Leasing Real Property

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The law of concurrent ownership, discussed in the previous chapter, generally regulates relationships between intimates. Arrangements like the joint tenancy generally arise between individuals who know each other and remain locked in ongoing relationships. As a result, there’s not much arms-length bargaining and relatively few disputes work their way into the court system.

The law of landlord-tenant is very different. It is the law of strangers—strangers who often have little in common and may never interact after the lease terminates. How the law responds to this difference is one of the central theoretical questions you will wrestle with in this chapter. More practically, in this section of the course you will learn about the types of leaseholds, tenant selection, transferring leases, ending leases, and the various rights and responsibilities of tenants and landlords during the course of the lease.

A. The Dual Nature of the Lease

In its simplest form, the lease is a transfer in which the owner of real property conveys exclusive possession to a tenant (generally in exchange for rent). Most law students know through personal experience that the process of renting generally entails signing a lease contract. Like other contracts, a lease’s terms can be negotiated and they explicitly govern many of the rights and responsibilities of the parties involved. So why then are leases discussed in the property course rather than contracts?

The short response is that a lease is a property-contract hybrid. While it is surely a contract, it’s a contract for a very particular kind of property interest. The fuller answer, like so much in property, lies in the history of feudal land law. Under the traditional common law, a leasehold was understood primarily as a property interest, similar in nature to the estates covered in our chapter on Estates and Future Interests. A lord (often a baron) conveyed a possessory right to a tenant (usually a peasant) and retained for himself a future interest (typically a reversion). Importantly, once the landlord transferred the right to possession, he had few other obligations to the tenant.
This basic model survived until the 1960s, when many jurisdictions began to introduce general contract law principles (e.g. the implied duty of good faith and fair dealing) into the law of landlord-tenant. Importing contract theories into the lease has had two practical effects. First, parties to a lease now have the option to terminate in the case of any material breach; in the past tenants could only terminate if the landlord interfered with their possession. Second, modern tenants have far more protections from indifferent and unscrupulous landlords than their counterparts 50 years ago. Courts and legislatures have proven particularly eager to help residential tenants—whom they view as vulnerable—from predations of the free market.

B. Creating the Leasehold

1. A Lease or Something Else?

A lease is a transfer of the right of possession of specific property for a limited period of time. It’s important to see that not all legal relationships that grant the use of an owner’s property qualify as leaseholds. Take, for example, the case of Snow White and Seven Dwarfs. If the Dwarfs give Snow White sole possession of their cottage for 12 months in exchange for a monthly payment, they have almost certainly created a lease. If, however, the Dwarfs invite Snow White to sleep on their couch for a few nights while she evades the Queen, they probably have created something called a license (a revocable permission to use the property of another, which we’ll study in greater detail later in the book) rather than a leasehold. This determination matters (as we’ll soon see) because the law extends a number of protections to grantees who qualify as tenants. It affects, among other things, whether the grantee can exclude the owner from certain spaces, how the parties can terminate the interest, whether the grantee can invite outsiders onto the property, who has the obligation to perform maintenance, who is liable if the grantee suffers an injury on the property, and what remedies the parties have if a disagreement arises.

To determine whether parties have created a leasehold or some other legal interest, courts have traditionally focused on whether a grantor has turned over exclusive possession or a more limited set of use rights. Possession, however, remains a slippery concept, difficult to define. Consider the following post from an internet message board:
Does the nanny have a lease? Do we need any other information? Should courts look beyond mere facts of possession and consider the policy considerations of extending landlord-tenant protections to the parties in the case? What might those policy considerations entail? As you read through the materials, you may want to revisit this question.

2. **Types of Leasehold**

As we have seen throughout this course, property interests come in a limited number of forms, many of which we have inherited directly from feudal England. This theme holds in landlord-tenant. The common law developed three types of leaseholds that our modern property system still recognizes: the term of years, the periodic tenancy, and the tenancy at will.

The Term of Years

The *term of years* is a leasehold measured by any fixed period of time. The most familiar term of years lease is the residential one-year lease. The actual term, however, may vary greatly. In 2001, the U.S. government signed a 99-year lease for an embassy in Singapore. Leases of hundreds or even thousands of years are not unheard of, either. *See* Monbar v. Monaghan, 18 Del. Ch. 395 (1932) (two thousand year lease). At the other end of the spectrum, vacation properties like beach condos and lake houses commonly rent for one-week periods.

Whatever the duration, a term of years automatically ends when the stated term expires. For example, imagine L leases Blackacre to T “from September 1, 2015 to August 31, 2016.” Neither party is required to give the other notice of termination. The tenant
must simply surrender possession to the landlord by midnight on August 31. The death of either contracting party does not affect a term of years lease, unless the landlord and tenant have agreed otherwise. If the tenant dies, the law requires her estate to carry out the lease.

The Periodic Tenancy

The *periodic tenancy* is a lease for some fixed duration that automatically renews for succeeding periods until either the landlord or tenant gives notice of termination. This automatic renewal is the chief practical difference between the periodic tenancy and the term of years. The most common type of periodic tenancy is the month-to-month lease. As the name suggests, a month-to-month lease lasts for a month and then continues for subsequent months, until either the landlord or tenant ends the lease. Periodic tenancies have no certain end date; some residential tenants with month-to-month leases stay in their apartments for decades.

Termination requires one party to give advance notice to the other. These notice requirements are now heavily regulated by statute in most jurisdictions. Under the common law (which is still the basis for many state regulations), for year-to-year periodic leases (or any periodic lease with a longer initial duration), parties must give notice at least six months before the period ends. For leases less than a year, the minimum notice equals the length of the lease period. Additionally, unless the parties make an agreement to the contrary, the lease must terminate on the final day of a period. Assume, for example, that T signs a month-to-month lease that begins May 1. On August 20, T gives notice of termination to her landlord. When will the lease end? T must give the landlord a minimum of one month notice. That pushes T's obligations under the lease to September 19. A periodic tenancy, however, must end on the last day of a period. Thus, T's lease will terminate on September 30 at midnight.

The death of either the landlord or tenant does not end a periodic tenancy. If, for example, the tenant dies before the lease terminates, the law vests the tenant’s estate with the responsibility to fulfill the remaining obligations under the lease.
The Tenancy at Will

The tenancy at will has no fixed duration and endures so long as both of the parties desire. For example, if the landlord and tenant sign a document that reads, “Tenant will pay the Landlord $500 on the first of the month and the lease will endure as long as both of us wish” they have created a tenancy at will. Under the common law, either party could end such a lease at any moment. Today, most states have enacted statutes that establish minimum notice periods—30 days is common. Tenancies at will also terminate if the landlord sells the property, the tenant abandons the unit, or either party dies.¹

Tenancies at will can arise as a result of the clear intention of the parties—the ease of termination is a valued feature in some negotiations. But note, the tenancy at will is also the catchall lease category. If a leasehold doesn’t qualify as either a term of years or periodic tenancy, the law crams it into the tenancy at will box—even if that clearly violates the goals of the parties. This occasionally creates real hardship for individuals with sloppily drafted leases.

Effel v. Rosberg
360 S.W.3d 626 (Tex. App. 2012)

MORRIS, Justice.
This is an appeal from the trial court’s judgment awarding Robert G. Rosberg possession of property in a forcible detainer action. Appellant Lena Effel brings seventeen issues generally contending the trial court . . . erred in concluding Rosberg was entitled to possession of the property. After examining the record on appeal and reviewing the applicable law, we conclude appellant’s arguments are without merit. We affirm the trial court’s judgment.

I.

[On March 1, 2006, Robert G. Rosberg filed suit against Lena Effel’s nephews, Henry Effel and Jack Effel. The parties settled the dispute out of court and signed a

¹ In jurisdictions that require 30-day notice periods before the termination of a tenancy at will, this is one of the key remaining differences between the month-to-month periodic lease and the tenancy at will.
compromise settlement agreement. As part of the settlement, Rosberg received a piece of land owned by Henry and Jack Effel. The property contained the home where Lena Effel lived. The settlement agreement between the Effels and Rosberg stated that Lena Effel “shall continue to occupy the property for the remainder of her natural life, or until such time as she voluntarily chooses to vacate the premises.” The settlement agreement further stated that a lease agreement incorporating the terms of the settlement agreement would be prepared before the closing date of the purchase.

The property in question was deeded to Rosberg with no reservation of a life estate. A lease for appellant was prepared by the Effels’ attorney. The term of the lease was “for a term equal to the remainder of the Lessee’s life, or until such time that she voluntarily vacates the premises.” The lease also contained various covenants relating to payment of rent and charges for utilities as well as the use and maintenance of the grounds. The lease provided that if there was any default in the payment of rent or in the performance of any of the covenants, the lease could be terminated at the option of the lessor. The lease was signed by Rosberg as lessor and by Henry Effel on behalf of appellant under a power of attorney as lessee.

