FORGOTTEN LESSONS FROM THE COMMON LAW, THE UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT, AND THE HOLDOVER TENANT

Property law contains some rules that have been around for centuries and others that have just been created. It is an evolving subject. Moreover, there is a fair amount of disagreement among the states on how to adjudicate property disputes. These differences in approach arise partly because property law protects multiple, conflicting goals and values and states have differences of opinion on how to resolve those conflicts.[1]

INTRODUCTION

With ancient concepts such as seisin and escheat,[2] and relatively recent innovations like the implied warranty of habitability,[3] property law is both old and new. Within this hodgepodge, disputes arise and interests clash. New rules are fashioned from time to time to displace the old in an attempt to better balance those competing interests. This interplay is particularly apt in the holdover-tenant situation. The holdover rule, long recognized at common law, imposes a harsh penalty on the unwary tenant.[4] It gives a landlord a unilateral election to treat a tenant who remains on the premises after the expiration of the lease as a trespasser, or, alternatively, to consent to the continued occupancy and hold the tenant to a new term.[5] Importantly, this election often is available regardless of whether the tenant consents.[6] Here is a prime situation in which various interests face off: a landlord has an interest in securing any rental income potentially disrupted by the holdover tenant, an incoming tenant seeks assurance that the property will be available at the start of the lease, and the tenant

1. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 1.3.1, at 9 (2001).

2. For seisen, see infra notes 38, 41. Escheat, a concept long identified at English common law, remains viable "in the United States in the sense that if a person dies intestate with no descending, ascending or collateral heirs, the property passes to the state." CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY § 7, at 20 n.5 (3d ed. 2002). For an American case applying the concept of escheat, see, for example, *In re O'Connor's Estate*, 252 N.W. 826 (Neb. 1934).

3. *See infra* notes 18–19 and accompanying text.

4. *See* ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 2:23, at 72 (1980) (suggesting that the severity of the sanction to the tenant outweighs the alleged benefits of the holdover rule).

5. 2 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 18.4, at 1232 (4th ed. 1997).

6. *Id.* at 1232–33; *see also infra* notes 97–108 and accompanying text.

remaining behind has an interest in not being subjected to an abnormally harsh penalty against his or her will.[7] Various rationales have been advanced for giving the landlord this choice, and various rules have been crafted to deal with this situation, each emphasizing different interests. Some favor certainty while others favor equity, and, consequently, dispute as to the best solution persists.

This Note examines the treatment of the holdover tenant in the residential setting and, specifically, the solution promulgated by the Uniform Residential Landlord and Tenant Act ("URLTA" or "the Act").[8] Drafted in 1972 by the National Conference of Commissioners on Uniform State Laws[9] in the midst of a "revolution" in landlord-tenant law,[10] URLTA was the flagship reform.[11] The Act, among other things, sought to free the landlord-tenant relationship from the antiquated common-law system and replace it with a matrix better suited to the modern-day residential lease.[12] A successful venture, URLTA has been adopted, in full or in part, by several states.[13] But while URLTA is largely salutary,[14] this Note contends that with respect to holdover tenancies, URLTA falls short. The Act's attempted solution to the holdover problem provides inadequate protection for tenants from overreaching landlords and, in practice, furthers no substantial interest other than the landlords' in having a continuous stream of rental income. Thus, I contend, the Act fails to fully embrace the spirit of the revolution in landlord-tenant law.

To fully appreciate URLTA's treatment of the holdover tenant, it is important to understand the setting in which it was drafted. Accordingly,

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7. *See* SCHOSHINSKI, *supra* note 4, at 72.

8. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, 7B U.L.A. 531 (2000) [hereinafter URLTA].

9. Richard E. Blumberg & Brian Quinn Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 3 n.5 (1976).

10. *See infra* notes 53–73 and accompanying text.

11. Among other things, a stated purpose of the Act was to unify residential landlord-tenant law. *See* URLTA § 1.102(b)(3). In this vein, URLTA codified several contemporary legal developments such as the implied warranty of habitability. *Id.* § 2.104 cmt.

12. Nat'l Conf. of Comm'rs on Unif. State Laws, A Few Facts About the Uniform Residential Landlord and Tenant Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urlta.asp (last visited Nov. 9, 2006). Indeed, one of the Act's stated purposes is "[t]o remove the landlord and tenant relationship from the constraints of property law and establish it on the basis of contract with all concomitant rights and remedies." *Id.*

13. *See id.*

14. Some commentators have criticized URLTA as being "only marginally effective, benefiting primarily middle-income tenants in the suburbs or the cities' better neighborhoods, while largely failing in the aim of helping the inner-city poor and upgrading the quality of slum housing." Samuel Jan Brakel & Donald M. McIntyre, *The Uniform Residential Landlord and Tenant Act (URLTA) in Operation: Two Reports*, 1980 AM. B. FOUND. RES. J. 555, 559 (1980).

Part I.A briefly traces the development of the landlord-tenant relationship through the landlord-tenant revolution in the late 1960s and early 1970s. In Part I.B, the common-law holdover rule is discussed, with various rationales advanced for it and some state attempts to solve the problem. Part I.C identifies the incoming tenant's interest in having the premises open and alternative views on the landlord's duty to deliver possession, as well as the special problems of the form lease. Next, Part D introduces URLTA and its various sections dealing with the holdover situation. Part II illustrates how landlords are able to undo those provisions to write in more favorable holdover provisions, and, additionally, how landlords' selective use of these provisions will not promote the holdover rule's goals and justifications. Part III is a proposal for change, with suggestions aimed at better capturing the spirit of the landlord-tenant revolution to protect tenants while balancing both parties' interests.

I. HISTORY

Shelter is fundamental, but for many the so-called American dream of owning a home is neither possible nor desirable, and, as such, the residential lease provides a popular alternative.[15] Given this prevalence, all states have extensive statutory and case law regulating the landlord-tenant relationship.[16] These laws can, much of the time, reasonably be characterized as pro-tenant.[17] A paradigmatic example is the implied warranty of habitability, which charges landlords with a nonwaivable obligation to maintain leased premises and gives tenants the right to withhold rent in the event of a landlord's delinquency.[18] All would agree that this rule is intended to benefit tenants.[19] Such a notion was unknown

15. *See* Debra Pankow, *To Buy or Rent? The Choice*, N.D. St. Univ. Extension Serv. Publ'n FE-241 1 (2002), *available at* http://www.ext.nodak.edu/extpubs/yf/fammgmt/fe241.pdf (identifying rising real estate prices and diminishing investment returns from home ownership). Leasing a home or apartment affords several advantages over purchasing, such as lower upfront and ongoing costs, fewer obligations regarding upkeep, and a more flexible length of term. *Id.* at 2–3.

16. *See, e.g.*, Legal Info. Inst., State Statutes by Topic, http://www.law.cornell.edu/topics/state_statutes3.html#property (last visited Mar. 4, 2006) (listing various state property codes).

17. *See* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521 (1984) (contending that almost all changes of the landlord-tenant-revolution era have favored the tenant).

18. *See* SINGER, *supra* note 1, § 10.1 at 411–14.

19. Some contend, however, that pro-tenant legal rules, such as the implied warranty of habitability, can negatively impact tenants—and exclude potential tenants—by increasing the cost of doing business and ultimately lead to higher rents. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 359 (1990). Others disagree. *See, e.g.*, Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1104–10 (1971) (suggesting that rents would not rise); Mark M. Hager,

at common law, where caveat emptor largely predominated.[20] But starting with a flood of reform in the late 1960s and early 1970s, tenants' legal protections substantially increased.[21] By recognizing that modern-day residential tenancies had little in common with the feudal tenancies that shaped this area of law and more in common with consumer transactions, courts and legislatures instilled some mutual dependence of lease covenants and also created certain minimum landlord obligations.[22] Moreover, these developments were considered radical because they effectively displaced centuries of common law in the course of a few decades—the wink of an eye in property law.[23] As one commentator described it, "The residential tenant, long the step child of the law, has now become its ward and darling."[24]

The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class, 41 AMER. U. L. REV. 7, 29 (1991) (responding to Posner's scenario and calling it "vastly oversimplistic").

20. *See generally infra* notes 55–72 and accompanying text.

21. SINGER, *supra* note 1, § 10.1 at 412.

22. Mary B. Spector, *Tenant's Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137–38 (2000).

23. *See* David M. Becker, *Eroding the Common Law Paradigm for Creation of Property Interests and the Hidden Costs of Law Reform*, 83 WASH. U. L.Q. 773, 774 n.1 (2005) ("[B]eginning approximately forty years ago, residential landlord-tenant law changed dramatically over a period of twenty years, and in terms of property history, this was the equivalent of an overnight revolution."); Christopher S. Brennan, Note, *The Next Step in the Evolution of the Implied Warranty of Habitability: Applying the Warranty to Condominiums*, 67 FORDHAM L. REV. 3041, 3048–49 (1999) ("The [implied warranty of habitability] merits such accolades primarily because it usurped ancient property concepts that had become entrenched in the English and American legal systems over hundreds of years."). However, the common-law system was in place for centuries, and some of those early traditions continue to shape and affect the landlord-tenant relationship today. *See* Spector, *supra* note 22, at 139 (identifying the ancient role of status and the procedural framework that developed to protect freeholders from conflicting ownership claims); *see also* DAVID S. HILL, LANDLORD AND TENANT LAW IN A NUTSHELL 3–4 (3d ed. 1995) (identifying the continued importance of classifying a lease as personal property with regard to intestate succession, taxation, and various liens).

24. Rabin, *supra* note 17, at 519. This unprecedented increase in tenants' rights is generally attributed to an attitudinal and doctrinal shift in approaching the landlord-tenant relationship—courts and legislatures moved away from reliance on ancient, common-law property concepts and moved toward reliance on contract-law concepts. *See* SINGER, *supra* note 1, § 10.1 at 412 ("The courts began a revolution in landlord/tenant law after several leading cases held that landlords had a contractual obligation to provide habitable housing. This implied obligation was based partly on reconceptualizing leaseholds as contractual relations and not just conveyances of real property."); *see also* URLTA § 1.102 cmt. ("Existing landlord-tenant law . . . is a product of English common law developed . . . at a time when doctrines of promissory contract were unrecognized . . . . These doctrines are inappropriate to modern urban conditions and inexpressive of the vital interests of the parties and the public which the law must protect.").

A. The Early Common Law and Development of the Modern Landlord-Tenant Relationship

The landlord-tenant relationship developed in the time of English feudal landholding when leases were primarily entered into for agricultural and commercial rather than residential purposes.[25] From the beginning, leases had a "hybrid legal identity," relying on both contract and property law,[26] but were initially dominated by property law concepts.[27] That is, the lease was viewed primarily as a conveyance. To the extent that early leases were contractual arrangements, the contract was deemed executed upon transfer of the premises.[28] Thus, the conveyance was emphasized,

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25. *See* Daniel E. Wenner, Note, *Renting in Collegetown*, 84 CORNELL L. REV. 543, 546 (1999). English feudalism dates back to the Norman Conquest in 1066. *See* 1 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 4.01, at 107 (David A. Thomas ed., 1994) ("[I]t can be shown that the eventual effect of the Norman Conquest was to achieve a considerable elaboration and uniformity of the real property laws governing the English and their Norman overlords."). *See generally id.* §§ 4.04(a)(2), 4.05(a). For a discussion of English landholding characteristics prior to the Norman Conquest, see *id.* §§ 2.02–3.06. Feudalism was largely a necessary response to the military reality of the times. *See generally* MOYNIHAN, *supra* note 2, at 4–5, 16–23. Feudalism describes a pyramidal system of land ownership with the king alone at the apex, and all land ownership originating in him. *See* MOYNIHAN, *supra* note 2, at 9; THOMPSON ON REAL PROPERTY, *supra*, at 132–33 (quoting Ann Williams, *The Land of the Conqueror*, *in* DOMESDAY: 900 YEARS OF ENGLAND'S NORMAN HERITAGE 47–78 (1986)) ("England belonged to [William] in a sense in which it had never belonged to any previous king. All landholders, lay and ecclesiastical, were his tenants and held of him; moreover, all who held land of the greater tenants were also the King's men and owed him allegiance."). Under this system the king granted land to lords who then granted land to lesser tenants, with each tenant owing obligations to their respective lord. *See* MOYNIHAN, *supra* note 2, at 9, stating as follows:

> Directly under [the king] were the tenants-in-chief; beneath these were tenants of lower social standing holding the smaller parcels into which an honour or barony was sub-divided. At the broad base were the peasants actually tilling the soil . . . . All persons having an intermediate place in this structure held the land in a dual capacity—they were tenants of those above them and lords . . . with respect to those holding under them.

See also Marta Wach, Note, *Withholding Consent to Alienate: If Your Landlord is in a Bad Mood, Can He Prevent You from Alienating Your Lease?*, 43 DUKE L.J. 671, 674 (1993). The nature of the services tenants provided to their lords had important social consequences. Not only did they establish "the [land]holder's rights in the land, [but] also determined the landholder's position—or status—within the social system." Spector, *supra* note 22, at 140. Thus, the more important the services rendered were deemed, the higher one's status. *Id.*; *see also* Wenner, *supra* note 25, at 546 ("The social structure of England developed around the land tenure in which a man's relationship to his land and to his lord defined his social position.").

