel repair, the right to withhold rent, and most allow recovery for personal injury where the conditions lead to injury—essentially by applying a *property rule*.²⁵⁴ But the no tort liability rule, still embraced by a few courts and which was not disavowed by the URLTA is essentially the enforcement of the right by a *liability rule*. The conventional view on liability rules is that they are the best that can be done under the circumstances.²⁵⁵ The landlord-tenant scenario falls far outside the normal context in which a liability rule is thought appropriate, that is, where transactions costs are high because there are many parties interested in the dispute, among which are potential

²⁵⁰ An owner can give another the right to pick apples, to put up a billboard, to graze cattle, all the while retaining ownership in fee.

²⁵¹ Fair Housing Act of 1968, 42 U.S.C. §§ 3601, 3604.

²⁵² This has historically been the case in New York City, though the current trend is toward amending this standard to allow for smaller, so-called “micro” apartments. See Natalie Shutler, *Home Shrunken Home: New York’s First Micro-Apartments, Prefabricated in Brooklyn*, N.Y. TIMES (Feb. 20, 2015), available at <http://www.nytimes.com/2015/02/22/realestate/micro-apartments-tiny-homes-prefabricated-in-brooklyn.html>.

²⁵³ It is the reality of inequality of bargaining position, that forbids a tenant from waiver the right to a habitable premises. *Hilder*, 478 A.2d at 208; N.Y. REAL PROP. LAW § 235-b.

²⁵⁴ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1109–10 (1972).

²⁵⁵ James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 457 (1995).

holdouts and free riders.²⁵⁶ Although the only transaction cost appearing in the landlord-tenant context is the burden of acquiring information (about the existence of hazards, their severity, costs of repair) by the tenant, there are more compelling reasons why a liability rule is not the best. Liability rules aim to award objective damages,²⁵⁷ which by their nature will often fail to come close to fully compensating the value of the right lost. This is because value is not a monolithic concept, but is as contested and contextual as efficiency.²⁵⁸ The value of property must have reference to its owner's and the community's expectation of deriving a benefit—whether economic or psychic. To the urban residential tenant, that value includes not only the value of a decent, habitable place to live, but freedom from injury as a consequence of the infringement of that right by the landlord's failure to repair. Such value can only be assessed, after an injury has occurred, too late to achieve the end of recognizing that right to start with. Only by assigning to a tenant *ex ante*, the right to recover for all losses, including from the consequences that occur *ex post* from the landlord's infringement of that right as part of the right to repair, will the goal of safe and decent rental housing be achieved.²⁵⁹

VI. CONCLUSION

The social and political facts that emerged prompting the “revolution” in landlord-tenant law was the recognition that housing was a basic need, and many seeking it were made vulnerable by their impoverished condition. Observers also realized that dilapidated housing was a social evil that could not be confined successfully to the areas where the poor housing was found. Also emerging throughout the legal and political system was the firm conviction that law should serve human values. As Professor Glendon pointed out, there came a marked shift from private law to public law and this was occurring throughout our legal system.²⁶⁰ Merchants were subject to implied warranties; home builders warranted the quality of construction; and

²⁵⁶ Even so, the usual mantra is that a liability rule may not be appropriate where these conditions do not exist.

²⁵⁷ Krier & Schwab, *supra* note 255, at 457–58.

²⁵⁸ In sales transactions, fair market value is determined in a number of ways, including comparable sales, which depends on the relative value of property similarly situated and appointed.

²⁵⁹ James Carter so aptly described the relationship between law and custom: Law, Custom, Conduct, Life—different names for almost the same thing—true names for different aspects of the same thing—are so inseparably blended together that one cannot be thought of without the other. No improvement can be effected in one without improving the other, and no retrogressing can take place in one without a corresponding decline in the other.

JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN, GROWTH, & FUNCTION* 320 (2d ed. 1974).