Three years later, on February 24, 2010, Rosberg, through his attorney, sent a letter to appellant both by regular mail and certified mail stating that he was terminating her lease effective immediately. The reason for the termination, according to the letter, was Rosberg’s discovery that appellant had installed a wrought iron fence in the front yard of the property in violation of two covenants of the lease. The letter stated that appellant was required to leave and surrender the premises within ten days and, if she did not vacate the premises, Rosberg would commence eviction proceedings. Appellant did not vacate the property.

On April 29, 2010, Rosberg filed this forcible detainer action in the justice court. The justice court awarded possession of the property to Rosberg, and appellant appealed the decision to the county court at law. The county court held a trial de novo without a jury and, again, awarded the property to Rosberg. The court concluded the lease created a tenancy at will terminable at any time by either party. The court further concluded that Rosberg was authorized to terminate the lease, whether because it was terminable at will or because appellant violated the terms of the lease, and the lease was properly terminated on February 24, 2010. Appellant now appeals the county court’s
II.

. . . In appellant’s remaining issues, she challenges the findings of fact and conclusions of law made by the county court. In her tenth issue, appellant challenges the county court’s first conclusion of law in which it stated “[t]he lease, which purported to be for the rest of Lena Effel’s life, created only a tenancy at will terminable at any time by either party.” Appellant argues that the lease must be read together with the settlement agreement and the court must give effect to the intent of the parties. Appellant was not a party to the settlement agreement, however. Appellant was a party only to the lease. It is the lease, and not the settlement agreement, that forms the basis of this forcible detainer action. Accordingly, we look solely to the lease to determine appellant’s rights in this matter.

The lease states that appellant was a lessee of the property “for a term equal to the remainder of Lessee’s life, or until such time as she voluntarily vacates the premises.” It is the long-standing rule in Texas that a lease must be for a certain period of time or it will be considered a tenancy at will. See Holcombe v. Lorino, 124 Tex. 446, 79 S.W.2d 307, 310 (1935). Courts that have applied this rule to leases that state they are for the term of the lessee’s life have concluded that the uncertainty of the date of the lessee’s death rendered the lease terminable at will by either party.

Appellant argues the current trend in court decisions is away from finding a lease such as hers to be terminable at will. Appellant relies on the 1982 decision of Philpot v. Fields, 633 S.W.2d 546 (Tex. App. 1982). In Philpot, the court stated that the trend in law was away from requiring a lease to be of a definite and certain duration. In reviewing the law since Philpot, however, we discern no such trend. See Kajo Church Square, Inc. v. Walker, 2003 WL 1848555, at *5 (Tex. App. 2003). The rule continues to be that a lease for an indefinite and uncertain length of time is an estate at will. See Providence Land Servs., L.L.C. v. Jones, 353 S.W.3d 538, 542 (Tex. App. 2011). In this case, not only was the term of the lease stated to be for the uncertain length of appellant’s life, but her tenancy was also “until such time that she voluntarily vacates the premises.” If a lease can be terminated at the will of the lessee, it may also be terminated at the will of the lessor. Because the lease at issue was terminable at will by either party, the trial court’s first conclusion of law was correct. We resolve appellant’s tenth issue against her.
In her fourth issue, appellant contends the trial court erred in concluding that Rosberg sent her a proper notice to vacate the premises under section 24.005 of the Texas Property Code. Section 24.005 states that a landlord must give a tenant at will at least three days’ written notice to vacate before filing a forcible detainer suit unless the parties contracted for a longer or shorter notice period in a written lease or agreement. TEX. PROP. CODE ANN. § 24.005(b) (West Supp. 2011). The section also states that the notice must be delivered either in person or by mail at the premises in question. Id. § 24.005(f). If the notice is delivered by mail, it may be by regular mail, registered mail, or certified mail, return receipt requested, to the premises in question.

The undisputed evidence in this case shows that Rosberg, through his attorney, sent appellant a written notice to vacate the premises by both regular mail and certified mail on February 24, 2010. The notice stated that appellant had ten days to surrender the premises. Nothing in the lease provided for a longer notice period. Henry Effel testified at trial that appellant received the notice and read it. Rosberg did not bring this forcible detainer action until April 29, 2010. The evidence conclusively shows, therefore, that Rosberg’s notice to vacate the property complied with section 24.005.

Because Rosberg had the right to terminate appellant’s tenancy at any time and properly notified her of the termination under section 24.005 of the Texas Property Code, the trial court did not err in awarding the property at issue to Rosberg. Consequently, it is unnecessary for us to address the remainder of appellant’s issues.

We affirm the trial court’s judgment.

Notes and Questions

1. The parties’ intent? When Henry and Jack Effel drafted the settlement agreement transferring their property to Robert Rosberg, what were they trying to accomplish? Did the court carry out the intentions of the parties? Why?

2. Other approaches. In Garner v. Gerrish, 473 N.E.2d 223 (N.Y. 1984), the New York Court of Appeals faced a case with very similar facts. The tenant, Lou Gerrish, had a lease stating, “Lou Gerrish [sic] has the privilege of termination [sic] this agreement at a date of his own choice.” The New York court found that the document created a new kind of leasehold—a lease for life.
opinion attacked the argument in favor of the tenancy at will as being grounded in the “antiquated notion[s]” of medieval property law. Is there any good reason for the law to only recognize three leasehold tenancies? What if, instead, the lease gave only the landlord the power to terminate, and required the tenant to stay and pay as long as the landlord desired?

3. **Working within the system.** Could the lease have been drafted in a way that would have let Lena Effel stay on the property for the duration of her life or until she chose to move, as long as she kept paying the rent?

4. **Institutional competence.** Are courts or legislatures better positioned to create new property forms?

5. **The background story.** Lena Effel lived in the house owned by her nephews for over 20 years. Before that, her twin brother (Henry and Jack’s father) had lived in the home for many years. At the time the compromise settlement agreement was signed, Lena was 93 years old. At the time Rosberg sought to evict her, Lena was 97. Should any of those facts have influenced the judges in the case?

**Lease Hypotheticals**

A professionally drafted lease will almost always make clear what type of leasehold the parties have elected. When problems arise it’s often because lessors and lessees have drafted legal documents without the help of a qualified lawyer. In the following examples try to figure out what kind of leasehold the parties have created. If it’s a term of years, how long is the term? If it’s a periodic tenancy, what is the period?

1. L and T sign an agreement that reads, “The term is one year, beginning September 1.”
2. L and T sign a lease that reads, “This agreement lasts as long as the parties consent.”
3. L and T sign an agreement that reads, “The lease will run from September 1 until the following August 31. One thousand dollars payable on the first of every month.”
4. L and T enter a lease that reads in relevant part, “the rent is $48,000 per year, payable $4,000 on the first of each month.”
5. L and T enter a lease that reads, “the rent is $1,000 per month.”
6. L and T enter a lease that reads, “the rent is $1,000 per month and lasts until the tenant completes medical school.”
7. L and T are negotiating on the phone over an apartment lease. At the end of the conversation L says, “Have we got a deal? Five years lease with rent at $10,000 a year?” T replies, “Great. I accept. It’s a deal.”

3. The Problem of Holdovers

The Tenancy at Sufferance

Imagine that you own a small apartment building in a college town. At the end of the school year, one of your tenants refuses to move out. The law refers to such tenants as holdovers. As a landlord, what are your options in this situation? How does the legal system treat individuals who stay past the end of their leases? Can you kick them out? Are they obligated to pay you rent?

When a tenant stays in possession after the lease has expired, the law allows the landlord to make a one-time election. The landlord has the option to treat the holdover as a trespasser, bring an eviction proceeding, and sue for damages. Alternatively, the landlord may renew the holdover’s lease for another term. This second option is typically referred to as a tenancy at sufferance. Some hornbooks list the tenancy at sufferance as a fourth type of common law leasehold. The tenancy at sufferance, however, is not based on any affirmative agreement between parties and is probably better understood as a remedy for wrongful occupancy. Also note that disputes sometimes pop-up over what election the landlord has made. For example, what if the landlord does nothing for two months but then initiates eviction?

In most jurisdictions, when a landlord chooses to hold the tenant to a new lease, it creates a periodic tenancy. States differ, however, on how to compute the length of the period and, thus, the amount of the damages. Some simply copy over the length of the original lease (with a maximum of one year). Others divine the repeating period by looking at how the rent was paid. Imagine, for example, your tenant had originally signed a lease reading, “This lease will run from January 1, 2014 to December 31, 2014.
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Rent is due on the first of each month.” The tenancy created by the holdover would either be a year-to-year lease or a month-to-month lease depending on the jurisdiction.

Still other states take other approaches. Some, for example, specify that a holdover must pay double (or triple) rent for the holdover period.

Notes and Questions

1. **The landlord’s options.** Under what circumstances should a landlord move to evict a tenant who holds over? Are there any scenarios where a landlord might want to keep a tenant who has already proven themselves untrustworthy by staying past the agreed-upon term?

2. **Drafting.** How can landlords draft leases to better protect themselves from the threat of holdovers?

3. **A holdover problem.** Seven years ago, Tommy Hillclimber leased a commercial building on a busy street from Lisa. The lease was for a five-year term with annual rent of $100,000. At the end of the term, Tommy retained possession of the building but continued to make rent payments. Lisa has cashed all of Tommy’s rent checks. Last week, Sprawl-Mart contacted Lisa and offered to rent the building for $200,000 a year. Lisa quickly sent notice to Tommy stating that the lease will terminate in 30 days. Does Tommy have to vacate?