26. *See* A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 250 (2d ed. 1986); Wach, *supra* note 25, at 676.

27. *See* Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 410–11 (2002) (discussing how the common-law "property approach focuses [on contract only to the extent] that a lease is a leasehold estate created by contract," as opposed to the modern-day "contract approach" which recognizes the ongoing obligations attendant to an executory contract).

28. *See* MOYNIHAN, *supra* note 2, at 78; Spector, *supra* note 22, at 145; Wach, *supra* note 25, at 677.

not what occurred later.[29] Coupled with the landlord's preferred position within the legal system, this often produced a hostile environment for tenants.

Contributing to the social hierarchy was the legal "principle of seisin, which not only embodied the modern conception of 'possession,' but also added elements of what today might be called 'title.'"[30] The feudal system developed a system of estates to catalogue various holdings in land—identified broadly as "freehold" and "nonfreehold" estates[31]—with the freeholds being those to which seisin attached,[32] and the nonfreeholds (also called leaseholds) being those to which no seisin attached.[33] A freeholder held a higher status than nonfreeholders and was afforded

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29. *See generally* SCHOSHINSKI, *supra* note 4, at 1–6. A corollary result is that a tenant dispossessed of the land by another had recourse only in an action for damages, not for recovery of possession. MOYNIHAN, *supra* note 2, at 77. This was thought to protect the tenants' economic interest in the land, as opposed to any interest in possession. *Id.* However, the continued spread of the agricultural lease led courts to eventually give tenants a remedy of ejectment to recover possession from a third party that had dispossessed them. *Id.* at 77–78 & n.4; *see also* Spector, *supra* note 22, at 148–49.

30. Spector, *supra* note 22, at 140. Generally, "[s]eisin is possession, but a peculiar possession—possession of land by a man holding a freehold estate therein. Thus, seisin is much more than possession—it is the basis of ownership in so far as the common law admits of ownership of land." MOYNIHAN, *supra* note 2, at 28. Seisin was such an important concept in feudal law that "[m]ost of that law concerned itself with seisin, remedies to recover seisin, and the consequences of loss of seisin." *Id.* at 26–27. For a general discussion of seisin, see *id.* at 27–32; C.F. KOLBERT & N.A.M. MACKAY, HISTORY OF SCOTS AND ENGLISH LAND LAW 227–37 (1977).

31. MOYNIHAN, *supra* note 2, at 33–34. Consistent with the importance of status and seisin, "[t]he word '*estate*' is of feudal origin and derived from the Latin word '*status*.'" *Id.* at 33. Central to the doctrine of estates is the idea that land ownership can be measured in periods of time. *Id.*; *cf.* Becker, *supra* note 23, at 778 ("Because ownership [of land] can be divided both in terms of time and possession, multiple interests can be created simultaneously.").

32. The freeholds include the "fee simple," "fee tail," and "life estate." *See* MOYNIHAN, *supra* note 2, at 33–75.

33. The leaseholds include the "estate for years," "periodic estate," and "estate at will." *Id.* at 76–77. A typical lease is either an estate for years, which is defined by a duration fixed in advance (for example, a lease for one year), or a periodic tenancy, which is characterized by having a certain period (for example, a month) with additional periods of equal duration unless terminated by the landlord or tenant. A third type of tenancy, the tenancy at will, is an estate terminable at any time by either party and generally arises when no agreement as to length of the term is reached and where the parties' intent as to duration cannot be implied (from, for example, a periodic rent payment). *See* SCHOSHINSKI, *supra* note 4, §§ 2.3–2.19. Note that in the case of a month-to-month lease, the tenancy does not end merely by lapse of time. A month-to-month lease generally requires notice to terminate of at least thirty days. *Id.* at 1228. An estate for years, however, will naturally terminate at the end of the term. JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW 20 (5th ed. 2003); *see also* Murray v. Cherrington, 99 Mass. 229, 230–31 (1868) ("The duration of a lease for years must be certain; this includes both its commencement and termination . . . . A leasehold interest for an uncertain and indefinite time is an estate at will only."). Because an estate at will is unlikely to be accompanied by the payment of rent, it is less likely to arise in commercial, residential, or agricultural leases. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 6.19 (3d ed. 2000).

protection in the courts against those who might try to take the land.[34] The absence of seisin in leaseholds, however, left early tenants largely without the protection of the courts.[35] The importance of seisin and the consequent discrepant treatment resulted from the differing roles played by each type of estate.[36] The freehold was a family estate, providing monetary sustenance and stability for a household,[37] but the leasehold, in contrast, developed primarily as an incident to monetary loans used to circumvent ecclesiastical prohibitions against charging interest.[38]

Moreover, as the lease historically emphasized conveyance of the right to possess the property, any covenants were only incidental to that primary purpose.[39] Having executed a lease, a landlord merely gave up possessory rights to the premises for the duration of the lease.[40] At this point, the tenant received the bargained-for benefit and became responsible for the property,[41] and, consequently, although the parties could create express

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34. STOEBUCK & WHITMAN, *supra* note 33, at 33–34. *See also* MOYNIHAN, *supra* note 2, at 28, explaining as follows:

> If O was seised of Blackacre in fee simple and B entered and ousted O, claiming a freehold estate therein, B now had seisin and O was disseised. O could recover seisin by making a peaceable entry for that purpose. If such self-help was not practical O could, as early as 1166, bring an assize of novel disseisin against his disseisor to recover seisin. This legal action was summary in nature, and judgment was entered in the King's court on a verdict returned by a jury of neighbors summoned by the sheriff as directed by the writ. No question of ownership could be litigated, the sole issue being whether the defendant had ousted the plaintiff wrongfully and without judgment.

35. Wach, *supra* note 25, at 677.

36. MOYNIHAN, *supra* note 2, at 76–77.

37. *Id.* at 77.

38. *See* BRUCE & ELY, *supra* note 33, at 11; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 572 (5th ed. 1956); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 608–09 (2005); *see also* Shael Herman, *Legacy and Legend: The Continuity of Roman and English Regulation of the Jews*, 66 TUL. L. REV. 1781 (1992), stating:

> [C]anon law prohibited all loans at interest on the basis that commercial profit threatened the salvation of the soul. According to Catholic dogma, all usurers were "attenuated robbers" and perforce sinners. If a Christian died a usurer, his chattels were forfeited to the Crown and his lands to his feudal lord. Living Christians guilty of usury were subject to an ipso facto sentence of excommunication; this entailed exclusion from the Church's sacraments and the company of other Christians.

Id. at 1802 n.64 (citation omitted). Under such an arrangement, a freeholder "rich in land but short of cash" granted the lender a possessory interest in their estate for a period of time in exchange for a loan. MOYNIHAN, *supra* note 2, at 77; *see also* STOEBUCK & WHITMAN, *supra* note 33, at 74–75; Spector, *supra* note 22, at 143–44. The lender then took possession of the land and was able to recoup the loan principal, and interest, through income the land produced from crops and other agrarian sources. Spector, *supra* note 22, at 144.

39. *See* HILL, *supra* note 23, at 8.

40. 1 FRIEDMAN, *supra* note 5, at 2–3.

41. Madison, *supra* note 27, at 410.

obligations, few implied duties were imposed on the landlord.[42] The landlord had few inherent duties regarding services, repair, or upkeep.[43] Essentially, the lessee took possession at his or her own risk, and the caveat emptor mentality placed an affirmative burden on the tenant to sufficiently inspect the premises beforehand in order to bargain for any express contractual lease terms.[44] But this scheme was not all-encompassing, and two default obligations did attach. First, the landlord, at a minimum, had to deliver to the tenant a legal right to possession.[45] Second, the landlord had to permit the tenant quiet enjoyment of the premises.[46] In other words, the landlord assured that the tenant had a right to be there and would be left alone, but little else was required.[47]

The burden of caveat emptor was amplified when combined with the historic treatment of lease covenants as independent of one another.[48] In essence, the tenant's obligation to pay rent was independent of the landlord's obligations.[49] And under such a system, counterintuitive results could result. Indeed, as one writer noted, "[t]enants living with rats, roaches, and raw sewage often stopped paying rent only to have a court

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42. MOYNIHAN, *supra* note 2, at 94–95.

43. Nor did the landlord even need assure that the premises were suitable for the tenant's intended use. *See id.* at 94 n.3 ("It is well settled that there is no implied covenant in a lease of this kind [lease of a dwelling house] that the premises are fit for habitation." (quoting Stevens v. Pierce, 23 N.E. 1006 (Mass. 1890))). In contrast, the tenant might have to make sufficient repairs to the premises so as not to be deemed to have committed waste. Traditionally, waste occurs when there is a substantial change in the property—either beneficial or harmful—on the theory that the person holding the reversionary interest has a right to receive the property in the same condition as when it was leased. *See* SINGER, *supra* note 1, at 308; *see, e.g.*, Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899).

44. *See* Barbara Jo Smith, Note, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty*, 72 WASH U. L.Q. 475, 478 (1994). Such a burden was logical in the context of an agrarian lease because the tenant could easily inspect the land, was more interested in the dirt and soil than buildings, and generally had sufficient bargaining power to contract for express lease provisions. *Id.* at 479.

45. MOYNIHAN, *supra* note 2, at 94. Courts are divided on whether actual, physical possession must be delivered by the landlord, or whether the mere legal right to possession is enough, although the majority view today is that physical possession is required. *See infra* Part I.C.1.

46. MOYNIHAN, *supra* note 2, at 94, stating as follows:

> This promise meant that the tenant's possession would be free from interference by the landlord, or by third persons acting under the landlord's authority, or by the holder of a paramount title. In other words, landlord's principal obligation was to assure the tenant a right to possession and then to leave the tenant alone.

47. *Id.*

48. *See* Smith, *supra* note 44, at 478. One common-law exception to independence of covenants was the doctrine of constructive eviction. *See infra* note 56; *see generally* MOYNIHAN, *supra* note 2, at 96–99.

49. *See generally* 1 FRIEDMAN, *supra* note 5, § 1.1. Likewise, a tenant could enforce their right to quiet enjoyment regardless of whether they had paid rent on time. In that situation, a landlord would have an action for breach of covenant, but no automatic right to recover possession of the premises. *Id.* at 3.

hold that they owed the withheld rent and future rental payments."[50] Taken to extremes, the doctrine of independent covenants mandated that even if the leased domicile burned down, the tenant's obligation to pay rent would continue.[51] In sum, "at common law the tenant had but one right—the right to pay rent."[52]

1. The Revolution in Landlord-Tenant Law[53]

The common-law lease-as-conveyance view, with attendant independent covenants and caveat emptor, was arguably viable with respect to agrarian leases where the lease was for the land, the tenant expected no services from the landlord, and the tenant was generally qualified to make necessary repairs.[54] However, this legal framework became "entrenched," and, as a result, "[r]ules meant for farm leases were adopted by courts in toto and applied to urban leases."[55] Such a framework was ill-suited for the modern residential lease. Among other reasons, the residential lease is not for a portion of land to be tilled but rather for part of a building to be lived in, which by necessity requires continuing obligations from the landlord such as hot water, a well-maintained roof, and garbage removal.[56]

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50. Smith, *supra* note 44, at 477.

51. 1 FRIEDMAN, *supra* note 5, at 2.

52. MOYNIHAN, *supra* note 2, at 94. The doctrine of independent covenants had other implications. For example, a landlord faced with a tenant's abandonment had no duty to mitigate the damages by finding a substitute tenant. As Milton Friedman wrote:

> [I]n the field of contracts . . . we know the wronged party may not sit by, let the damages pile up, and then recover for damages he [or she] could have avoided. In leases it is otherwise. Under what has been the majority rule . . . if a tenant signs a lease . . . and moves out during the term . . . [then the] landlord may leave the property vacant and recover for rent periodically during the term. The rule . . . is consistent with the premise that a lease is a conveyance rather than a contract.

1 FRIEDMAN, *supra* note 5, at 1–2; *see generally id.* § 16.3.

53. Many comprehensive articles have been authored on this subject. *See, e.g.*, Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242 (1974); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982); Rabin, *supra* note 17.

54. 1 FRIEDMAN, *supra* note 5, at 7.

55. Gary Goldman, *Uniform Commercial Landlord and Tenant Act—A Proposal to Reform "Law Out of Context,"* 19 T.M. COOLEY L. REV. 175, 180–81 (2002).

56. 1 FRIEDMAN, *supra* note 5, at 7. *See generally* Bruce N. Bagni, Note, *The Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities*, 6 IND. L. REV. 741, 741–52 (1973). Courts did fashion a number of exceptions, however, to diminish the harsh applications of the common-law rules. *See* Goldman, *supra* note 55, at 182–83 and accompanying footnotes. For example, exceptions were created for constructive eviction, short-term leases of furnished premises, fraudulent concealment and failure to disclose defects, and the maintenance of common areas in multi-unit buildings. *Id.* at 183.