²⁶⁰ Glendon, *supra* note 6 and accompanying text.

sellers were obligated to make disclosures about the condition of the premises. While the differences between property law and contract law largely remained, the law stepped in to ameliorate the harsh contract relation with implied covenants—of good faith and fair dealing²⁶¹—and unconscionability.²⁶² In property, the law moved from Blackstone’s despotic dominion, to limits on taking down trees,²⁶³ curtailments of the right to exclude where larger public policy loomed,²⁶⁴ and the prohibition against discrimination based upon race or handicap.²⁶⁵ There came a time during the revolution when courts, determined that in fulfilling their traditional roles as defenders of justice, they needed to break with the past and announce a new rule.²⁶⁶

Beginning in the 19th century and continuing in the 20th, law came to assume a more functional attitude, that it must serve some purpose other than maintaining order;²⁶⁷ that is, the rules or laws chosen to be applied by judges should be a means to an end, purposive instruments, embodying value choices. Whether that end is efficiency or distributive justice,²⁶⁸ the imperatives are the same. To say that clinging to the no tort liability is medieval is to disserve the courts and lawyers of that time.²⁶⁹

The promulgation of the URLTA, although it only embraced, and did not start the “revolution” in landlord-tenant law, was yet momentous. Its aim to consolidate and bring coherence to the seemingly disparate changes occurring nationwide is surely to be lauded.²⁷⁰ Perhaps that was the problem. Rather than setting out to create a new regime of landlord-tenant relations, it

²⁶¹ *Erk v. Moran*, 901 N.E.2d 187, 190–91 (N.Y. 2008).

²⁶² *Williams v. Walker-Thomas*, 198 A.2d 914, 916 (D.C. 1964).

²⁶³ *New Jersey Builders Ass’n v. Twp. of Jackson*, 970 A.2d 992 (N.J. 2009).

²⁶⁴ *State v. Shack*, 277 A.2d 369, 371–72 (N.J. 1971).

²⁶⁵ Fair Housing Act of 1968, 42 U.S.C. §§ 3601, 3604.

²⁶⁶ *Sargent*, 308 A.2d at 528; *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977); *Kendall v. Pestana*, 709 P.2d 837 (Cal. 1985); *Javins*, 428 F.2d at 1071; *Tristram’s Landing v. Wait*, 327 N.E.2d 727 (Mass. 1975); *Davis*, 480 So. 2d 625.

²⁶⁷ Jürgen Habermas, *Between Facts and Norms: An Author’s Reflections*, 76 DENVER L. REV. 937, 937 (1999).

²⁶⁸ RAWLS, A THEORY OF JUSTICE 11–15 (1971) (conceiving justice as fairness in treatment and in the allocation of social benefits).

²⁶⁹ In *Javins*, the court expressed its view that it was the duty of courts to reappraise old doctrines in light of the facts and values of contemporary life—particularly old common law doctrine which the courts themselves created and developed. *Javins*, 478 F.2d at 1074. In a letter to Professor Rabin, Judge J. Skelly Wright, who authored the *Javins* opinion, stated that:

Obviously, judges cannot be unaware of what all people, know and feel. . . . I was indeed influenced by the facts that, during the nationwide racial turmoil of the sixties. . . . There is no doubt in my mind that these conditions played a subconscious role in influencing my landlord-tenant decisions. . . . I didn’t like what I saw, and did what I could to ameliorate, if not eliminate, the injustice involved in the way many poor were required to live in the nation’s capital.

Rabin, *supra* note 2, at 180.

²⁷⁰ See discussion *supra* Parts I & II.

focused too narrowly on correcting what was perceived as the then most pressing concern. There are as I have pointed out, many good reasons for avoiding a complete overhaul of law.²⁷¹ Nonetheless, the reasons offered for continuing to adhere to the common law no tort liability are not at all convincing.²⁷² Surely, that because it has always been the rule is not a good reason and landlords could not have missed the revolution—it was too pervasive. While fictions make law malleable, allowing sensible responses under the semblance of stability, sometimes resort to them deserves the ends of a coherent and sensible legal order. A forthright movement would serve us better.

²⁷¹ See discussion *supra* Parts I & II.

²⁷² See discussion *supra* Parts I & II.