Delivering Possession

Holdovers can also cause problems for other renters. Suppose that before the start of law school you agree to a one-year lease that begins on August 1. Although you’ve signed a binding lease agreement and have received a set of keys, when your van pulls into the driveway on move-in day, you find that the previous tenant hasn’t left “your” apartment. If the lease doesn’t include a contingency for such an event, what are your rights?
The declaration filed by the plaintiff, Hannan, against the defendant, Dusch, alleges that Dusch had on August 31, 1927, leased to the plaintiff certain real estate in the city of Norfolk, Virginia, therein described, for fifteen years, the term to begin January 1, 1928, at a specified rental; that it thereupon became and was the duty of the defendant to see to it that the premises leased by the defendant to the plaintiff should be open for entry by him on January 1, 1928, the beginning of the term, and to put said petitioner in possession of the premises on that date; that the petitioner was willing and ready to enter upon and take possession of the leased property, and so informed the defendant; yet the defendant failed and refused to put the plaintiff in possession or to keep the property open for him at that time or on any subsequent date; and that the defendant suffered to remain on said property a certain tenant or tenants who occupied a portion or portions thereof, and refused to take legal or other action to oust said tenants or to compel their removal from the property so occupied. Plaintiff alleged damages which he had suffered by reason of this alleged breach of the contract and deed, and sought to recover such damages in the action. There is no express covenant as to the delivery of the premises . . . .

The single question of law therefore presented in this case is whether a landlord, who without any express covenant as to delivery of 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 — that is, whether without an express covenant there is nevertheless an implied covenant to deliver possession. . . .

It seems to be perfectly well settled that there is an implied covenant in such cases on the part of the landlord to assure to the tenant the legal right of possession — that is, that at the beginning of the term there shall be no legal obstacle to the tenant’s right of possession. This is not the question presented. Nor need we discuss in this case the rights of the parties in case a tenant rightfully in possession under the title of his landlord is thereafter disturbed by some wrongdoer. In such case the tenant must protect himself from trespassers, and there is no obligation on the landlord to assure his quiet enjoyment of his term as against wrongdoers or intruders.

Of course, the landlord assures to the tenant quiet possession as against all who
rightfully claim through or under the landlord.

The discussion then is limited to the precise legal duty of the landlord in the absence of an express covenant, in case a former tenant, who wrongfully holds over, illegally refuses to surrender possession to the new tenant. This is a question about which there is a hopeless conflict of the authorities. It is generally claimed that the weight of the authority favors the particular view contended for. There are, however, no scales upon which we can weigh the authorities. In numbers and respectability they may be quite equally balanced.

It is then a question about which no one should be dogmatic, but all should seek for that rule which is supported by the better reason. . . .

It is conceded by all that the two rules, one called the English rule, which implies a covenant requiring the lessor to put the lessee in possession, and that called the American rule, which recognizes the lessee’s legal right to possession, but implies no such duty upon the lessor as against wrongdoers, are irreconcilable.

The English rule is that in the absence of stipulations to the contrary, there is in every lease an implied covenant on the part of the landlord that the premises shall be open to entry by the tenant at the time fixed by the lease for the beginning of his term. . . .

[A] case which supports the English rule is *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N.W. 382, 111 N.W. 359, 9 L.R.A. (N.S.) 1127, 14 Ann. Cas. 399, note. In that case the court gave these as its reasons for following the English rule:

> We think . . . that the English rule is most in consonance with good conscience, sound principle, and fair dealing. Can it be supposed that the plaintiff in this case would have entered into the lease if he had known at the time that he could not obtain possession on the 1st of March, but that he would be compelled to begin a lawsuit, await the law’s delays, and follow the case through its devious turnings to an end before he could hope to obtain possession of the land he had leased? Most assuredly not. It is unreasonable to suppose that a man would knowingly contract for a lawsuit, or take the chance of one. Whether or not a tenant in possession intends to hold over or assert a right to future term may nearly always be known to the landlord, and is certainly much more apt to be
within his knowledge than within that of the prospective tenant. Moreover, since in an action to recover possession against a tenant holding over, the lessee would be compelled largely to rely upon the lessor's testimony in regard to the facts of the claim to hold over by the wrongdoer, it is more reasonable and proper to place the burden upon the person within whose knowledge the facts are most apt to lie. We are convinced, therefore, that the better reason lies with the courts following the English doctrine, and we therefore adopt it, and hold that, ordinarily, the lessor impliedly covenants with the lessee that the premises leased shall be open to entry by him at the time fixed in the lease as the beginning of the term. . . .

So let us not lose sight of the fact that under the English rule a covenant which might have been but was not made is nevertheless implied by the court, though it is manifest that each of the parties might have provided for that and for every other possible contingency relating to possession by having express covenants which would unquestionably have protected both.

Referring then to the American rule: Under that rule, in such cases, [ ] the landlord is not bound to put the tenant into actual possession, but is bound only to put him in legal possession, so that no obstacle in the form of superior right of possession will be interposed to prevent the tenant from obtaining actual possession of the demised premises. If the landlord gives the tenant a right of possession he has done all that he is required to do by the terms of an ordinary lease, and the tenant assumes the burden of enforcing such right of possession as against all persons wrongfully in possession, whether they be trespassers or former tenants wrongfully holding over.[ ] . . .

So that, under the American rule, where the new tenant fails to obtain possession of the premises only because a former tenant wrongfully holds over, his remedy is against such wrongdoer and not against the landlord — this because the landlord has not covenanted against the wrongful acts of another and should not be held responsible for such a tort unless he has expressly so contracted. This accords with the general rule as to other wrongdoers, whereas the English rule appears to create a specific exception against lessors. It does not occur to us now that there is any other instance in which one clearly without fault is held responsible for the independent tort of another in which he has neither participated nor concurred and whose misdoings he cannot
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For the reasons which have been so well stated by those who have enforced the American rule, our judgment is that there is no error in the judgment complained of. Affirmed

Notes and Questions

1. **The basic law.** U.S. jurisdictions remain split over the landlord’s duty to provide possession. A majority of jurisdictions (and the Uniform Residential Landlord and Tenant Act) now follow the English rule, but the American rule remains alive and well. As should be obvious, the biggest difference between the two approaches is the remedy available to the dispossessed tenant. Under the English view, the tenant may terminate the lease and sue the landlord for damages. The tenant can also choose to withhold payment from the landlord until the tenant is able to take possession. In contrast, under the American rule, the tenant must bring an eviction action directly against the holdover.

2. **Justifying the rules.** What policies support the English view? What polices support the American view? Would you find the remedies available under the American rule helpful?

3. **Conceptual Arguments.** The Hannan case does an excellent job discussing the policy rationales for and against the two rules. But what about the more conceptual arguments? If we view the lease as a conveyance of the legal right to possession, isn’t the American rule “correct?” Once a landlord turns over possessory rights, aren’t her obligations fulfilled?

4. **What do tenants know?** Do you think that tenants in American rule jurisdictions know that their landlord has no obligation provide them with actual possession? Should that matter?

5. **What rules are mandatory?** Imagine that you sit in a state legislature that wants to adopt the English Rule by statute. Should you make the new law a mandatory rule or a default position that parties can negotiate around?
6. **Your Lease?** Does the lease for the apartment you’re currently renting make any provision for this problem?

4. **Tenant Selection**

As we saw earlier in the textbook, the right to exclude remains a cornerstone of property ownership. Owners have expansive power to keep others off of their land and out of their homes. Generally speaking, this right extends to landlords, who have broad discretion to select tenants as they see fit. Landlords, for example, remain free to exclude smokers from their properties. They can also refuse to rent to a tenant who acts erratically, possesses a criminal record, or has a low credit score. Landlords, however, cannot violate state or federal anti-discrimination laws when they go through the leasing process.

**The Civil Rights Act of 1866**

One of the oldest laws that protects tenants against discrimination in the housing market is the Civil Rights Act of 1866. Passed in the aftermath of the Civil War, the Civil Rights Act of 1866 prohibits all discrimination based on race in the purchase or rental of real or personal property. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Thus, landlords cannot deny an apartment unit to a potential tenant based on tenant’s heritage or the color of their skin. There are no exceptions.

**The Fair Housing Act of 1968**

The Fair Housing Act of 1968 (and its many amendments) greatly expanded the number of individuals covered by anti-discrimination law. Broadly speaking, the Fair Housing Act (FHA) prohibits discrimination in the renting, selling, advertising, or financing of real estate on the basis of race, color, national origin, religion, sex, familial status, and disability. It is worth looking closely at some of its provisions. The Act begins with a statement of policy and a few (counter-intuitive) definitions:
§3601. Declaration of Policy
It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§3602. Definitions
As used in this subchapter . . .
   (c) “Family” includes a single individual. . .
   (h) “Handicap” means, with respect to a person—
      (1) a physical or mental impairment which substantially limits one or more of such person’s major life activities,
      (2) a record of having such an impairment, or
      (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21). . . .
   (k) “Familial status” means one or more individuals (who have not attained the age of 18 years) being domiciled with—
      (1) a parent or another person having legal custody of such individual or individuals; or
      (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

The definition of “familial status” surprises many students. Whom, exactly, does it protect? Unmarried people? Single mothers? Although more intuitive, the definition of handicap has generated a number of legal disputes. Alcohol, for example, is not a controlled substance under section 802 of title 21. Does that mean that a landlord cannot refuse to rent to a person who drinks heavily or sounds very drunk (and belligerent) over the phone?