Beginning in the late 1960s, in the face of roughly 900 years' worth of precedent, the law of landlord-tenant in the United States was quickly transformed.[57] Nearly across the board, tenants' rights were increased while landlords' were decreased.[58] Professor Edward Rabin has suggested that social unrest caused by the civil rights movement and the Vietnam War prompted the shift by causing individuals, courts, and legislatures to question the status quo.[59] In addition, low-cost legal services were made widely available in urban centers, allowing for test cases to be brought defining tenants' rights.[60] As one indication of the swiftness of this movement, roughly fifty-six communities had formal housing codes in 1956, yet by 1968 nearly five thousand did.[61]

But prior to the landmark case of *Javins v. First National Realty Corp.*[62] in 1970, despite the existence of such housing codes, few courts used them as guideposts by which to define tenants' rights.[63] *Javins* was decided at an opportune time, and influenced several courts to reject caveat emptor in favor of the implied warranty of habitability, and to reject the doctrine of independent covenants in favor of ongoing, mutually dependent obligations.[64] *Javins*'s recharacterization of the lease from conveyance to contract "gave residential tenants a meaningful remedy against overreaching landlords for the first time in common law history," namely, the ability to withhold rent.[65]

The revolution swept into other areas of landlord-tenant law as well. For example, the era witnessed increases in landlords' tort liability,[66] prohibitions on discriminatory renting through passage of the Fair Housing

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57. *See* Donahue, *supra* note 53, at 242 ("The last ten years have witnessed an extraordinary ferment in landlord-tenant law in the United States."); Gerald Korngold, *Whatever Happened to Landlord-Tenant Law?*, 77 NEB. L. REV. 703 (1998) (describing landlord-tenant law in the late 1960s and early 1970s as the "leading edge" of real property law); Rabin, *supra* note 17, at 519.

58. Rabin, *supra* note 17, at 519.

59. *Id.* at 540–50; *see also* Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681, 707–12 (1994).

60. *See* Goldman, *supra* note 55, at 183; Rabin, *supra* note 17, at 550–51.

61. Rabin, *supra* note 17, at 551.

62. 428 F.2d 1071 (D.C. Cir. 1970).

63. *See* SINGER, *supra* note 1, at 452; Rabin, *supra* note 17, at 552. Some courts had relied on housing codes to find an implied warrant of habitability prior to *Javins*, most notably in *Pines v. Perssion*, 111 N.W.2d 409, 413 (Wis. 1961). However, *Perssion* did not influence other courts in the manner *Javins* did, partly because "[t]he time was not yet ripe" due to the then-existing social and political environment. Rabin, *supra* note 17, at 553; *see also* Madison, *supra* note 27, at 413–14.

64. *See* 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 16B.04[2], at 16B-50 to 51 (Michael Allan Wolf ed. 2000); SINGER, *supra* note 1, at 452–55.

65. Madison, *supra* note 27, at 418.

66. Rabin, *supra* note 17, at 530–31.

Act,[67] prohibitions on retaliatory eviction for tenants complaining about housing code violations,[68] and substantial limitations on landlords' ability to use self-help to evict tenants.[69] In addition, the *Javins* approach usurped common-law rules regarding such things as the landlord's duty to deliver possession, the landlord's duty to mitigate damages in the event of the tenant's abandonment, and the standards to be applied in constructive eviction situations.[70] State legislatures soon codified many of these changes in statutes, going so far as to "trump the bargaining process" in some cases to protect tenants from overreaching landlords with superior bargaining power.[71] A comprehensive model for state legislation reflecting these important changes was provided by URLTA in 1972,[72] and, in addition, a new Restatement of Property was drafted in 1977.[73]

B. The Common-Law Holdover Rule

Following this revolution, the landlord-tenant relationship today is largely viewed through a pro-tenant lens. Similarly, the holdover situation provides a specific context in which landlord-friendly common-law rules were crafted, but many states later took a more pro-tenant stance. To start, every lease contains an express or implied agreement that upon conclusion of the term the tenant will give up possession of the premises.[74] This flows logically from the presumption that it is wrong for a tenant to remain in possession of the premises after the lease ends.[75] A tenant who remains in possession is deemed a "tenant at sufferance" or a "holdover tenant."[76] In

67. *Id.* at 531–33. The Fair Housing Act is codified at 42 U.S.C. §§ 3601–19 (1976 & Supp. V 1981).

68. Rabin, *supra* note 17, at 533–34.

69. *Id.* at 537–38; *see infra* note 81.

70. *See* Madison, *supra* note 27, at 422–23 and accompanying footnotes.

71. Korngold, *supra* note 57, at 706–07 n.20; *see, e.g.*, N.Y. REAL. PROP. LAW § 235-b(2) (McKinney 1989) (providing that waiver of the implied warranty of habitability is void as against public policy).

72. *See supra* notes 8–12 and accompanying text.

73. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT (1977).

74. 49 AM. JUR. 2D *Landlord & Tenant* § 352 (1995). Most leases do in fact contain express provisions to this effect. *See* 2 FRIEDMAN, *supra* note 5, at 1189, 1193.

75. STOEBUCK & WHITMAN, *supra* note 33, § 6.20. For an explanation of when the various types of leases end, see *supra* note 33. In addition to quitting the premises, the tenant must generally return them in good condition. 2 FRIEDMAN, *supra* note 5, at 1189–90. Most leases do contain surrender clauses specifying the condition under which the premises are to be returned. *Id.* at 1193. For an in-depth discussion of the obligations on a surrendering tenant with regard to the condition of the premises see *id.* at 1189–1217.

76. The terms "tenant at sufferance" and "holdover tenant" are used interchangeably. The tenancy at sufferance is used to distinguish the holdover tenant from one who never lawfully occupied the premises. *See* BARLOW BURKE & JOSEPH A. SNOE, PROPERTY: EXAMPLES & EXPLANATIONS 315

such a circumstance, the common-law holdover rule provides that "if a tenant remains in possession of leased quarters, after expiration of the term and without agreement with the landlord, [the] landlord may elect to treat him either as a trespasser, and begin proceedings to evict him, or to make him a holdover tenant, usually for a year."[77] A holdover tenant is thus in a precarious position.[78]

Although holdover tenants wrongfully remain on the land, their initial lawful entry distinguishes them from a true trespasser.[79] Instead, this situation affords the landlord options as to what course of action to take. Indeed, the landlord may opt to treat the holdover tenant like a trespasser and begin proceedings to evict him or her.[80] Every state has a law providing for a summary judicial proceeding that allows a landlord to quickly evict a tenant who, for example, has failed to pay rent or holds over at the expiration of the lease.[81] Alternatively, the landlord can consent to the holding over.[82]

(2001); SINGER, *supra* note 1, § 10.3.4 at 430–31.

77. 2 FRIEDMAN, *supra* note 5, at 1232.

78. Some maintain that tenancies at sufferance are not really tenancies at all, but instead are "as illusory as the rings of Saturn viewed edge-on." STOEBUCK & WHITMAN, *supra* note 33, § 6.20. This tenancy exists to avoid making a holdover tenant a probable adverse possessor. *Id*. *Benton v. Williams*, 88 N.E. 843 (Mass. 1909), described the position of the tenant at sufferance as follows:

> A tenant at sufferance has no estate or title, but only a naked possession, without right and wrongfully, stands in no privity to the landlord, at common law is not liable for rent, is not entitled to notice to quit, and has no action against his landlord or other person entitled to possession, if himself, his family and goods are ejected without unnecessary force. He differs from a trespasser or disseisor only in that his entry upon the premises is not unlawful. His continued occupancy is due wholly to the laches or forbearance of the person entitled to possession in not evicting him. He may leave at any time without notice or liability. No contractual relation (apart from statute) arises out of a possession of such a character.

Id. at 844.

79. In fact, the holdover tenant will not be liable in an action for trespass and continues to legally occupy the premises until after entry (or procedures to evict the tenant) by the landlord. *See* 49 AM. JUR. 2D *Landlord & Tenant* § 352 (1995); MOYNIHAN, *supra* note 2, at 92; SINGER, *supra* note 1, § 10.3.4 at 430.

80. SINGER, *supra* note 1, § 10.3.4 at 430.

81. 49 AM. JUR. 2D *Landlord & Tenant* § 1003 (1995). This proceeding might be called an action for forcible entry and detainer, an unlawful detainer action, summary process, or summary dispossession, and it is generally said that the landlord must exercise this option within a reasonable time. *Id.* At common law, the landlord could use self-help to evict a tenant. *See* 49 AM. JUR. 2D *Landlord & Tenant* § 995 (1995). This might include changing the locks, removing the tenant's personal property, or cutting off utilities in an effort to force the tenant to leave the premises. A majority of states now forbid self-help evictions, and such actions will likely subject a landlord to a lawsuit. In many states, tenants who have been forcibly evicted through self-help can recover not only their actual losses but also court costs, attorney fees, and the cost of temporary housing, among other things. For example, in Connecticut, a landlord using self-help may be prosecuted for a misdemeanor, and in Kentucky, a tenant can recover three months' rent. *See* CONN. GEN. STAT. ANN. § 53a-214 (2001 & Supp. 2006); KY. STAT. ANN. § 383.655 (2002 & Supp. 2005); *see generally* MARCIA STEWART ET AL., EVERY LANDLORD'S LEGAL GUIDE §§ 17/2, 17/15–17/17 (2d ed. 1997). "[With self-

When a landlord opts to treat the holdover tenant as an ongoing tenant, the original lease provisions that relate to the landlord-tenant relationship generally carry over to the new term.[83] The length of the new term is also generally determined by the previous lease, with some modification. If the previous lease was for a year or more, the new term is one year.[84] If the previous lease was a periodic tenancy, the periodic term of less than a year will govern the new term.[85] The amount of the tenant's rent is one provision that might be changed in some circumstances. For example, the landlord may insist on increased rent if the tenant continues in possession, and the tenant, by remaining, may be found to have acquiesced to such an increase.[86]

1. Justifications for Giving the Landlord this Choice

The landlord's election is generally justified either as arising out of contract or as being a penalty to the individual tenant.[87] As to the former—the contractual rationale—for background one should begin in England, where courts "have not recognized [a unilateral] option in the landlord thus to hold the tenant for another period merely because he wrongfully retains possession [by holding to] the rule that a tenancy can be created only by the consent of the parties thereto."[88] English courts and a minority of American courts, therefore, only allow the landlord to hold the tenant

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help, the] potential for nastiness and violence is great; the last thing you want is a patrol car at the curb while you and your tenant wrestle over the sofa on the lawn." *Id.* at 17/18.

82. SCHOSHINSKI, *supra* note 4, § 2:23; *see, e.g.*, Conway v. Starkweather, 1 Denio 113 (N.Y. Sup. Ct. 1845).

83. *See* Emmett S. Hickman Co. v. Am. Realty Enter., Inc., 277 A.2d 688, 689–90 (Del. 1971); *Conway*, 1 Denio at 116; *see generally* 2 FRIEDMAN, *supra* note 5, at 1236–37 and accompanying footnotes; 49 AM. JUR. 2D *Landlord & Tenant* §§ 369–76 (1995); R.D. Hursh, Annotation, *Binding Effect on Tenant Holding Over of Covenants in Expired Lease*, 49 A.L.R.2D 480 (1956); *cf.* Lewiston Pre-Mix Concrete, Inc. v. Rohde, 718 P.2d 551, 556–57 (Idaho Ct. App. 1985) (stating that an option-to-purchase provision does not carry over because it does not relate to the landlord-tenant relationship).

84. *Conway*, 1 Denio at 116.

85. *Id.*; *see also* Marks v. Corliss' Estate, 240 N.W. 71 (Mich. 1931), stating that:

> Where one has a lease for years, with annual rent reserved, and holds over after the expiration of the term with the acquiescence of the landlord, the tenancy is from year to year on the conditions of the lease, although the annual rent is payable in monthly installments, but where the rent reserved is monthly, the holding over is from month to month unless the lease otherwise provides.

Id. at 72 (internal citations omitted).

86. *See, e.g.*, David Prop., Inc. v. Selk, 151 So.2d 334, 340 (Fla. Dist. Ct. App. 1963).

87. *See* BURKE & SNOE, *supra* note 76, at 316–17.

88. 2 HERBERT THORNDIKE TIFFANY, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 209, at 1471 (1912).

for a new term when both the landlord and tenant manifest intent to be so bound.[89] This is merely a construction of contract principles. Certainly nothing prevents them from agreeing to and signing a new lease.[90] Unless expressly forbidden or clearly against public policy, the parties are always free to form an agreement.[91] If the parties are deemed to have reached a new agreement, it can even trump state statutes providing for a landlord's exclusive remedy in the holdover situation, such as a statutory provision calling for double rent.[92]

In lieu of an express agreement, such an agreement can arise by implication so long as the new term involves something that satisfies the statute of frauds.[93] Problems arise with regard to implied agreements when one begins to wonder what constitutes an appropriate manifestation of assent.[94] But the import of this view is in its rejection of the notion that the mere act of holding over is alone sufficient to manifest intent to be held to a new term.[95] There must be something more. Some consider this view

89. *Id.*; *see also* BURKE & SNOE, *supra* note 76, at 316.

90. *See generally* TIFFANY, *supra* note 88, § 210.

91. *See* First Capital Inst. Real Estate, Ltd. v. Pennington, 368 S.E.2d 165, 168 (Ga. Ct. App. 1998); *cf.* Gorman v. Ratliff, 712 S.W.2d 888, 891 (Ark. 1986) (invalidating a provision authorizing self-help); Lonergan v. Conn. Food Store, Inc., 357 A.2d 910, 913–14 (Conn. 1975) (disallowing a provision for perpetual renewal of the lease because it did not include an escalation of rent clause).

92. *See* Miss. State Dep't of Pub. Welfare v. Howie, 449 So.2d 772, 777–79 (Miss. 1984) (holding that a landlord's objective manifestation of consent created a month-to-month tenancy and trumped a statutory double-rent provision). For an example of a double-rent statute, *see infra* note 132 (Mississippi); *see also* N.J. STAT. ANN. § 2A:42-5 (2005).

93. The validity of oral leases is limited by the statute of frauds. In most jurisdictions, leases of more than one year must be in writing to be enforceable. *See* HILL, *supra* note 23, at 5; *see generally* E. ALLAN FARNSWORTH, CONTRACTS § 6.5 (3d ed. 1999).

94. For instance, "[l]andlords often act, or fail to act, in ambiguous ways, so that courts have to resolve difficult fact questions whether the landlord treated the tenant as a continuing tenant or trespasser." GRANT S. NELSON, ET AL., CONTEMPORARY PROPERTY 414 n.2 (2d ed. 2002) (citing Kilbourne v. Forester, 464 S.W. 2d 770 (Mo. App. 1970)). Consider the following situations: (1) The tenant holds over, making it known that she wishes to be a tenant for a further term. The landlord, however, is silent, and does not accept the rent payments. This goes on for months. It is not clear at what point the landlord must take action. (2) The tenant holds over and the landlord asks for rent. This time the tenant remains silent. (3) The tenant holds over and the landlord says, "You're not my tenant. You're a tenant at sufferance." However, the tenant sends rent checks which the landlord accepts as the reasonable rental value of the premises while the tenant holds over. It is not clear in which of these situations an agreement will be found. In addition, if the landlord and tenant are negotiating for a further term before the expiration of the current lease, and fail to achieve agreement, this is evidence that they did not intend the further term. BURKE & SNOE, *supra* note 76, at 316. But if during those negotiations they discussed a higher rent which the landlord insisted on, then the holding over might be viewed as implied acceptance of the higher rent. *Id.*; *see also supra* note 86 and accompanying text.

95. *See, e.g.*, Commonwealth Bldg. Corp. v. Hirschfield, 30 N.E.2d 790, 792–93 (Ill. App. Ct. 1940) (tenant held over by ten hours and lease provided for double rent in such a circumstance); Herter v. Mullen, 159 N.Y. 28, 42 (N.Y. 1899) (finding that a tenant's holding over due to mother's sickness was not voluntary).

equitable since it attempts to ascertain the parties' actual intent and is more likely to result in the formation of a periodic tenancy for the holdover period, as opposed to an entire additional term.[96]

Alternatively, within the ambit of the penalty theory, the American common-law view is that the landlord has the unilateral right to make the determination, regardless of the tenant's consent.[97] Courts have at times tried to make the tenuous connection between the landlord's choice and an implied-in-fact contract.[98] That is, the tenant's mere act of holding over creates an irrebuttable presumption that the tenant intended to extend the lease for another term.[99] What this amounts to is a fabricated intent, with nothing available to overcome it.[100] A more appropriate characterization of this view is as arising from quasi-contract, or rather, as implied by operation of law.[101] To illustrate the havoc and inequity such a presumption can wreak, consider the following example: T leases premises from L for a term of years with rent paid annually, with the lease set to expire at midnight on October 1.[102] Prior to the lease's expiration, T informs L that he has no intent to renew the lease; in fact, T has arranged to rent different premises from a different landlord.[103] T hires movers who begin moving him out on September 26.[104] That same day, T becomes

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96. *See* BURKE & SNOE, *supra* note 76, at 316; 2 TIFFANY, *supra* note 88, at 1471–72.

97. *See* 2 TIFFANY, *supra* note 88, at 1470; *see also* Conway v. Starkweather, 1 Denio 113, 115 (N.Y. Sup. Ct. 1845) ("If [the tenant] holds over, though for a very short period, without any unequivocal act at the time to give his holding the character of a trespass, he is not afterwards at liberty to deny that he is in as a tenant, if the landlord chooses to hold him to that relation."); RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 14.4 (1977); BURKE & SNOE, *supra* note 76, at 316, explaining:

> This "penalty theory" is particularly apt in rental markets where there is a so-called natural term. In agricultural leases, for example, the turnover at the start of the growing season is necessary, and the landlord who misses this date likely also misses the opportunity to rent the land for that year. In fact, the market for agricultural leases provides the historic origin of the election rule. Sometimes rental markets in the neighborhood of a college or university work on the same turnover principle, premise turning over between academic years.

98. BURKE & SNOE, *supra* note 76, at 316.

99. 2 TIFFANY, *supra* note 88, at 1472.

100. *See, e.g.*, Mason v. Wierengo's Estate, 71 N.W. 489 (Mich. 1897); *infra* notes 102–08.

101. 2 TIFFANY, *supra* note 88, at 1472. The general premise of a quasi-contract is that a person should not be able to retain an unsolicited benefit in a situation where a contract should have been formed. A typical example is the case of a plumber who installs a sprinkler system in the lawn of the wrong house. The owner is happy about this, but refuses to pay asserting lack of contract. Here, a court would likely find a quasi-contract. *Cf.* Glenhaven Vill., Inc. v. Kortmeyer, No. A-02-641, 2003 WL 221225343 (Neb. Ct. App. Sept. 16, 2003) (finding defendants who ceased making utilities payments but continued to accept services liable in quasi-contract for the value of the services they received). For a general description of quasi-contracts, see FARNSWORTH, *supra* note 93, § 2.20.

102. This example is based on Wierengo's Estate, 71 N.W. at 489.

103. *Id.*

104. *Id.*

gravely ill—so ill that he dies as a result on October 6.[105] Due to the distraction of T's illness and death, the move-out process is not completed until October 11—ten days after the lease's expiration date.[106] Despite T's intention not to renew, and despite his untimely death, in this situation, a court held T's estate liable for an entire additional year's rent.[107] The court found that liability "does not depend upon the intention of the tenant," and there was "no legal reason for lifting the burden of misfortune from [the tenant], and imposing it upon [the landlord], who is in no way responsible for it."[108] By contrast, application of the previously mentioned English standard in this case would have produced a different result due to the tenant's clear lack of assent.

Although the unilateral election can result in a severe sanction when the tenant is held against his or her will, justification flows from a penalty and deterrence theory[109] and is generally attributed to the case of *A.H. Fetting Manufacturing Jewelry Co. v. Waltz*.[110] In *Fetting*, the court strongly rejected the notion that the holdover rule is based on an implied agreement between the parties.[111] Instead, the *Fetting* court embraced the rule's harshness and, in effect, imposed it as a form of punishment for the tenant's misconduct.[112] The court felt the rule "ultimately operates for the benefit of tenants as a class by its tendency to secure the agreed surrender of terms to incoming tenants," thus creating "confidence in leasehold transactions."[113] Such a rule serves a dual purpose. First, it is meant to protect the landlord's interest in being compensated for any lost rents from incoming tenants caused by the improper holding over—this is the penalty aspect.[114] Second, it is thought that the threat of being held to another term gives the tenant incentive to promptly vacate, and will hence protect the

105. *Id.*
106. *Id.*
107. *Id.* at 490.
108. *Id.*
109. SCHOSHINKSI, *supra* note 4, at 72.
110. 152 A. 434 (Md. 1930).
111. *Id.* at 435. The court stated the following:

> The rule is sometimes stated to be based on the theory that the tenant holding over presumably intends to prolong the duration of his tenancy by another term, and that he cannot overcome this presumption by setting up, to the disadvantage of the landlord, that he is holding as a wrongdoer . . . . It is difficult to ascribe the liability to contract, when this liability exists, notwithstanding any statement, however explicit, of a contrary intention by the tenant.

112. *Id.* at 436 ("[T]he rule imposes a penalty upon the individual tenant.").
113. *Id.*
114. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.4 Introductory Note (1977).

incoming tenant's interest in having the premises available—this is the deterrence aspect.[115]

The distinction between the consensual and unilateral views may stem from different values placed on equity and certainty by the courts.[116] Unquestionably, one logical argument in favor of any established legal doctrine is certainty. Courts routinely enforce bright-line rules in the face of inequitable results,[117] and property law is no exception. The Rule in Shelley's Case, now largely abandoned,[118] almost always caused harsh results but achieved certainty.[119] Recording acts, designed to prevent fraud and achieve confidence as to ownership, always produce an unsympathetic result for someone when used.[120] The chief benefits of such rules are notice and predictability, simplicity in application, and equality in treatment of similarly situated parties.[121] When courts mitigate bright-line

115. *Id.*

116. Whether it is more desirable to have certain outcomes or equitable outcomes is a question "as old as the law itself." Paul Heinrich Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795, 795 (1963).

117. *See, e.g.*, Matisoff v. Dobi, 681 N.E.2d 376 (N.Y. 1997). Here the New York Court of Appeals refused Husband's attempt to enforce a nuptial agreement, drafted by Lawyer, and entered into at Wife's suggestion. *Id.* at 377–78. The spouses earned comparable wages when the marriage commenced, and both maintained separate finances throughout. *Id.* at 377. At the time of the divorce, Husband's salary had grown to ten times that of Wife's. *Id.* at 378. Wife contended at the proceedings that the nuptial agreement was invalid because it had not been acknowledged as required by statute. *Id.* The court agreed, stating that "a bright-line rule requiring an acknowledgment in every case is easy to apply and places couples and their legal advisors on clear notice of the prerequisites to a valid nuptial agreement." *Id.* at 381.

118. *See* T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 535–36 (2003).

119. *See generally* MOYNIHAN, *supra* note 2, at 181–91. The Rule provides that "[i]f a freehold estate is conveyed by deed or bequeathed by will to a person and in the same conveyance or will a remainder is limited to the heirs or to the heirs of the body of that person, that person takes both the freehold estate and the remainder." *Id.* at 181. Suppose O conveys to A for life, then to A's heirs. Absent the Rule, A merely gets a life estate, with A's heirs holding a contingent remainder in fee simple. The Rule in Shelley's Case converts the remainder in A's heirs into a remainder in fee simple in A—which merges with A's life estate—ultimately leaving A with a present estate in fee simple. A's heirs are left with nothing, regardless of O's intent. *Id.* at 181–82. When applied, the Rule "govern[s] remorselessly and without regard to specific intent or context." David M. Becker, *Debunking the Sanctity of Precedent*, 76 WASH. U. L.Q. 853, 867 (1998).

120. Under each of the three general types of recording acts—race, notice, and race/notice—harsh results can occur. Consider a race statute, which generally provides that with respect to successive grantees to the same piece of land the grantee who records first prevails. *See* JESSE DUKEMINIER, PROPERTY 469, 473 (Gilbert Law Summaries, Thomson 16th ed. 2002). Suppose O conveys Blackacre to A on Monday, and A does not immediately record. On Tuesday, O conveys Blackacre to B, and B immediately records. A subsequently records. B prevails, even if B had actual notice of A's interest in Blackacre. *Id.* at 473. Similar inequities are possible under notice and race/notice statutes. *Id.* at 474.

121. *See* Neuhaus, *supra* note 116, at 795 ("[Certainty reflects] the public interest in clear, equal, and foreseeable rules of law which enable those who are subject to them to order their behavior in such a manner as to avoid legal conflict or to make clear predictions of their chances in litigation.").

rules by carving out exceptions that bring in equitable concerns, these benefits suffer. In the end, outcomes become unpredictable and certainty is not achieved.[122] Thus, courts adopting the unilateral election, by disregarding actual intent and equitable factors, place a greater value on certainty than on equity.[123] Others have noted the inherent contradiction of having such a harsh rule in an otherwise tenant-friendly legal system.[124] Yet the majority of common-law courts seemed willing to sacrifice the equity of a single tenant for a rule allegedly, and with certain results, operating for the benefit of all tenants. But if that is not true—if in practice the rule does not function to advantage tenants as a class—the viability of the rule is seriously called into question, especially in light of the recent focus on tenants' equitable and procedural rights. As will be discussed, it is unlikely that this alleged benefit is actually true given the restrictions on the landlord-tenant relationship imposed by URLTA.