The real meat of the Fair Housing act comes in §3604. The first subsection makes it unlawful to “refuse to sell or rent . . . or otherwise make unavailable” a “dwelling” to any person because of race, color, religion, sex, familial status, or national origin. See 42 U.S.C. §3604(a). Later sections provide similar protections for the handicapped. The
Act then takes a number of additional steps designed to eliminate discrimination from the housing market. Under the terms of the law it is illegal to:

(1) discriminate in the terms or conditions of a sale or rental [§3604(b)];
(2) create or publish an advertisement or statement that express a preference or hostility toward individuals in any of the protected categories [§3604(c)];
(3) lie about or misrepresent the availability of housing [§3604(d)];
(4) refuse to permit handicapped tenants from making reasonable modifications of the existing premise at their own expense [§3604(f)(3)(A)];
(5) refuse to make reasonable accommodations in rules and policies to accommodate individuals with handicaps [§3604(f)(3)(B)];
(6) Harass or intimidate persons in their enjoyment of a dwelling [§3617].

Unlike the Civil Rights Act of 1866, the Fair Housing Act does contain a number of important exemptions. Section 3607(b), for example, allows housing designated for older persons to bar families with young children. Similarly, section 3607(a) allows religious organizations and private clubs to give preferences to their own members. The most controversial exemption, reproduced below, is the so-called Mrs. Murphy exemption:

(b) Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or
rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

What does this exemption allow? If the act is intended to root out pernicious discrimination, why include this provision?

It is crucial to note that the plain text of the Mrs. Murphy exemption states that it does not apply to 3604(c)—the subsection that prohibits discriminatory advertising. Thus, although certain categories of landlords are exempted from the statute’s basic framework, they are still not allowed to post discriminatory advertisements.

State Anti-Discrimination Efforts

Some state legislatures have passed laws that afford far more protection from discrimination than the federal statutes provide. Minnesota, for example, protects against housing discrimination on the basis of sexual orientation, gender identity, marital status, and source of income. Other states in the Northeast and West Coast provide similar coverage, but these positions are in no way a majority. As the map below indicates, in most states nothing prevents a landlord from denying an apartment to an engaged heterosexual couple, based on the belief that cohabitation before marriage is sinful.
Proving Discrimination

Two broad categories of cases may be brought under the FHA: disparate treatment claims and disparate impact claims.

A sign erected by white homeowners trying to prevent black tenants from moving into their Detroit neighborhood (1942).
Disparate treatment claims target intentional forms of discrimination, including the refusal to rent based on one of the protected categories. A plaintiff can show intent to discriminate with “smoking gun” style evidence, such as statements by the landlord that he “would never rent to an Irishman.” Of course, modern landlords rarely make such forthright admissions. As a result, courts in the United States have established a burden-shifting approach that allows plaintiffs to prove intentional discrimination with indirect circumstantial evidence. The initial burden is on the plaintiff to make a prima facie case of discrimination. In a refusal to rent case, the plaintiff must show that (1) that she is a member of a class protected by the FHA; (2) that she applied for and was qualified to rent the unit; (3) that she was rejected; and (4) the unit remained unrented. Once the plaintiff has established sufficient evidence to state a prima facie case, the burden shifts to the defendant landlord to proffer a legitimate nondiscriminatory reason for the refusal to rent. If the defendant meets this requirement, the burden then shifts back to the tenant to prove that the reason offered is a pretext.

Discrimination is often ferreted out through the use of “testers.” Advocacy groups, many of which are funded by the federal government, will send comparable white and black individuals to inquire about renting a vacant unit. If the landlord treats the testers differently (e.g., provides different levels of assistance, shows different units, provides different information about unit availability) this provides persuasive evidence of illegal discrimination.

Disparate impact claims allege that some seemingly neutral policy has a disproportionately harmful effect on members of a group protected by the FHA. These cases rely heavily on statistical evidence and employ a very similar burden-shifting methodology as the disparate treatment claims. Using statistics, plaintiffs need to show that a defendant’s policy has actually caused some disparity. The defendant then has the opportunity to escape liability if it can show show that its actions are necessary to achieve a valid goal. See Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).

Problems

1. William Neithamer, who is gay and HIV positive attempted to rent an apartment from Brenneman Properties. Neithamer did not reveal his HIV
status, but admitted to the property manager that he had dismal credit because he had recently devoted all of his resources to taking care of a lover who had died of AIDS. Neithamer, however, offered to pre-pay one year's rent. Brenneman Properties rejected Neithamer's application and, in turn, Neithamer sued under the FHA. Does he have a case? See *Neithamer v. Brenneman Property Services, Inc.*, 81 F. Supp 2d 1 (D.D.C. 1999).

2. Over the phone, Landlord said to Plaintiff, “Do you have children? I don’t want any little boys because they'll mess up the house and nobody would be here to watch them. Really, this house isn’t good for kids because it’s right next to a main road.” Plaintiff sues. Landlord argues that her statements only show that she is concerned about the welfare of children. Is that a legitimate non-discriminatory reason to refuse to rent?

3. A local government has decided to knock down two high-rise public housing projects within its borders. The high-rises primarily house recent immigrants from Guatemala. A local advocacy group brings a lawsuit on their behalf, claiming that the government action has a disparate impact on a protected group. Is this a disparate treatment or disparate impact case? Can you think of a non-discriminatory reason why the government may have taken such an action?

4. The FHA requires landlords to make “reasonable accommodations” for individuals with handicaps. Which of the following requests by a tenant would qualify as a reasonable accommodation? (a) Asking a landlord with a first-come/first-served parking policy to create a reserved parking space for a tenant who has difficulty walking; (b) Requesting that a landlord waive parking fees for a disabled tenant’s home health care aide; (c) Asking the landlord to make an exception to the building’s “no pets” rule for a tenant with a service animal; (d) Requesting landlord to pay for a sign language interpreter for a deaf individual during the application process; (e) Asking the landlord to provide oral reminders to pay the rent for a tenant with documented short-term memory loss.
Imagine that you are a lawyer for a newspaper in a large metropolitan area. The local chapter of the ACLU has raised concerns that some advertisements in the classifieds section of your paper violate the Fair Housing Act. Your boss has asked you to review the ads for any offending language. Which of the following would you feel comfortable printing?

2 Would any of these ads violate the Civil Rights Act of 1866?
3 The government does provide some guidance to landlords worried about triggering FHA liability through their advertisements. There are, for example, published lists of “words to avoid” and “acceptable language.” Although context is important, landlords can generally use these phrases: good neighborhood, secluded setting, single family home, quality construction, near public transportation, near places of worship, and assistance animals only.
What about this ad for a roommate on Craigslist? Is it objectionable to you? Does it violate the FHA? Does it matter that the poster is looking for a roommate? Would your answers change if the advertisement read, “Have a room available for an able-bodied white man with no children?”

Fair Housing Council of San Fernando Valley v. Roommate.com, LLC
666 F.3d 1216 (9th Cir. 2012)

KOZINSKI, Chief Judge:
There’s no place like home. In the privacy of your own home, you can take off your coat, kick off your shoes, let your guard down and be completely yourself. While we usually share our homes only with friends and family, sometimes we need to take in a stranger to help pay the rent. When that happens, can the government limit whom we choose? Specifically, do the anti-discrimination provisions of the Fair Housing Act (“FHA”) extend to the selection of roommates?

Roommate.com, LLC (“Roommate”) operates an internet-based business that helps roommates find each other. Roommate’s website receives over 40,000 visits a day and roughly a million new postings for roommates are created each year. When users sign up, they must create a profile by answering a series of questions about their sex, sexual orientation and whether children will be living with them. An open-ended “Additional Comments” section lets users include information not prompted by the questionnaire. Users are asked to list their preferences for roommate characteristics, including sex, sexual orientation and familial status. Based on the profiles and preferences, Roommate matches users and provides them a list of housing-seekers or available rooms meeting their criteria. Users can also search available listings based on roommate characteristics,
including sex, sexual orientation and familial status. The Fair Housing Councils of San Fernando Valley and San Diego ("FHCs") sued Roommate in federal court, alleging that the website’s questions requiring disclosure of sex, sexual orientation and familial status, and its sorting, steering and matching of users based on those characteristics, violate the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 et seq. . . .

**ANALYSIS**

If the FHA extends to shared living situations, it’s quite clear that what Roommate does amounts to a violation. The pivotal question is whether the FHA applies to roommates.

I

The FHA prohibits discrimination on the basis of “race, color, religion, sex, familial status, or national origin” in the “sale or rental of a dwelling.” 42 U.S.C. § 3604(b) (emphasis added). The FHA also makes it illegal to:

make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Id. § 3604(c) (emphasis added). The reach of the statute turns on the meaning of “dwelling.”

The FHA defines “dwelling” as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families.” Id. § 3602(b). A dwelling is thus a living unit designed or intended for occupancy by a family, meaning that it ordinarily has the elements generally associated with a family residence: sleeping spaces, bathroom and kitchen facilities, and common areas, such as living rooms, dens and hallways.

It would be difficult, though not impossible, to divide a single-family house or apartment into separate “dwellings” for purposes of the statute. Is a “dwelling” a bedroom plus a right to access common areas? What if roommates share a bedroom?
Could a “dwelling” be a bottom bunk and half an armoire? It makes practical sense to interpret “dwelling” as an independent living unit and stop the FHA at the front door.

There’s no indication that Congress intended to interfere with personal relationships inside the home. Congress wanted to address the problem of landlords discriminating in the sale and rental of housing, which deprived protected classes of housing opportunities. But a business transaction between a tenant and landlord is quite different from an arrangement between two people sharing the same living space. We seriously doubt Congress meant the FHA to apply to the latter. Consider, for example, the FHA’s prohibition against sex discrimination. Could Congress, in the 1960s, really have meant that women must accept men as roommates? Telling women they may not lawfully exclude men from the list of acceptable roommates would be controversial today; it would have been scandalous in the 1960s.

While it’s possible to read dwelling to mean sub-parts of a home or an apartment, doing so leads to awkward results . . . . Nonetheless, this interpretation is not wholly implausible and we would normally consider adopting it, given that the FHA is a remedial statute that we construe broadly. Therefore, we turn to constitutional concerns, which provide strong countervailing considerations.

II

The Supreme Court has recognized that “the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.” Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537 (1987). “[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984). Courts have extended the right of intimate association to marriage, child bearing, child rearing and cohabitation with relatives. Id. While the right protects only “highly personal relationships,” IDK, Inc. v. Clark Cnty., 836 F.2d 1185, 1193 (9th Cir. 1988) (quoting Roberts, 468 U.S. at 618), the right isn’t restricted exclusively to family, Bd. of Dirs. of Rotary Int’l, 481 U.S. at 545. The right to association also implies a right not to associate. Roberts, 468 U.S. at 623.

To determine whether a particular relationship is protected by the right to intimate association we look to “size, purpose, selectivity, and whether others are excluded from
critical aspects of the relationship.” Bd. of Dirs. of Rotary Int’l, 481 U.S. at 546. The roommate relationship easily qualifies: People generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship, such as using the living spaces. Aside from immediate family or a romantic partner, it’s hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms.

Because of a roommate’s unfettered access to the home, choosing a roommate implicates significant privacy and safety considerations. The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. . . .

Equally important, we are fully exposed to a roommate’s belongings, activities, habits, proclivities and way of life. This could include matter we find offensive (pornography, religious materials, political propaganda); dangerous (tobacco, drugs, firearms); annoying (jazz, perfume, frequent overnight visitors, furry pets); habits that are incompatible with our lifestyle (early risers, messy cooks, bathroom hogs, clothing borrowers). When you invite others to share your living quarters, you risk becoming a suspect in whatever illegal activities they engage in.

Government regulation of an individual’s ability to pick a roommate thus intrudes into the home, which “is entitled to special protection as the center of the private lives of our people.” Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring). . . . Holding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security.

For example, women will often look for female roommates because of modesty or security concerns. As roommates often share bathrooms and common areas, a girl may not want to walk around in her towel in front of a boy. She might also worry about unwanted sexual advances or becoming romantically involved with someone she must count on to pay the rent.
An orthodox Jew may want a roommate with similar beliefs and dietary restrictions, so he won’t have to worry about finding honey-baked ham in the refrigerator next to the potato latkes. Non-Jewish roommates may not understand or faithfully follow all of the culinary rules, like the use of different silverware for dairy and meat products, or the prohibition against warming non-kosher food in a kosher microwave.

It’s a “well-established principle that statutes will be interpreted to avoid constitutional difficulties.” Frisby v. Schultz, 487 U.S. 474, 483 (1988). “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 466 (1989). Because the FHA can reasonably be read either to include or exclude shared living arrangements, we can and must choose the construction that avoids raising constitutional concerns. . . . Reading “dwelling” to mean an independent housing unit is a fair interpretation of the text and consistent with congressional intent. Because the construction of “dwelling” to include shared living units raises substantial constitutional concerns, we adopt the narrower construction that excludes roommate selection from the reach of the FHA.

As the underlying conduct is not unlawful, Roommate’s facilitation of discriminatory roommate searches does not violate the FHA.

Notes and Questions

1. **What's a dwelling?** The FHA defines “dwelling” as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families.” Id. § 3602(b). Do you think the FHA applies to college dormitories? Is it illegal to reserve some dormitories for women or to have ethnic-themed dorms?

2. **A broader Craigslist problem.** It’s not unusual to stumble across advertisements for apartments (as opposed to just roommate ads) on Craigslist that violate the FHA. If a local newspaper published similar ads they would be liable under the FHA for publishing discriminatory material. Why doesn’t anyone sue Craigslist? The answer is that section 230(c) of the Communications Decency Act provides internet service providers and website owners with broad
immunity from liability for content posted by third parties. Craigslist and other similar sites may voluntarily remove offending posts, but they are not required to do so.

C. Exiting a Lease

Most leases expire either at the end of the agreed-upon term or when one party serves the other with notice that they’ve decided not to renew for another period. Sometimes, however, either a tenant or landlord seeks to get out of the lease before the negotiated term concludes. For example, a new job in a faraway state, a family emergency, or a business failure can all change a tenant’s needs or ability to pay the rent. We turn now to the legal consequences of exiting a lease.

1. Landlord Exit: Transfer

Landlords may sell their properties to third parties at any time. The law categorizes a landlord’s interest in rented property as a reversion and, like most other property interests, the landlord’s reversion is fully alienable. But what happens to a lease if a property is transferred? As a default rule, when a landlord sells his interest, the purchaser takes subject to any leases. If there are tenants with unexpired term-of-years leases, for example, the new landlord cannot evict them. Conversely, the tenants must continue to pay the agreed upon rent to the new owner. If the lease is a periodic tenancy (or tenancy at will), the new landlord may end the leasehold by providing the tenant with the required notice. Until then, the leases continue unabated. Remember that these are default rules, alterable by contract. In fact, landlords often insert provisions into leases that give them the option to terminate rental agreements upon sale of the property.

2. Tenant Exit: Transfer

Tenants have exit options, too. The default rule is that a tenant’s interest in a term of years lease or periodic tenancy is also freely transferable. (Note, however, that a tenant cannot transfer a tenancy at will to another party.) The law recognizes two types of transfer: the assignment and the sublease. The vast majority of jurisdictions use an
objective test to distinguish the two. In an assignment, the original tenant transfers all of the remaining interest under the lease to a new tenant. In a sublease, on the other hand, the original tenant transfers less than all of her remaining rights in the unexpired period—the original tenant either gets the unit back at the end of the sublease or reserves a right to cut the sublease short.

An example should illuminate the concepts. Imagine that the Witch leases her Gingerbread Cottage to Hansel for a period of one year—January 1 to December 31—in exchange for $100 a month. Four months into the lease, Hansel then transfers all of his remaining interest in the property to Gretel so that she now has exclusive possessory rights until the end of the term. This transfer is an assignment because Hansel has no further rights in the property. If Hansel had retained for himself the final two months of the lease or if he’d rented the cottage to Gretel for only the summer months, we would then categorize the agreement as a sublease.

A minority of jurisdictions takes a less formalistic approach to the assignment/sublease division. In these states, the subjective intent of the parties, rather than the structure of the transaction, controls. Arkansas, for example, allows parties to designate their leases as subleases or assignment (and receive all the attendant rights and obligations under the chosen category) regardless of whether the new tenant takes the unit for the entire remaining term.

The distinction between subleases and assignments has a few significant legal consequences. Primarily, it affects who can benefit from the promises in the original lease and who is on the hook for the obligations. Think again about the Hansel and
Gretel example described above. If Gretel, who took over the lease, stops making rent payments, whom can the landlord sue? The original tenant, Hansel? Gretel? Both? What if the original one-year lease contained a provision allowing the tenant to renew for a second year with the same terms? Can Gretel take advantage of that clause?

To enforce any promise, the law requires a certain type of legal relationship between the parties, known as privity. Donald Trump, for example, cannot successfully sue you if one of his Trump Tower tenants suddenly fails to pay rent—there's simply no connection between Trump and you. Trump could only sue you if a privity relationship exists: either privity of contract or privity of estate. Privity of contract is easy enough to understand. Parties are in privity of contract if they have entered into a valid contract with each other. In our example, the Witch and Hansel are in privity of contract because they signed the original lease agreement. The Witch gave Hansel the right to exclusive possession for one year and Hansel promised to pay rent every month. As a result of this legal relationship, the Witch has the option to sue Hansel if she doesn't receive rent. That remains true even if Hansel transfers his lease to someone else. That bears repeating: the original tenant’s promise to pay the landlord stands until the original lease expires (or until the landlord releases the tenant from this obligation).