2. State Solutions to the Holdover Problem and the Restatement (Second)

Given the multiple interests present, the potential for harsh outcomes, and considerations of certainty versus equity, disagreement as to the best answer is reflected in the various ways states have addressed the holdover situation.[125] Some states, such as Illinois, simply continue to give the landlord the unilateral choice to hold the tenant to a new term.[126] This is

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122. Consider the statute of frauds, which mandates that certain contracts, such as those for conveyances of interests in land, leases for one year or more, and real estate brokers' commission agreements, must be in writing. Farnsworth, supra note 93; Lawrence M. Boesch, *Magnificent Exceptions*, L.A. LAW, May 2001, at 38, 38–39 (2001), *available at* http://www.lacba.org/showpage.cfm?pageid=1249. Here, courts have crafted sweeping exceptions in the name of equity such as the aptly named doctrine of equitable estoppel. *Id*. at 38–40. Now a practicing attorney must master the exceptions, some the mere application of which is a question of fact determined on a case-by-case basis. *Id*. at 38. One commentator notes that "[c]laims of equitable estoppel against the assertion of the Statute of Frauds have complicated the practice of law far beyond what law students could ever imagine when they study for the bar exam." *Id*.

123. At least one early court explicitly said as much. In Haynes v. Aldrich, 31 N.E. 94, 95 (N.Y. 1892), the court refused to except involuntary holding over from the rule, stating:

> It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would always be forthcoming, and their sufficiency be subject to the doubtful conclusions of a jury; and no lessor would ever know when he could safely promise possession to a new tenant.

The court added, "To sustain this defense would open the door to a destruction of the settled doctrine, and tend to involve the rights of both lessor and lessee in uncertainty and confusion." *Id*.

124. *See infra* note 237 and accompanying text.

125. *See* 2 FRIEDMAN, *supra* note 5, at 1231; SCHOSHINSKI, *supra* note 4, at 75.

126. *See, e.g.*, A.O. Smith Corp. v. Kaufmann Grain Co., 596 N.E.2d 1156, 1162 (Ill. App. Ct.

similar, but not identical, to the view promulgated by the Restatement (Second) of Property, Landlord & Tenant. The Restatement gives the landlord a unilateral right to impose another term based solely on the tenant's holding over when there is no incoming tenant or, if there is an incoming tenant, gives the incoming tenant the unilateral right, with both elections tempered against "equitable considerations."[127] By contrast, some states, such as Connecticut, follow the English view by finding that "[h]olding over by any lessee, after the expiration of the term of his [or her] lease, shall not be evidence of any agreement for a further lease,"[128] and instead require further evidence of an agreement to continue the lease.[129] Other states, such as New York, limit the length of the new term by calling for the creation of a month-to-month tenancy in all cases where a new agreement cannot be found.[130] Similarly, the District of Columbia statute accomplishes the same month-to-month limitation by requiring thirty days' notice to terminate a tenancy at sufferance.[131] In addition,

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1992) ("At the sole option of the landlord, a tenant at sufferance may be evicted as a trespasser or treated as a holdover tenant.") (internal citation omitted).

127. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.4 (1977), providing as follows:

> Except to the extent the parties to a lease validly agree otherwise, the landlord, if there is no incoming tenant, or the incoming tenant if there is one, may elect, solely on the basis of the tenant's improper holding over after the termination of his lease, unilaterally to hold the tenant to another term, unless equitable considerations justify giving the tenant an extension of time to vacate the leased property and the tenant vacates the leased property before the end of the extended period.

128. CONN. GEN. STAT. ANN. § 47a-3d (1994 & Supp. 2006).

129. *See* FJK Associates v. Karkoski, 725 A.2d 991, 993 (Conn. App. Ct. 1999).

130. See N.Y. Real Prop. Law § 232-C (2006) ("[I]f the landlord shall accept rent [after] the expiration of such term, then, unless an agreement either express or implied [provides] otherwise, the tenancy created . . . shall be a tenancy from month to month . . . ."); see also Dashnaw v. Shiflett, No. C-415-2002, 2005 WL 3108213 (N.Y. App. Term Oct. 4, 2005) ("The language in the statute 'unless an agreement either express or implied is made providing otherwise' refers only to the extension of the duration of the holdover tenancy beyond a tenancy from month to month."). In other words, the landlord's statutory choice in New York is to evict or to create a month-to-month tenancy. 2 FRIEDMAN, *supra* note 5, at 1230. However, New York cases suggest agreements can be made that indicate a new tenancy for something more than month-to-month. For example, in *United Mutual Life Ins., Co. v. ICBC Corp*., 410 N.Y.S.2d 292 (N.Y. App. Div. 1978), the lease contained a provision allowing a tenant for a two-year term to renew for an additional two years. *Id.* at 292. After expiration of the original two-year term, the tenant held over by ten-and-a-half months, paying rent each month but at the higher rate called for under the lease. *Id.* at 293. The landlord wished to hold the tenant liable for the remainder of the two-year term, and the tenant defended on the grounds that N.Y. Real Prop. Law § 232-C mandated the creation of a month-to-month tenancy. *Id.* at 292–93. The court found that the provision of the lease, as well as the tenant's paying of the increased rent called for by the new term, was sufficient to find "an agreement either express or implied . . . providing otherwise." *Id.* at 294 (quoting § 232-C).

131. SCHOSHINSKI, *supra* note 4, at 75–76. The statute provides as follows:

some state statutes, such as Mississippi's, completely abrogate the holdover rule by providing the sole remedy for landlords against holdover tenants is the payment of double rent for the time of the holding over.[132]

C. The English Rule for Delivery and the Form Lease

1. The Rules for Delivery of Possession

Focusing on incoming tenants' interest in having the premises open, historically a lease consisted of a transfer of the right to possess the premises.[133] One of the early default obligations placed upon a landlord was the duty to deliver possession of the leased property.[134] But suppose that when the tenant prepared to take possession of the land, it was already occupied by a third person, such as a holdover tenant. In such an instance, courts have not been in unison with respect to the exact parameters of the landlord's duty to deliver possession.[135] The issue that arises is whether the landlord is obligated to deliver actual, physical possession of the premises at the start of the lease, thus ensuring no third party is wrongfully

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> A tenancy by sufferance may be terminated at any time by a notice in writing from the landlord to the tenant to quit the premises leased, or by such notice from the tenant to the landlord of his [or her] intention to quit on the 30th day after the day of the service of the notice. If such notice expires before any periodic instalment of rent falls due, according to the terms of the tenancy, the landlord shall be entitled to a proportionate part of such instalment to the date fixed for quitting the premises.

D.C. CODE § 42-3204 (2006).

132. *See* MISS. CODE ANN. § 89-7-25 (2005), providing as follows:

> When a tenant, being lawfully notified by his [or her] landlord, shall fail or refuse to quit the demised premises and deliver up the same as required by the notice, or when a tenant shall give notice of his [or her] intention to quit the premises at a time specified, and shall not deliver up the premises at the time appointed, he [or she] shall, in either case, thenceforward pay to the landlord double the rent which he [or she] should otherwise have paid, to be levied, sued for, and recovered as the single rent before the giving of notice could be; and double rent shall continue to be paid during all the time the tenant shall so continue in possession.

However, even where such a double-rent statute provides the landlord's sole remedy, failure by the landlord to pursue this remedy in a reasonable time and acceptance of rent following the holdover may result in a waiver. *See, e.g.*, Miss. State Dep't of Public Welfare v. Howie, 449 So.2d 772 (Miss. 1984); Sherrill v. Stewart, 23 So.2d 915 (Miss. 1945).

133. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 1.2 (1977) ("A landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property."); Glen Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform*, 46 U. CIN. L. REV. 937, 937 (1977) ("The essence of a lease of real property is the transfer of the right to possess the leased premises from the landlord to the tenant.").

134. Weissenberger, *supra* note 133, at 937. As a corollary, a landlord necessarily covenants that he has, in fact, an estate out of which a lease can be shaped, and that he will not personally prevent the tenant from assuming possession. STOEBUCK & WHITMAN, *supra* note 33, at 270.

135. STOEBUCK & WHITMAN, *supra* note 33, at 270.

in possession,[136] or whether the landlord must merely ensure superior legal right to the premises, with no guarantee as to third parties.[137]

A majority of United States jurisdictions embrace the so-called English Rule for delivery of possession.[138] This default rule requires the landlord to deliver actual, physical possession of the premises,[139] compelling the landlord to remove anyone from the property who might interfere with the new tenant's entry.[140] Although contemporary rationales exist for the English Rule,[141] it is rooted in feudal traditions of seisin.[142] Since a tenant

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136. Weissenberger, *supra* note 133, at 937–38.

137. *See* Hannan v. Dusch, 153 S.E. 824, 826 (Va. 1930). This court aptly posed the question as "whether a landlord, who without any express covenant as to delivery or possession leases property to a tenant, is required under the law to oust trespassers and wrongdoers so as to have it open for entry by the tenant at the beginning of the term." *Id.* at 825. *Compare* Hannan, 153 S.E. at 830 (adopting the American Rule) *with* Sloan v. Hart, 63 S.E. 1037, 1038 (N.C. 1909) ("[I]n the absence of an express provision in the lease, the lessor impliedly covenants with the lessee that the premises shall be open to entry by the lessee at the time fixed for the beginning of the term.").

138. Matthew J. Heiser, Note, *What's Good for the Goose Isn't Always Good for the Gander: The Inefficiencies of a Single Default Rule for Delivery of Possession of Leasehold Estates*, 38 COLUM. J.L. & SOC. PROBS. 171, 174 (2004).

139. *See Hannan*, 153 S.E. at 826; 1 FRIEDMAN, *supra* note 5, at 86.

140. *See* Weissenberger, *supra* note 133, at 941, stating as follows:

> The obligation of the landlord under the covenant in English rule jurisdictions is satisfied if the premises are open at the time the tenant's occupancy right accrues, and once the time for commencement of the lease has passed, the landlord is not responsible for trespasses committed by third persons. After the leasehold interest has begun, the landlord's obligations are governed by the covenant of quiet enjoyment which, as traditionally implied, extends only to the acts of the landlord himself, a person acting under the landlord's direction, or the holder of a paramount title.

Id. (internal footnotes omitted).

141. The Restatement (Second) identifies the following five rationales in support of the English Rule:

> (1) The landlord knows, or should know, the status of the possession of the leased property better than the tenant in the period before the date the tenant is entitled to possession.
>
> (2) The landlord knows, or should know, better than the tenant whether a person in possession of the leased property before the date the tenant is entitled to possession is properly or improperly on the leased property.
>
> (3) Before the date the tenant is entitled to possession of the leased property, the landlord is the only one of the two who can evict a person improperly in possession of the leased property.
>
> (4) In the situation where the person in possession of the leased property is entitled to be there until the date the tenant is entitled to possession, the case of the possible holdover prior tenant, the landlord is the only one of the two who has an opportunity to get some assurance that the prior tenant will not hold over.
>
> (5) The tenant will have received less than he bargained for if he must go forward with the lease and bear the cost of legal proceedings to clear the way for his entry on the leased property.

RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 6.2 cmt. a (1977).

142. *See generally* Weissenberger, *supra* note 133, at 942.

was not seised of the land,[143] a proxy was created that required delivery to and entry by the tenant.[144] Both were necessary to "vest the term with the lessee," but could not properly occur if a third party was already present.[145] Because at common law the bargained-for benefit was the right to possession of the premises, fulfillment of the proxy was an essential element of the transaction.[146] In this way, an English court in *Coe v. Clay* ascribed the English Rule to the notion that an entering tenant did not bargain for the "chance of a lawsuit."[147] This reasoning was subsequently adopted by Alabama in the 1880 case of *King v. Reynolds*,[148] and other states soon followed the reasoning of *King* in applying the English Rule.[149]

The landlord's failure to deliver open premises in these jurisdictions has economic consequences. In this situation the incoming tenant owes no rent during the time he or she is kept from possession.[150] In addition, failure to deliver possession is deemed a breach and will subject the landlord to an action for damages.[151] These damages are comprised of both actual damages—the difference between the agreed-to rent and the fair rental value of the premises—and consequential damages, such as the cost of temporary housing.[152] This is not as detrimental to the landlord as it might initially sound. Unless the incoming tenant was able to negotiate for a bargain rental price, most breaches of this nature "will generally occur at a time when there is little or no difference between the [fair] market value of the leasehold interest and the agreed rent," and, consequently, will give rise to only nominal damages.[153] Because of this probable result, there is a "unique justification" for imposing additional

143. *Id.*; *see supra* note 33 and accompanying text.

144. *See* Bloch v. Busch, 22 S.W.2d 242, 243 (Tenn. 1929).

145. *Id.* Such an event blocked entry, and the lessee therefore could not, "in fact or law," become a tenant. *Id.*

146. *See* Weissenberger, *supra* note 133, at 942; *see also* King v. Reynolds, 67 Ala. 229, 233 (Ala. 1880), stating that:

> A lease for a year, or a term of years, is not a freehold. It is a chattel interest. The prime motive of the contract is, that the lessee shall have possession; as much so, as if a chattel were the subject of the purchase. Delivery is one of the elements of every executed contract. When a chattel is sold, the thing itself is delivered. When realty is the subject, still there must be livery of seizin. Formerly, parties went upon the land, and there symbolical delivery was perfected. Now, the delivery of the deed takes the place of this symbolical delivery.