When Hansel and the Witch first sign the lease, they also stand in privity of estate with each other. This concept is yet another holdover from feudal times. Privity of estate makes concrete the medieval belief that an individual takes on a series of rights and obligations when they occupy land owned by another. For our purposes, privity of estate arises when two parties have successive ownership claims in the same property. Hansel and the Witch have privity of estate because once Hansel’s possessory interest concludes, his property rights flow immediately back to the Witch. Despite its archaic origin, the idea remains important in modern property law because individuals in privity of estate can sue each other directly for (some) violations of a rental agreement.

Consider, again, what happens when Hansel transfers his rights in the gingerbread cottage to Gretel. Can the Witch successfully haul Gretel into court if she stops making

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4 The medieval mind thought of rent as something that came from the land itself: the tenant paid the landlord out of the fruits of the land, sometimes metaphorically but sometimes literally, with crops harvested from the land being leased.

5 We'll learn more about which promises “run with the land” in a later chapter about covenants. For now, it's enough to know that transferees can only enforce promises that concern the property or land.
payments? It should be obvious that Gretel has not made any direct agreement with the Witch (or made any promise to benefit her) so they are not in privity of contract. But what about privity of estate? This is where the distinction between assignments and subleases matters. If Hansel assigns his interest to Gretel, then Gretel and the Witch would be in privity of estate (and the Witch could sue Gretel for the missing rent). We know they have privity of estate because when Gretel’s rights end under the assignment, the Witch would immediately be entitled to exclusive possession of the cottage—they have successive interests in the same piece of real estate. Conversely, if Hansel subleases his apartment to Gretel for the summer, a privity relationship would not arise between Gretel and the Witch. Instead, Gretel would have privity of estate with Hansel because at the conclusion of Gretel’s interest, Hansel would have the right to exclusive possession. Thus, under the sublease, the Witch could not sue Gretel for rent.

Figuring out which parties stand in privity of estate can initially cause a lot of confusion. However, asking two quick questions can help define these relationships. The first step is to ask, “Have any tenants made an assignment of their rights?” If a tenant has assigned their rights they have no chance of possessing the property again and, thus, cannot stand in privity of estate with anyone (although they may still be in privity of contract with various parties). For all the remaining tenants ask, “Who receives the property when this tenant’s possessory rights finally end?” Remember, parties with successive interests have privity of estate.

Although it may be redundant, a few diagrams may help clarify these relationships. Assume that L leases an apartment to T. Whenever a landlord initially leases to a tenant the two parties are in both privity of contract and privity of estate:

![Diagram showing the relationship between L, T, and the Witch, illustrating privity of contract and privity of estate.](image-url)
L and T are in privity of contract because they agreed on a lease contract. To figure out the privity of estate relationships, we first ask if anyone has assigned their interest. The answer here is “no.” For all remaining tenants, we inquire “who gets control over the property when this tenant’s possessory rights end?” In this hypothetical, who gets the leased premise when T’s term concludes? The answer, of course, is the landlord. T and L are in privity of estate because the landlord gets the property back from the tenant at the end of the lease.

The relationships change if T assigns his rights to a new party, T2. The diagram of an assignment is below:

The contractual relationships are easy enough to map. As discussed earlier, when T assigns his interest, he remains in privity of contract with L—they signed a rental agreement that has not expired. T and T2 are also in privity of contract as a result of the assignment contract. But what about privity of estate? L and T are no longer in privity of estate because T has relinquished all of his property interests. Remember that parties who assign their rights stand in privity of estate with no one. For all other tenants we ask, “Who receives the property when this tenant’s possessory rights finally end?” When T2’s possessory rights conclude, who takes control of the property? The answer is the landlord. L and T2 now have a privity of estate relationship.

How do things change with a sublease?
As before, T remains in privity of contract with L for the duration of the original lease. In this example, there are no assignments, so we begin by asking which parties have successive property interests. When the possessory rights of T2 end, T will then have control over the property. Thus T2 and T have a privity of estate relationship. Then, when T’s rights over the property conclude, the possessory rights will flow back to the landlord, meaning that T and L also have privity of estate.

Before moving on, one final wrinkle merits attention. As discussed earlier, when the original tenant subleases or assigns his leasehold, the default rule is that the landlord and the new tenant are not in privity of contract. It is possible, however, to create a privity of contract relationship between the L and T2. Most often this is accomplished by including a clause in the takeover agreement between the original tenant and the new tenant that reads, “New Tenant assumes the obligation to perform all of the original tenant’s duties under the original lease.” If the new tenant takes on this responsibility, the landlord becomes a third-party beneficiary to the agreement and comes into privity of contract with the new tenant.

**Problems**

1. Landlord leases property to T1 from January 1, 2015 to December 31, 2015. On March 1, T1 sold T2 her remaining interest in the property. On October 1, T2 rented the property to T3 for two months. Describe the privity relationships between all of the parties. If T3 stops sending rent payments to Landlord, whom can the Landlord sue to recover the money?
2. Alger, a landlord, rents a commercial building to Brown for 5 years. Six months into the lease, Brown subleases his interest to Clancy for 3 years. Clancy then turns around and assigns his interest to Dahl. Describe the privity relationships between all of the parties. If Dahl stops sending rent checks to Alger, whom can Alger sue to recover the money.

3. Picasso, a landlord, rents an apartment to Renoir for one year. The lease contains a provision allowing the tenant to renew the leasehold for a second year on the same terms. Renoir assigns his interest in the lease to Seurat. Seurat then assigns his interest to Turner. What are the privity relationships between the parties? Can Turner exercise the renewal clause in the original lease? See Castle v. Double Time, Inc., 737 P.2d 900 (Okla. 1987) (discussing renewal clauses).

4. Landlord leases a unit to T1 for ten years beginning in 2010. In 2012, T1 transfers all of his right to T2 “for a period of five” years. In 2013, T2 subleases to T3 for one year. What are the privity relationships and whom can the landlord sue if T3 stops paying rent?

5. L leases a commercial property to T1 for ten years beginning in 2010. In 2012, T1 assigns all of her interest to T2. A year later, T2 assigns all of her interest to T3. In 2014, T3 subleases to T4 for a term of four years. In the sublease contract, T4 agrees to assume “all of the covenants and promises” in the original lease between L and T1. In 2015, T4’s business fails and she ceases making paying rent. What are the privity relationships? Whom can L sue to recover the unpaid rent money?

3. **Tenant Exit: Limiting the Right to Transfer**

Under the traditional common law, leaseholds were freely transferable property interests. Modern courts continue to recognize the alienability of tenancies as a default position, but allow parties to contract around the basic rule. As a result, most leases (including yours, probably) now contain some restriction on a tenant’s ability to assign or sublease her property interests. For example, one oft-used lease agreement, which
can be downloaded for free from the Internet, includes the following provision: “The tenant will not assign this Lease, or sublet or grant any concession or license to use the Property or any part of the Property. Any assignment or subletting will be void and will, at the Landlord’s option, terminate the Lease.” In most states, courts uphold such bars on transfer as reasonable restraints on alienation. More controversial are clauses that allow sublease or assignment but only “with the consent of the landlord.”

**Julian v. Christopher**

575 A.2d 735 (Md. 1990)

CHASANOW, Judge.

In 1961, this Court decided the case of *Jacobs v. Klawans*, 169 A.2d 677 (1961) and held that when a lease contained a “silent consent” clause prohibiting a tenant from subletting or assigning without the consent of the landlord, landlords had a right to withhold their consent to a subletting or assignment even though the withholding of consent was arbitrary and unreasonable. . . . We now have before us the issue of whether the common law rule applied in *Klawans* should be changed.

In the instant case, the tenants, Douglas Julian and William J. Gilleland, III, purchased a tavern and restaurant business, as well as rented the business premises from landlord, Guy D. Christopher. The lease stated in clause ten that the premises, consisting of both the tavern and an upstairs apartment, could not be assigned or sublet “without the prior written consent of the landlord.” Sometime after taking occupancy, the tenants requested the landlord’s written permission to sublease the upstairs apartment. The landlord made no inquiry about the proposed sublessee, but wrote to the tenants that he would not agree to a sublease unless the tenants paid additional rent in the amount of $150.00 per month. When the tenants permitted the sublessee to move in, the landlord filed an action in the District Court of Maryland in Baltimore City requesting repossession of the building because the tenants had sublet the premises without his permission.

At the district court trial, the tenants testified that they specifically inquired about clause ten, and were told by the landlord that the clause was merely included to prevent them from subletting or assigning to “someone who would tear the apartment up.” The district court judge refused to consider this testimony. He stated in his oral opinion that he would “remain within the four corners of the lease, and construe the document
strictly,” at least as it pertained to clause ten. Both the District Court and, on appeal, the Circuit Court for Baltimore City found in favor of the landlord. The circuit judge noted: “If you don’t have the words that consent will not be unreasonably withheld, then the landlord can withhold his consent for a good reason, a bad reason, or no reason at all in the context of a commercial lease, which is what we’re dealing with.” We granted certiorari to determine whether the *Klawans* holding should be modified in light of the changes that have occurred since that decision.