Id.

147. Coe v. Clay, (1829) 130 Eng. Rep. 1131, 1131 (Ct. Common Pleas).

148. 67 Ala. 229 (Ala. 1880).

149. Heiser, *supra* note 138, at 177.

150. Weissenberger, *supra* note 133, at 944 & n.41.

151. *Id.* at 944.

152. *Id.*

153. *Id.* at 945.

penalties upon landlords to generate an adequate disincentive for this type of breach.[154]

In contrast, and ironically, the so-called American Rule for delivery of possession is, and has always been, the minority rule in the United States.[155] It provides that "the landlord is . . . bound only to put [the tenant] into legal possession, so that no obstacle in the form of a superior right of possession will be interposed to prevent the tenant from obtaining actual possession of the demised premises."[156] Justification for the American Rule is troublesome,[157] and in jurisdictions where it is applied, an incoming tenant kept from possession by a holdover tenant has a remedy only against the holdover tenant.[158]

2. The Prevalence and Problem of the Form Lease

Landlords and tenants may proactively address the holdover situation by including a provision in the lease that stipulates the parties' rights in such a circumstance.[159] As a bargained-for resolution, this embraces

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154. *Id.*

155. Heiser, *supra* note 138, at 174.

156. Hannan v. Dusch, 153 S.E. 824, 828 (Va. 1930) (quoting Sloan v. Hart, 63 S.E. 1037 (N.C. 1909)).

157. Some commentators point first to a misplaced reliance on the covenant of quiet enjoyment, under which courts obliged landlords only to the requirements of quiet enjoyment, and, second, to a mistaken interpretation of state dispossession statutes. *See* Weissenberger, *supra* note 133, at 948, stating as follows:

> Many states' dispossession statutes are loosely worded to afford a remedy to "one entitled to possession." Several American rule courts have interpreted such language as precluding the landlord from bringing an action and, therefore, have reasoned that no obligation to proceed against a third person in possession could be implied. The position suffers from circular reliance on the conclusion that it seeks to establish: that the landlord can escape liability by transferring the mere right to possession rather than actual possession.

Id. (internal footnotes omitted).

158. *Hannan*, 153 S.E. at 828. This creates the illogical possibility that a landlord could benefit from a lease by demanding rent from the incoming tenant, even when the landlord knows a lingering tenant will obstruct possession. *See* Weissenberger, *supra* note 133, at 950. Regardless of such criticisms, the American Rule is still applied in a number of jurisdictions. Heiser, *supra* note 138, at 175.

159. *See, e.g.*, Tex. Real Estate Comm'n, *Seller's Temporary Residential Lease*, O1A TREC No. 15-3 (1998), *available at* http://www.trec.state.tx.us/pdf/contracts/15-3.pdf. Clause 19, entitled "Holding Over," provides as follows:

> Tenant shall surrender possession of the Property upon termination of this Lease. Any possession by Tenant after termination creates a tenancy at sufferance and will not operate to renew or extend this Lease. Tenant shall pay $_____ per day during the period of any possession after termination as damages, in addition to any other remedies to which the Landlord is entitled.

Id.; *cf.* United Mut. Life v. ICBC Corp., 410 N.Y.S.2d 292 (N.Y. App. Div. 1978) (involving a lease that included a provision calling for a two-year extension at tenant's choice).

contract principles and accommodates the parties' interests, but only if one presumes that each had an equal say in the matter. Although landlords are not free to include lease provisions that are unconscionable or clearly against public policy,[160] these notions do not fully encompass the disparity in bargaining power that exists between landlords and tenants. The landlord-tenant revolution produced many beneficial changes, yet did surprisingly little to bolster tenants' bargaining power with regard to specific lease terms.[161]

The bargaining power pendulum swings almost utterly in favor of the landlord in the context of the standard form lease that pervades the American landscape.[162] Certainly form leases are efficient, but problems with them abound. In one study, form leases from sixteen cities across the country were collected and analyzed.[163] The study found that, of those leases collected, the median length was 3800 words, they often utilized hard-to-read typeface, and they were strongly biased in favor of landlords.[164] On top of this, landlords continue to include many unenforceable provisions in leases.[165]

The potential for abuse is clear. First, there is a lack of informational parity in the lease transaction; residential tenants are likely to be without sufficient knowledge and understanding to meaningfully scrutinize their leases.[166] Moreover, the time and effort required to understand a lease or to

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160. For an example of unconscionability, see *Jaramillo v. JH Real Estate Partners, Inc.*, 3 Cal. Rptr. 3d 525, 525–30 (Cal. Ct. App. 2003). Lease provisions that waive a landlord's liability are often voided as being against public policy. *See, e.g.*, Lloyd v. Serv. Corp. of Ala., Inc. 453 So.2d 735 (Ala. 1984) (holding that exculpatory clause in lease is void as against public policy when the tenant reported an improperly installed window to landlord and was subsequently raped by an assailant who entered through the window); Henrioulle v. Marin Ventures, Inc., 573 P.2d 465, 469 (Cal. 1978) ("In holding that exculpatory clauses in residential leases violate public policy, this court joins an increasing number of jurisdictions."). *But see* Warren v. Paragon Techs. Group, 950 S.W.2d 844, 845 (Mo. 1997) (en banc) ("Releases of future negligence are not void as against public policy, though they are disfavored and strictly construed.").

161. *See* Green, *supra* note 59, at 712.

162. *See* Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791 (1974) ("Standard form leases for residential and short term business tenancies appear in all urban centers."); Donald E. Clocksin, *Consumer Problems in the Landlord-Tenant Relationship*, 9 REAL PROP. PROB. & TR. J. 572, 572 (1974); Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 247–48 (1970); *see, e.g.*, Minn. State Bar Assoc., *Minnesota Standard Residential Lease*, Real Prop. Form. No. 41 (2000), *available at* http://www2.mnbar.org/sections/real-property/forms/rpf41.pdf.

163. Berger, *supra* note 162, at 821.

164. *See id.* at 835 (finding strong pro-landlord elements in each lease, with a large percentage comprised of tenant duties and landlord remedies).

165. *See* Wenner, *supra* note 25, at 551 n.41.

166. *See* Berger, *supra* note 162, at 791; Mueller, *supra* note 162, at 256–63.

hire an attorney encourages many to opt for ignorance.[167] Second, landlords deal with a generally captive and ready supply of renters.[168] A residential tenant who challenges a particular lease provision can be replaced with a more accommodating tenant who will either agree to or fail to challenge the troublesome provision.[169]

Compounding this problem, form leases are slow to adapt.[170] For example, form leases continue to include unenforceable provisions because courts invalidate such provisions on a case-by-case basis.[171] In other words, if a thousand form leases exist, all of which contain the same unenforceable provision, but only ten tenants bring suit and successfully challenge that provision, the provision will remain in place in the other 990 leases.[172] Upon including a favorable, unenforceable term, a landlord preys upon the ignorant tenant who assumes it is valid and does not think to challenge it.[173] Thus, through "stylistic devices, [the tenant's lack of information and bargaining power, and] unenforceable and illegal clauses," landlords can "tether the tenant to the often unfair provisions of the form lease."[174]

D. The Uniform Residential Landlord and Tenant Act

In 1972 the Commissioners on Uniform State Laws sought "to simplify, clarify, modernize, and revise the law governing landlord-tenant relations."[175] URLTA was meant solely for residential leases,[176] and it

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167. Wenner, *supra* note 25, at 555. Complicating matters, parties to a lease are generally presumed to have read what they signed. *See* Warren v. Paragon Techs. Group, 950 S.W.2d 844, 846 (Mo. 1997) (en banc). Lease provisions are also more likely to be enforced if clear and unambiguous. As a result, a lease may contain understandable yet detrimental provisions, and a tenant who does not read the lease loses the opportunity to negotiate, creating subsequent difficulty in challenging the provisions. *See, e.g.*, Pool v. Insignia Residential Group, No. C-010074, 2002 WL 63535 at *4 (Ohio Ct. App. Jan. 18, 2002) (upholding lease provision providing for nonrefundability of security deposit); *cf.* Bedrosky v. Hiner, 430 N.W.2d 535, 539–41 (Neb. 1988) (upholding a commercial lease clause waiving landlord liability and stating that "[c]ourts are not free to interpret contracts which are couched in clear and unambiguous language") (internal citation omitted).

168. Goldman, *supra* note 55, at 201.

169. *See* Berger, *supra* note 162, at 791; Mueller, *supra* note 162, at 264–70.

170. *See* Berger, *supra* note 162, at 791 n.3 (explaining how the New York City Real Estate Board's form remained largely the same from 1942 to 1972).

171. Wenner, *supra* note 25, at 551.

172. *See id.* and accompanying footnotes.

173. *See id.* at 550–55.

174. *Id.* at 555.

175. Subcommittee on the Model Landlord-Tenant Act of Committee of Leases, *Proposed Uniform Landlord and Tenant Act*, 8 REAL PROP. & TR. J. 104 (1973). The Uniform Residential Landlord and Tenant Act that resulted was based on the American Bar Foundation's Tentative Draft of a Model Residential Landlord-Tenant Code. *Id.* at 104 n.2.

unequivocally rejected the lease-as-conveyance view in favor of the lease-as-contract model.[177] URLTA has been influential, and, as of 2004, fifteen states had adopted it entirely,[178] five other states with some modification,[179] and possibly more to come in the future.[180]

URLTA aspires to protect tenants' rights by creating incentives for landlords to improve the quality of rental housing.[181] To this end, URLTA's provisions codify several of the substantive developments of the landlord-tenant revolution.[182] For example, section 2.104 adopts the

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176. *Id. See also* URLTA § 1.101 cmt. However, URLTA does not apply to all residential leases, providing the following exceptions:

> (1) residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service;
>
> (2) occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his interest;
>
> (3) occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;
>
> (4) transient occupancy in a hotel, or motel [or lodgings [subject to cite state transient lodgings or room occupancy excise tax act]];
>
> (5) occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises;
>
> (6) occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative;
>
> (7) occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes.

Id. § 1.202.

177. *See* Subcommittee on the Model Landlord-Tenant Act, *supra* note 175, at 105.

178. *See* Madison, *supra* note 27, at 467. These states are Alaska (ALASKA STAT. §§ 34.03.10–34.03.380 (2004)), Arizona (ARIZ. REV. STAT. ANN. §§ 33-1301 to -1381 (2000)), Florida (FLA. STAT. §§ 83.40–.67 (2004)), Hawaii (HAW. REV. STAT. §§ 521-1 to -78 (2006)), Iowa (IOWA CODE §§ 562A.1–.37 (1992)), Kansas (KAN. STAT. ANN. §§ 58-2540 to -2573 (2005)), Kentucky (KY. REV. STAT. ANN. §§ 383.500–.715 (2002)), Montana (MONT. CODE ANN. §§ 70-24-101 to -442 (2005)), Nebraska (NEB. REV. STAT. §§ 76-1401 to -1449 (2003)), New Mexico (N.M. STAT. §§ 47-8-1 to -52 (1995)), Oregon (OR. REV. STAT. §§ 91-700 to -955 (2003)), Rhode Island (R.I. GEN. LAWS §§ 34-18-1 to -56 (1995)), South Carolina (S.C. CODE ANN. §§ 27-40-10 to -940 (1991 & Supp. 1995)), Tennessee (TENN. CODE ANN. §§ 66-28-101–516 (2004)), and Virginia (VA. CODE ANN. §§ 55-248.2–.40 (2003)).

179. These states are Connecticut (CONN. GEN. STAT. §§ 47a-1 to 47a-20 (1994)), Nevada (NEV. REV. STAT. §§ 118A.010–530 (2000)), Ohio (OHIO REV. CODE ANN. §§ 5321.01–19 (2004)), Oklahoma (OKLA. STAT. tit. 41, §§ 101–35 (1999)), and Washington (WASH. REV. CODE §§ 59.18.010–900 (2004)).

180. In 2005, Alabama introduced a bill to adopt URLTA. *See* 2005 Reg. Sess. (Ala. 2005).

181. URLTA § 1.102(b)(2). However, some have criticized the effectiveness of URLTA in accomplishing this goal. *See supra* note 14.

182. *See* Bagni, *supra* note 56, at 752, stating as follows:

> The drafters of URLTA recognized the obsolescence of traditional landlord-tenant law; consequently, they signaled for wholesale departures. Whereas, the common law minimized landlord obligations, the URLTA maximizes them; substantial affirmative duties have been imposed in the spirit of the judicial decisions and legislative acts [of the landlord-tenant revolution].

implied warranty of habitability[183] and requires landlords to comply with applicable building and housing codes,[184] keep the premises fit and habitable,[185] keep all common areas safe and clean,[186] maintain certain services and utilities,[187] provide for garbage removal,[188] and supply running water.[189] A material breach of these requirements gives the tenant a right to terminate the lease[190] or, if the breach concerns an "essential service" such as failure to provide heat or water, the tenant can recover damages or the cost of substitute housing.[191] The Act also contains provisions prohibiting constructive eviction[192] and certain retaliatory conduct,[193] requiring the landlord to mitigate damages in the event of abandonment,[194] and providing for waivers of the landlord's right to terminate the lease.[195]

In addition, URLTA gives courts some discretion to police leases. Section 1.303(a)(1) provides that a court may refuse to enforce a lease provision it finds to be unconscionable.[196] In making that determination, the court is to consider whether "the conditions of the particular parties to the rental agreement, settlement or waiver of right or claim are so one-sided as to be unconscionable under the circumstances."[197] Similarly, URLTA specifically prohibits the inclusion of certain lease terms, a proactive response to the problem of form leases and the unequal bargaining power of the parties.[198] Specifically, section 1.403 prohibits any lease provision in which a tenant waives or forgoes any right or remedy provided by the Act,[199] which authorizes a tenant to confess judgment on a claim arising from the lease,[200] which requires the tenant to

183. URLTA § 2.104 cmt.
184. *Id.* § 2.104(a)(1).
185. *Id.* § 2.104(a)(2).
186. *Id.* § 2.104(a)(3).
187. *Id.* § 2.104(a)(4).
188. *Id.* § 2.104(a)(5).
189. *Id.* § 2.104(a)(6).
190. *Id.* § 4.101(a).
191. *Id.* § 4.104(a)–(c).
192. *Id.* § 4.107.
193. *Id.* § 5.101(a)–(d).
194. *Id.* § 4.203(c).
195. *Id.* § 4.204.
196. *Id.* § 1.303(a).
197. *Id.* § 1.303 cmt.
198. *Id.* § 1.403 cmt. ("Rental agreements are often executed on forms provided by landlords, and some contain adhesion clauses the use of which is prohibited by this section.").
199. *Id.* § 1.403(a)(1).
200. *Id.* § 1.403(a)(2).

pay the landlord's legal fees,[201] or which limits or indemnifies the landlord for liability.[202] Such a lease provision is per se unenforceable, and its deliberate inclusion allows a tenant to recover actual damages, an additional sum equal to three months' rent, and attorneys' fees.[203]

1. URLTA and the Holdover Tenant

The starting point for analysis of URLTA's treatment of the holdover tenant is section 4.301, entitled "Periodic Tenancy; Holdover Remedies."[204] Subsection (c) of that section provides as follows:

> If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession and if the tenant's holdover is willful and not in good faith the landlord may also recover an amount not more than [3] month's [sic] periodic rent or [threefold] the actual damages sustained by him, whichever is greater, and reasonable attorney's fees. If the landlord consents to the tenant's continued occupancy, Section 1.401(d) applies.[205]

Section 4.301(c) mimics the common-law holdover rule by giving the landlord a choice between treating the holdover tenant as a trespasser and recovering damages or consenting to the continued occupancy. Section 4.301(c) is not as explicit as the Restatement, for example, in giving the landlord the unilateral right to make this choice,[206] but it does says that a new term will arise only "[i]f *the landlord* consents."[207] The conclusion that this language grants the landlord a unilateral election is bolstered by the absence of any other URLTA provision indicating a preference for the alternative consent-of-both-parties formulation; nowhere does URLTA require anything more than the act of holding over to suggest agreement for a further term.[208]

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201. *Id.* § 1.403(a)(3).
202. *Id.* § 1.403(a)(4).
203. *Id.* § 1.403(b).
204. *Id.* § 4.301.
205. *Id.* § 4.301(c) (brackets in original).
206. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.4 (1977) ("[T]he landlord . . . may elect, solely on the basis of the tenant's improper holding over after the termination of his lease, unilaterally to hold the tenant to another term . . . .").
207. URLTA § 4.301(c) (emphasis added).
208. URLTA § 1.101–6.104. By contrast, Connecticut, for example, has adopted virtually identical provisions to URLTA regarding the holdover situation, but specifically provides that

Assuming the landlord consents to the holdover tenant's continued occupancy, section 1.401(d) then dictates the length of the new term. That section states, "Unless the rental agreement fixes a definite term, the tenancy is week-to-week in case of a roomer who pays weekly rent, and in all other cases month-to-month."[209] By its terms, then, section 1.401(d) makes the default term of the holdover a month-to-month tenancy in all cases where the tenant does not pay weekly rent or where the lease does not provide otherwise. Notably, this is a departure from the common law,[210] and is perhaps a compromise to mitigate the harshness of adopting the stricter unilateral landlord election.

In addition, URLTA embraces the English Rule for delivery of possession.[211] Section 2.103 provides that "[a]t the commencement of the term a landlord shall deliver possession of the premises to the tenant . . . . The landlord may bring an action for possession against any person wrongfully in possession and may recover the damages provided in section 4.301(c)."[212] Similar to the common-law rule, pursuant to Section 4.102(a), "[i]f the landlord fails to deliver possession . . . rent abates until possession is delivered,"[213] and the incoming tenant can cancel the lease after five days' written notice or demand possession and recover actual damages.[214] As an additional incentive, section 4.102(b) allows the incoming tenant to recover the greater of three months' rent or triple the actual damages sustained, and reasonable attorney fees, when the failure to deliver possession is willful and not in good faith.[215]

II. ANALYSIS

One can document the shift from the common-law system, which was largely geared toward the protection of status and the landlord's superior

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"[h]olding over by any lessee, after the expiration of the term of his [or her] lease, shall not be evidence of any agreement for a further lease." CONN. GEN. STAT. § 47a-3d (2004). An analogous provision is lacking in URLTA.

209. URLTA § 1.401(d).

210. The common-law rule provided that a tenant for a year or more could be held to a year-to-year holdover tenancy. *See supra* note 84.

211. *See* Heiser, *supra* note 138, at 176–77; Rabin, *supra* note 17, at 540.

212. URLTA § 2.103.

213. *Id.* § 4.102(a).

214. *Id.* § 4.102(a)(1)–(2).

215. *Id.* § 4.102(b). This section provides, "If a person's failure to deliver possession is willful and not in good faith," then the incoming tenant may recover the above-mentioned damages. *Id.* Since URLTA adopts the English Rule for delivery of possession, the use of the word "person" indicates that the incoming tenant will have an action against the landlord only. *See also* URLTA § 1.301(8) (defining person to include "an individual or organization").

property interest, to a system geared primarily toward tenant protection. URLTA, in keeping with this movement, was intended to provide increased tenant protections consistent with those that were concurrently being developed by state courts and legislatures. In the context of the holdover tenant, at first glance URLTA's scheme mitigates the common-law rule when the landlord binds the tenant to a new term by calling for the creation of a month-to-month tenancy by default. Because the common-law rule provided that leases of a year or more resulted in holdover periods of one year, while periodic tenancies resulted in the same periodic holdover tenancy, a default month-to-month tenancy benefits those tenants subject to leases of one year or more. Section 1.401(d)'s creation of a month-to-month tenancy might be seen as striking an appropriate balance between the parties' competing interests. This result protects landlords from potentially foregone rents caused by the tenant's holding over, protects incoming tenants by creating a disincentive for holding over and thereby increasing the likelihood the premises will be open, and, importantly, tempers these interests against the remaining tenant's interest in not being subjected to an excessive term against their will. In addition, the creation of a month-to-month tenancy might better, albeit artificially, reflect the tenant's actual intent. If a tenant for a year or more intended to be held for another full term, one assumes that a new agreement would have been reached and a new lease signed. By holding over and not executing a new lease, then, the tenant is deemed to intend to extend the lease by at most another month. The statutory creation of a month-to-month tenancy captures this assumption. At least facially, section 4.301(c) is consistent with the overall thrust of URLTA itself and the revolution in landlord-tenant law—increased tenant protection and decreased landlord privileges compared to those that existed at common law.

But it is obvious the drafters of URLTA did not intend the default month-to-month tenancy in all cases, for they provided an obvious statutory loophole within section 1.401(d) to defeat this result. Once again, section 1.401(d), which applies to determine the length of the new holdover term, provides, "*Unless the rental agreement fixes a definite term*, the tenancy is week-to-week in case of a roomer who pays weekly rent, and in all other cases month-to-month."[216] Therefore, the creation of a month-to-month tenancy is merely a default rule; if the landlord desires to put a different and longer term in the lease, seemingly it would govern

216. URLTA § 1.401(d) (emphasis added).

the holdover situation. By way of illustration, a landlord might execute a lease containing the following provision:

> If the Tenant remains in possession of the premises following the expiration of the term and without executing a new lease, such holding over shall, at the sole discretion of the Landlord, be construed as a tenancy from year-to-year, subject to all the conditions, provisions, and obligations of this Lease.

Such a provision simply and effectively rewrites section 1.401(d)'s default month-to-month tenancy. If the Commissioners had intended to limit the new tenancy to month-to-month in all cases,[217] they could have omitted the offensive language permitting a lease provision to trump the statutory tenancy. The Commissioners could have written a statutory provision preemptively disallowing specific lease terms, as was done in other places,[218] but here they chose to specifically cross-reference section 4.301(c) to another provision which expressly allows the lease to supersede the statutory tenancy.

The problems identified with form leases and bargaining power discrepancies indicate that it would be surprisingly easy for a landlord to include such a provision if so desired. As mentioned, the revolution in landlord-tenant law increased tenants' protections in several ways but did little to alleviate the disparate bargaining power between the parties. In the context of the form lease, where various provisions are set in place ahead of time by the landlord, this discrepancy is magnified. Here, with section 1.401(d)'s blessing, the landlord can include a defeating lease provision and the average tenant will likely not read or understand it, or, alternatively, will fail to negotiate around it. The potential result is that a boilerplate provision, as above, could make its way into the form leases of URLTA jurisdictions and only be challenged on a case-by-case basis.

If such a hypothetical provision is challenged, although URLTA in places tips its hat to notions of good faith and unconscionability,[219] there is a unique and verisimilar risk that it would be enforceable. First, such a lease provision is not expressly prohibited by URLTA. Although section

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217. Week-to-week tenants are excluded. *Id.*

218. *See supra* notes 198–203 and accompanying text.

219. *See* URLTA § 1.302; *see also id.* § 1.103, providing:

> Unless displaced by the provisions of this Act, the principles of law and equity, including the law relating to capacity to contract, mutuality of obligations, principal and agent, real property, public health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

1.403 identifies several per se unenforceable provisions, none relate to sections 4.301(c) or 1.401(d) or regulate the length of a holdover term. In fact, just the opposite is true. The language of section 1.401(d) actually welcomes such a provision.[220] It is clear the Commissioners explicitly recognized the bargaining-power disparity inherent in the landlord-tenant relationship. The comment to section 1.403 indicates that the Commissioners were well aware of the problems of the form lease, stating that "[r]ental agreements are often executed on forms provided by landlords, and some contain adhesion clauses the use of which is prohibited by this section."[221] Yet they chose not to trump the bargaining process and declare provisions invalid unless the offensive covenant relates to a more traditionally fundamental tenant right, such as waiver of the warranty of habitability or a landlord's tort liability. These two factors—the lack of a prohibitory statutory provision and section 1.401(d)'s express mandate that such a lease term is permissible—strongly indicate that, instead, the Commissioners felt it wise to leave such a choice to the agreement of the parties, circumscribed only by unconscionability.

Yet it is problematic to conclude that such a provision would be deemed unconscionable. Even if it were challenged, the hypothetical provision calling for a year-to-year holdover period is clear and unambiguous, and tenants can generally be presumed to have read and understood the lease. Even traditionally antiholdover states like New York, which provides for a statutory month-to-month tenancy, have recognized the ability of a precisely drawn lease provision to nullify the statute in favor of a term substantially longer.[222] In effect, what the landlord accomplishes through this provision is merely to preserve within a lease the result that was mandated at common law—that is, the ability to hold a tenant who has a lease term of a year or longer, who wrongfully remains in possession, to an additional year-to-year tenancy. By contrast, the landlord's inclusion of a lease provision calling for a holdover period of five years, for example, is more uncertain. Such a provision carries a higher presumption of unconscionability given that no court, even at common law, recognized the ability of a landlord to bind a holdover tenant for anything greater than one year.[223] The year-to-year term simply does

220. Since § 1.401(d) limits the maximum default tenancy to month-to-month "[u]nless the rental agreement fixes a definite term," one can assume by negative implication that the drafters anticipated rental agreement holdover terms longer than month-to-month. URLTA § 401(d).

221. URLTA § 1.401(d) cmt.

222. *See* United Mut. Life Ins. Co. v. ICBC Corp., 410 N.Y.S.2d 292 (N.Y. App. Div. 1978).

223. *See* 2 TIFFANY, *supra* note 88, at 1470.

not rise to the level of the five-year term in departing from common-law precedent, nor is it categorically similar to that class of cases where courts have trumped the bargaining process and held lease provisions unconscionable.[224] Thus, section 4.301(c), by way of section 1.401(d), enables landlords to utilize enforceable holdover provisions akin to those obtainable by default at common law, with the same results criticized as overly severe.