While we are concerned with the need for stability in the interpretation of leases, we recognize that since the *Klawans* case was decided in 1961, the foundations for that holding have been substantially eroded. The *Klawans* opinion cited Restatement of Property § 410 as authority for its holding. The current Restatement (Second) of Property § 15.2 rejects the *Klawans* doctrine and now takes the position that:

A restraint on alienation without the consent of the landlord of the tenant’s interest in the leased property is valid, but the landlord’s consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.

Another authority cited in *Klawans* in support of its holding was 2 R. Powell, Powell on Real Property. The most recent edition of that text now states:

Thus, if a lease clause prohibited the tenant from transferring his or her interest without the landlord’s consent, the landlord could withhold consent arbitrarily. This result was allowed because it was believed that the objectives served by allowing the restraints outweighed the social evils implicit in them, inasmuch as the restraints gave the landlord control over choosing the person who was to be entrusted with the landlord’s property and was obligated to perform the lease covenants. It is doubtful that this reasoning retains full validity today. Relationships between landlord and tenant have become more impersonal and housing space (and in many areas, commercial space as well) has become scarce. These changes have had an impact on courts and legislatures in varying degrees. Modern courts almost universally adopt the view that restrictions on the tenant’s right to transfer are to be strictly construed. (Footnotes omitted.)

Finally, in support of its decision in *Klawans*, this Court noted that, “although it, apparently, has not been passed upon in a great number of jurisdictions, the decisions of the courts that have determined the question are in very substantial accord.” *Klawans*, 169 A.2d at 679. This is no longer true. Since *Klawans*, the trend has been in the opposite direction. “The modern trend is to impose a standard of reasonableness on the landlord in withholding consent to a sublease unless the lease expressly states otherwise.” *Campbell v. Westdahl*, 715 P.2d 288, 292 (Ariz. Ct. App. 1985). . . .

Traditional property rules favor the free and unrestricted right to alienate interests in property. Therefore, absent some specific restriction in the lease, a lessee has the right to freely alienate the leasehold interest by assignment or sublease without obtaining the permission of the lessor. R. Schoshinski, *American Law of Landlord and Tenant* § 5:6 (1980); 1 *American Law of Property* § 3.56 (1952).

Contractual restrictions on the alienability of leasehold interests are permitted. R. Cunningham, W. Stoebuck, and D. Whitman, *The Law of Property* § 12.40 (1984). Consequently, landlords often insert clauses that restrict the lessee’s common law right to freely assign or sublease. *Id.* Probably the most often used clause is a “silent consent” clause similar to the provision in the instant case, which provides that the premises may not be assigned or sublet without the written consent of the lessor.

In a “silent consent” clause requiring a landlord’s consent to assign or sublease, there is no standard governing the landlord’s decision. Courts must insert a standard. The choice is usually between 1) requiring the landlord to act reasonably when withholding consent, or 2) permitting the landlord to act arbitrarily and capriciously in withholding consent.

Public policy requires that when a lease gives the landlord the right to withhold consent to a sublease or assignment, the landlord should act reasonably, and the courts ought not to imply a right to act arbitrarily or capriciously. If a landlord is allowed to arbitrarily refuse consent to an assignment or sublease, for what in effect is no reason at all, that would virtually nullify any right to assign or sublease.

Because most people act reasonably most of the time, tenants might expect that a landlord’s consent to a sublease or assignment would be governed by standards of reasonableness. Most tenants probably would not understand that a clause stating “this
lease may not be assigned or sublet without the landlord’s written consent” means the same as a clause stating “the tenant shall have no right to assign or sublease.” Some landlords may have chosen the former wording rather than the latter because it vaguely implies, but does not grant to the tenant, the right to assign or sublet.

There are two public policy reasons why the law enunciated in Klawans should now be changed. The first is the public policy against restraints on alienation. The second is the public policy which implies a covenant of good faith and fair dealing in every contract.

Because there is a public policy against restraints on alienation, if a lease is silent on the subject, a tenant may freely sublease or assign. Restraints on alienation are permitted in leases, but are looked upon with disfavor and are strictly construed. Powell on Real Property, supra. If a clause in a lease is susceptible of two interpretations, public policy favors the interpretation least restrictive of the right to alienate freely. Interpreting a “silent consent” clause so that it only prohibits subleases or assignments when a landlord’s refusal to consent is reasonable, would be the interpretation imposing the least restraint on alienation and most in accord with public policy.

Since the Klawans decision, this Court has recognized that in a lease, as well as in other contracts, “there exists an implied covenant that each of the parties thereto will act in good faith and deal fairly with the others.” Food Fair v. Blumberg, A.2d 166, 174 (1964). When the lease gives the landlord the right to exercise discretion, the discretion should be exercised in good faith, and in accordance with fair dealing; if the lease does not spell out any standard for withholding consent, then the implied covenant of good faith and fair dealing should imply a reasonableness standard.

We are cognizant of the value of the doctrine of stare decisis, and of the need for stability and certainty in the law. However, as we noted in Harrison v. Mont. Co. Bd. of Educ., 456 A.2d 894, 903 (1983), a common law rule may be modified “where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people.” The Klawans common law interpretation of the “silent consent” clause represents such a “vestige of the past,” and should now be changed.
REASONABLENESS OF WITHHELD CONSENT

In the instant case, we need not expound at length on what constitutes a reasonable refusal to consent to an assignment or sublease. We should, however, point out that obvious examples of reasonable objections could include the financial irresponsibility or instability of the transferee, or the unsuitability or incompatibility of the intended use of the property by the transferee. We also need not expound at length on what would constitute an unreasonable refusal to consent to an assignment or sublease. If the reasons for withholding consent have nothing to do with the intended transferee or the transferee’s use of the property, the motivation may be suspect. Where, as alleged in this case, the refusal to consent was solely for the purpose of securing a rent increase, such refusal would be unreasonable unless the new subtenant would necessitate additional expenditures by, or increased economic risk to, the landlord.

PROSPECTIVE EFFECT

The tenants ask us to retroactively overrule Klawans, and hold that in all leases with “silent consent” clauses, no matter when executed, consent to assign or sublease may not be unreasonably withheld by a landlord. We decline to do so. In the absence of evidence to the contrary, we should assume that parties executing leases when Klawans governed the interpretation of “silent consent” clauses were aware of Klawans and the implications drawn from the words they used. We should not, and do not, rewrite these contracts.

In appropriate cases, courts may “in the interest of justice” give their decisions only prospective effect. Contracts are drafted based on what the law is; to upset such transactions even for the purpose of improving the law could be grossly unfair. . . .

For leases with “silent consent” clauses which were entered into before the mandate in this case, Klawans is applicable, and we assume the parties were aware of the court decisions interpreting a “silent consent” clause as giving the landlord an unrestricted right to withhold consent.

For leases entered into after the mandate in this case, if the lease contains a “silent consent” clause providing that the tenant must obtain the landlord’s consent in order to assign or sublease, such consent may not be unreasonably withheld. If the parties intend to preclude any transfer by assignment or sublease, they may do so by a freely
negotiated provision in the lease. . . . For example, the clause might provide, “consent may be withheld in the sole and absolute subjective discretion of the lessor.”

The final question is whether the tenants in the instant case, having argued successfully for a change in the law, should receive the benefit of the change. . . . [Even though our decision is to have only prospective effect] [t]he tenants in the instant case should get the benefit of the interpretation of the “silent consent” clause that they so persuasively argued for, unless this interpretation would be unfair to the landlord. We note that the tenants testified they were told that the clause was only to prevent subleasing to “someone who would tear the apartment up.” Therefore, we will reverse the judgment of the Circuit Court with instructions to vacate the judgment of the District Court and remand for a new trial. At that trial, the landlord will have the burden of establishing that it would be unfair to interpret the “silent consent” clause in accordance with our decision that a landlord must act reasonably in withholding consent. He may establish that it would be unfair to do so by establishing that when executing the lease he was aware of and relied on the Klawans interpretation of the “silent consent” clause. . . .

Notes and Questions

1. **Landlords love restrictions.** Why are restrictions on transfer so common in both commercial and residential leases? You might want to refer back to the Sprawl-Mart example from earlier in the chapter, which makes clear why a landlord and tenant might disagree about who should get the benefit of the remaining term.

2. **Status of the Julian rule.** The approach taken in Julian, which reads a reasonableness requirement into the lease, is still a minority rule. Roughly 15 states have taken a position similar to Maryland’s highest court, including California, Illinois, North Carolina, and Ohio. Although the Julian/minority approach has gained popularity in the last two decades (and is considered the “modern” rule), it’s important to note that in most states a landlord may still arbitrarily refuse to consent to any sublease or assignment under a “silent consent” clause.