The preceding demonstrates that the Commissioners did not provide adequate statutory safeguards for tenants against landlords who desire to include a more favorable holdover provision in the lease. Furthermore, it appears this lack of statutory paternalism was intentional. But the discussion cannot end there because rationales exist that support the harshness of the holdover rule, and the strong interests of the landlord and incoming tenant may warrant a provision such as section 4.301(c). The customary justification for the holdover rule and, more specifically, for the landlord's unilateral election, is that it ultimately operates for the benefit of tenants as a class by its tendency to ensure the current tenant departs promptly.[225] This is a commendable goal; surely one signing a lease does not forecast that their possession will be put off by a lingering tenant. By adopting the English Rule for delivery of possession, URLTA endorses the early view of *Coe v. Clay* that an incoming tenant should not have to gamble with the "chance at a lawsuit."[226] In this regard, implicit within URLTA's holdover scheme is a considerable deterrence component. The threat of being held to another term, in theory, should dissuade the tenant from holding over, thus ensuring the availability of the property for the incoming tenant. This ground has been criticized, however, because deterrence "is burdened by the requirement that it is only valid if the tenant knows of his [or her] liabilities," and it is questionable whether requisite notice takes place in the majority of cases.[227] Without meaningful notice, there is no heightened incentive to vacate on time, at which point justification for the rule falls back to a penalty theory.[228] The Restatement (Second) admits that without notice, the unilateral election is only "designed to protect the legitimate interests of the landlord."[229] Thus, there is a problem with the rationale for the rule.

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224. *See supra* note 71.
225. *See supra* notes 97–115 and accompanying text.
226. Coe v. Clay, (1829) 130 Eng. Rep. 1131, 1131 (Ct. Common Pleas).
227. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.4 (1977) (Introductory Note).
228. *Id.*
229. *Id.*

Putting that aside for a moment, even if we assume that URLTA's holdover scheme serves a legitimate deterrence purpose in the case where there is an incoming tenant, in practice the election will rarely, if ever, be used in that situation. For if the landlord includes a statutory defeating provision and the tenant holds over, because URLTA embraces the English Rule for delivery of possession, there are only two discrete circumstances in which the landlord will make the election to hold the tenant to a new term. To reach this conclusion, begin with the following premise: "While the landlord is almost always in the best position to prevent the lessee from holding over under a residential lease, he [or she] should not do so if holding over would yield an efficient outcome."[230] Although the landlord's failure to deliver possession to the incoming tenant is a breach, it will be an economically efficient and rational course of action if the future rents from the holdover tenant outweigh the costs of the breach. As noted, the costs of the breach in the form of actual and compensatory damages are likely to be nominal. However, section 2.104(b) creates an additional disincentive for breach by allowing the incoming tenant to recover the greater of three months' rent or threefold the actual damages sustained and reasonable attorney fees when the failure to deliver possession is willful and not in good faith.[231] As a result, the prospect of paying a sum equal to triple rent plus attorney fees creates a powerful incentive for the landlord not to exercise the holdover election.[232] Thus, it is primarily section 2.104(b), and not the threat of being held to another term by way of section 4.301(c), that ensures the premises will nearly always be open for an incoming tenant. A landlord will rarely use the election when there is an incoming tenant because "there is almost never an efficient outcome when a residential tenant holds over."[233] A landlord instead has an incentive to quickly initiate removal proceedings, and the incoming tenant might be put out of possession for a few days, while the holdover tenant becomes liable for damages.[234] This is a positive outcome; the end goal of having open premises is achieved by less drastic

230. Heiser, *supra* note 138, at 191.

231. *See supra* note 215.

232. Also clearly the time and effort required to litigate creates additional disincentives.

233. Heiser, *supra* note 138, at 191 (making statement in regard to jurisdictions where the English Rule for delivery of possession is utilized).

234. *See* URLTA § 4.301(c) ("[T]he landlord may bring an action for possession and . . . may also recover an amount not more than [3] month's periodic rent or [threefold] the actual damages sustained by him, whichever is greater, and reasonable attorney's fees."); URLTA § 2.103("At the commencement of the term a landlord shall deliver possession of the premises to the tenant [and] may bring an action for possession against any person wrongfully in possession and may recover the damages provided in Section 4.301(c).").

means than binding the holdover tenant to a new term, and the incoming tenant is able to secure actual possession at a not-too-distant future time. If the overriding concern is that the premises will be open, section 2.104(b) makes sections 4.301(c) and 1.401(d) superfluous deterrence measures.

Yet the landlord's election remains. The problem with strongly discouraging landlords from creating holdover tenancies when there is an incoming tenant, yet giving the landlord the unilateral right to create such tenancies, is that landlords will only utilize the election when there is no incoming tenant or when there is an incoming tenant but a falling rental market.[235] Without an incoming tenant, the idea that sections 4.301(c) and 1.401(d) remain viable as beneficial to tenants as a class is a legal fiction. However, this is the prime situation in which the election will be exercised. With no concern over an incoming tenant and breach, the landlord would jump at the opportunity to bind an unwitting holdover tenant, thus securing another year's rent. Any negligible penalty justification that exists for this result is vastly outweighed by the severity of the sanction on the individual tenant,[236] and no substantial interest is furthered other than the landlord's interest in securing a continuous stream of rental income.

URLTA's policy of enabling, if not encouraging, landlords to selectively engage in rental arbitrage at the expense of important countervailing interests is striking. Again, the problem is with the rationale for the rule. The holdover tenant's interest in equity is discarded, and, more fundamentally, such a policy advances no discernible benefit for tenants as a class—the chief and perhaps only legitimate justification for allowing the holdover rule in the first place. Nearly one hundred years ago, one commentator identified the hypocrisy of allowing landlords to impose this penalty upon unwilling tenants in an otherwise tenant-friendly country, stating:

> It is somewhat surprising that the courts of this country, which have ordinarily shown a desire to mould the law in favor of the tenant rather than the landlord, should have originated and generally adopted [the unilateral landlord election], the tendency of which is,

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235. For the landlord to rationally opt to bind the holdover tenant in the falling market scenario, the sum of the incoming tenant's rent would have to be at least one dollar less than the sum of the holdover's rent for the holdover period less the cost of the breach. By way of illustration, assume both the holdover and incoming tenant have lease terms of 12 months. Then $12x$ must be less than $12y–z$, where x is equal to the incoming tenant's rental rate, y is equal to the holdover tenant's rental rate, and z is equal the cost of the breach. Presumably, this would require a substantial drop in rental rates.

236. *Cf.* SCHOSHINKSI, *supra* note 4, at 72.

> in many cases, to operate with considerable severity upon a tenant who is disposed promptly to relinquish possession but is accidentally prevented from doing so.[237]

This statement was made long before any grumblings about a revolution in landlord-tenant law took place. Thus, it is all the more surprising that the drafters of URLTA, a flagship reform written at the very crux of a revolution in which tenants' legal protections were increasing by leaps and bounds, would craft a rule that tends not only to operate with considerable severity upon an individual tenant but also to operate in such as way so as to further no beneficial interest of tenants anywhere.

It seems there is no good reason for giving the landlord this election at all. In sum, section 2.104(b) nullifies the need for the election as deterrence protection for incoming tenants; any remaining rationale for the landlord's election is itself but a holdover from the common law, the only result of which is to further the landlord's economic interest. To borrow from Justice Oliver Wendell Holmes, it appears somewhat "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV [and] more revolting if the grounds upon which it was laid down have vanished . . . and the rule simply persists from blind imitation of the past."[238]

III. PROPOSAL

There are modifications to URLTA's holdover system that could preserve the landlord's interest in rental income while, importantly, striking a better balance between the interests of the holdover and incoming tenants, and also better achieving equilibrium between certainty and equity. This Note suggests primarily that URLTA's default unilateral election contained within section 4.301(c) be done away with. In reaching this conclusion, brief application to both holdover situations—where there is an incoming tenant and where there is not—is needed. In the case of the former, note that URLTA's current system, absent the unilateral election, already provides adequate protections to both landlords and incoming tenants. Once again, section 2.103 requires the landlord to evict the holdover tenant while allowing him or her to recover damages from that tenant, and sections 4.102(a) and (b) make the landlord liable to the

237. 2 TIFFANY, *supra* note 88, at 1471–72.
238. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

incoming tenant for damages if possession is not delivered. The threat of the holdover election is unnecessary in this circumstance because adequate pressure is already applied to the landlord to evict and to the tenant to vacate. This is substantially similar in effect to a double-rent statute. Here, instead, the potential liability is a lump-sum payable from holdover to landlord, and another lump-sum payable from landlord to incoming tenant. If the tenant holds over unintentionally, the incoming tenant is allowed to cancel the lease after too long a wait. And in that case, section 2.102 shields the landlord from liability if eviction proceedings are brought because failure to deliver possession must be willful and not in good faith. Again, the end goal of having open premises is achieved by less drastic means than binding the holdover tenant to a new term, and the incoming tenant is able to secure actual possession at a not-too-distant future time.

In the latter case where there is no incoming tenant, the landlord's default unilateral election should be removed because no important interest is served by allowing landlords to bind tenants to a new term. Here, any additional term should arise by agreement of the parties.[239] If the tenant remains with no intent to extend the lease, the tenant should simply be liable for prorated rent for the time of holding over. This allows the landlord to maintain the status quo until a new tenant is found, or, alternatively, until a new lease is signed with the current tenant. The tenant that remains behind will be able to take extra time, sometimes unavoidable,[240] to vacate the premises, but must pay for that privilege. If the tenant continues to pay rent in expectation of extending the lease and the landlord accepts, a month-to-month tenancy should apply, not by the landlord's election, but by the payment and acceptance of rent. If the landlord does not accept the payment as an extension of the lease, proceedings to evict should be brought in a reasonable time and the tenant will remain liable for the reasonable rent during occupation. In sum, where there is no incoming tenant, a modified consent approach should govern, more consistent with general contract principles. The parties are always free to sign a new lease, but in the absence of such an agreement the tenant will remain liable for prorated rent, unless the tenant pays rent and the landlord accepts as an extension of the lease, at which point a month-to-month tenancy will arise.

Even after omitting the landlord's default election, the problem of the form lease remains. As noted previously, even in those states that have

239. Of course, problems also arise with what constitutes adequate manifestation of intent. *See supra* note 94 and accompanying text.

240. *See, e.g.*, Mason v. Wierengo's Estate, 71 N.W. 489 (Mich. 1897).

abrogated the holdover rule through double-rent statutes, or in those that call for a month-to-month tenancy in all cases, an agreement reached through lease provision or otherwise can trump the statutory holdover resolution. Due to the disparity of bargaining power between the parties, greater legislative paternalism may be warranted to protect tenants from overreaching landlords. Although a landlord's year-to-year holdover provision in a lease is unlikely to be exercised when there is an incoming tenant, it would be nearly impossible to determine ex ante whether an incoming tenant will in fact be present on the date of expiration. Thus, a bright-line rule prohibiting lease provisions that allow a holdover term in excess of month-to-month is necessary. Such a rule integrated into URLTA's system would eliminate the risk that a holdover tenant will be bound in the absence of an incoming tenant. It would also virtually eliminate that small class of cases in which a landlord might bind a holdover tenant even when there is an incoming tenant due to a falling rental market. Presumably, in this latter situation, the rental rate to which the holdover tenant would be bound would be substantially higher than the prevailing market rate, resulting in an unwilling tenant being bound to an unreasonable rental rate. In addition, nothing suggested here alters the ability of the landlord and tenant to later agree to a new term if both find it in their interests to do so.

These suggestions are an attempt to better capture the result the Commissioners should have been striving for. Eliminating the landlord's unilateral election leaves adequate protections for the incoming tenant while removing the risk of a holdover being bound in the absence of an incoming tenant. In addition, adopting per se unenforceability of lease terms creating a holdover term greater than month-to-month protects tenants from the heavy-handed bargaining power of landlords.

CONCLUSION

The law of landlord and tenant is an area that has been literally revolutionized, with huge momentum building in the late 1960s and early 1970s. Despite laudable gains to tenants' rights, the obligations of the holdover tenant nevertheless remain. Although URLTA's provisions addressing holdover tenants appear to embrace the thrust of this revolution and mitigate the common-law doctrine by providing for the creation of a month-to-month tenancy in the majority of cases, in theory and in practice section 4.301(c) frustrates the Act's overall purpose by leaving many undesirable characteristics of the common-law system in place. Section 4.301(c) has no teeth because sophisticated (and perhaps not-so-

sophisticated) landlords can nullify its effects by writing it out of the lease, and, in addition, are motivated to do so. Landlords in URLTA jurisdictions are able to manipulate leases in such a way as to write in an enforceable, landlord-friendly holdover provision, and then selectively enforce that provision only when economically beneficial. Because of this, the holdover rule ceases to function in its proper role. No longer will it even arguably work for the benefit of tenants as a class, but instead it will become yet another item in the landlord's bag of tricks. In the end, section 4.301(c) is not revolutionary but devolutionary. Only by providing increased tenant protections from overreaching landlords, consistent with the rest of the Act, can URLTA cease to be hypocritical in the holdover context and become more genuine in its role as a flagship reform.

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