3. **Contracting around the rule?** Imagine a lease that includes the following provision: “The tenant shall not sublease or assign any part of their interest in
the property without the Landlord’s written permission. The Landlord reserves the absolute right to deny any request for any and all reasons at his sole and absolute discretion.” Under the holding in Julian, would this clause be valid? See Restatement (Second) Property § 15.2 (“A restraint on alienation with the consent of the landlord of the tenant’s interest in the leased property is valid, but the landlord’s consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.”)

4. **Defining reasonableness.** What counts as a reasonable objection to a sublease or assignment request? Courts in Illinois have found that it’s proper to consider: (1) the sublessee’s credit history, (2) the sublessee’s capital on hand, (3) whether the sublessee’s business is compatible with landlord’s other properties, (4) whether the sublessee’s business will compete with those of the lessor or any other lessee, and, (5) the sublessee’s expertise and business plan. See, for example, *Jack Frost Sales, Inc. v. Harris Trust & Savings Bank*, 433 N.E. 2d 941 (Ill. App. 3d 1982). In most jurisdictions, tenants have the burden to show the sublessee or assignee meets the reasonable commercial standard.

5. **The Landlord’s Stance.** Is the reasonableness rule fair to landlords? Imagine you’re a landlord and your original tenant announces that they’re moving out and proffers a subleasee for your approval. If you’re not completely satisfied with the new tenant, should you object? If you say “no” and the tenant either leaves or sues you, how much will that enforcement action cost?

6. **Residential v. Commercial.** Courts have not imposed the rule articulated in Julian on residential tenants. Why not? Aren’t commercial tenants better able to protect themselves and bargain than residential tenants? Consider the following statute from a jurisdiction where residential leases account for a huge proportion of extremely scarce housing stock: New York. As you read it, consider whether and to what extent the statute permits parties to residential leases to contract around its provisions, and whether it is more or less restrictive than the rule of Julian.
New York Real Property Law § 226-B

1. Unless a greater right to assign is conferred by the lease, a tenant renting a residence may not assign his lease without the written consent of the owner, which consent may be unconditionally withheld without cause provided that the owner shall release the tenant from the lease upon request of the tenant upon thirty days notice if the owner unreasonably withholds consent which release shall be the sole remedy of the tenant. If the owner reasonably withholds consent, there shall be no assignment and the tenant shall not be released from the lease.

2. (a) A tenant renting a residence pursuant to an existing lease in a dwelling having four or more residential units shall have the right to sublease his premises subject to the written consent of the landlord in advance of the subletting. Such consent shall not be unreasonably withheld.

(b) The tenant shall inform the landlord of his intent to sublease by mailing a notice of such intent by certified mail, return receipt requested. Such request shall be accompanied by the following information: (i) the term of the sublease, (ii) the name of the proposed sublessee, (iii) the business and permanent home address of the proposed sublessee, (iv) the tenant's reason for subletting, (v) the tenant's address for the term of the sublease, (vi) the written consent of any cotenant or guarantor of the lease, and (vii) a copy of the proposed sublease, to which a copy of the tenant's lease shall be attached if available, acknowledged by the tenant and proposed subtenant as being a true copy of such sublease.

(c) Within ten days after the mailing of such request, the landlord may ask the tenant for additional information as will enable the landlord to determine if rejection of such request shall be unreasonable. Any such request for additional information shall not be unduly burdensome. Within thirty days after the mailing of the request for consent, or of the additional information reasonably asked for by the landlord, whichever is later, the landlord shall send a notice to the tenant of his consent or, if he does not consent, his reasons therefor. Landlord's failure to send such a notice shall be deemed to be a consent to the proposed subletting. If the landlord consents, the premises may be sublet in accordance with the request, but the tenant thereunder, shall nevertheless remain liable for the performance of tenant's obligations under said lease. If the landlord reasonably withholds consent, there shall be no subletting and the tenant shall
not be released from the lease. If the landlord unreasonably withholds consent, the tenant may sublet in accordance with the request and may recover the costs of the proceeding and attorneys fees if it is found that the owner acted in bad faith by withholding consent.

…

5. Any sublet or assignment which does not comply with the provisions of this section shall constitute a substantial breach of lease or tenancy.

6. Any provision of a lease or rental agreement purporting to waive a provision of this section is null and void.

Problems

1. Last year, X rented a storefront in a local strip mall and opened a successful coffee shop. The lease is for 10 years and includes the following provision: “No assignments or subleases without the landlord’s consent. Landlord can only deny consent based on commercially reasonable objections.” Recently X was offered her dream job on a coffee plantation in a faraway country. She now wishes to exit her lease. Must the Landlord consent to the following assignment proposals?

   a. Alfred plans to open a mattress store. He’s a college dropout with no business experience but his rich father will co-sign the lease and guarantee all payments get made on time.

   b. Bob, an experienced therapist with good credit, wants to open a marriage counseling practice targeted at same-sex couples. The landlord, however, believes same-sex marriage is immoral and worries that the counseling center will hurt the business of a Christian bookstore in the strip mall.

   c. Cathy has a well-thought out plan to open a shooting range. The Landlord agrees to the assignment on the condition that Cathy increase the rent payment by $100/month. Cathy refuses.
4. **Tenant Exit: Abandonment and the Duty to Mitigate**

A tenant who needs to exit a lease early and cannot find another party to sublet must seek out other alternatives. For example, a tenant can always ask her landlord to terminate the lease before the term ends. The tenant generally agrees to turn over the property and pay a small fee and, in return, the landlord releases the tenant from all further obligations. This is called a *surrender*.

Alternatively, a tenant may simply pack her things, abandon the premise, and stop making rent payments. This often happens if a tenant cannot work out a surrender agreement or finds herself in desperate financial circumstances. What are the rights and obligations of the parties in this scenario? What happens if a tenant breaks a lease and leaves?

**Sommer v. Kridel**

378 A.2d 767 (N.J. 1977)

PASHMAN, J.

We granted certification in these cases to consider whether a landlord seeking damages from a defaulting tenant is under a duty to mitigate damages by making reasonable efforts to re-let an apartment wrongfully vacated by the tenant. Separate parts of the Appellate Division held that, in accordance with their respective leases, the landlords
in both cases could recover rents due under the leases regardless of whether they had attempted to re-let the vacated apartments. Although they were of different minds as to the fairness of this result, both parts agreed that it was dictated by Joyce v. Bauman, 174 A. 693 (1934) . . . . We now reverse and hold that a landlord does have an obligation to make a reasonable effort to mitigate damages in such a situation. We therefore overrule Joyce v. Bauman to the extent that it is inconsistent with our decision today.

I.

This case was tried on stipulated facts. On March 10, 1972 the defendant, James Kridel, entered into a lease with the plaintiff, Abraham Sommer, owner of the “Pierre Apartments” in Hackensack, to rent apartment 6-L in that building. The term of the lease was from May 1, 1972 until April 30, 1974, with a rent concession for the first six weeks, so that the first month’s rent was not due until June 15, 1972.

One week after signing the agreement, Kridel paid Sommer $690. Half of that sum was used to satisfy the first month’s rent. The remainder was paid under the lease provision requiring a security deposit of $345. Although defendant had expected to begin occupancy around May 1, his plans were changed. He wrote to Sommer on May 19, 1972, explaining:

I was to be married on June 3, 1972. Unhappily the engagement was broken and the wedding plans cancelled. Both parents were to assume responsibility for the rent after our marriage. I was discharged from the U.S. Army in October 1971 and am now a student. I have no funds of my own, and am supported by my stepfather.

In view of the above, I cannot take possession of the apartment and am surrendering all rights to it. Never having received a key, I cannot return same to you.

I beg your understanding and compassion in releasing me from the lease, and will of course, in consideration thereof, forfeit the 2 month’s rent already paid. Please notify me at your earliest convenience.

Plaintiff did not answer the letter.
Subsequently, a third party went to the apartment house and inquired about renting apartment 6-L. Although the parties agreed that she was ready, willing and able to rent the apartment, the person in charge told her that the apartment was not being shown since it was already rented to Kridel. In fact, the landlord did not re-enter the apartment or exhibit it to anyone until August 1, 1973. At that time it was rented to a new tenant for a term beginning on September 1, 1973. The new rental was for $345 per month with a six week concession similar to that granted Kridel.

Prior to re-letting the new premises, plaintiff sued Kridel in August 1972, demanding $7,590, the total amount due for the full two-year term of the lease. Following a mistrial, plaintiff filed an amended complaint asking for $5,865, the amount due between May 1, 1972 and September 1, 1973. The amended complaint included no reduction in the claim to reflect the six week concession provided for in the lease or the $690 payment made to plaintiff after signing the agreement. Defendant filed an amended answer to the complaint, alleging that plaintiff breached the contract, failed to mitigate damages and accepted defendant’s surrender of the premises. He also counterclaimed to demand repayment of the $345 paid as a security deposit.

The trial judge ruled in favor of defendant. Despite his conclusion that the lease had been drawn to reflect “the ‘settled law’ of this state,” he found that “justice and fair dealing” imposed upon the landlord the duty to attempt to re-let the premises and thereby mitigate damages. He also held that plaintiff’s failure to make any response to defendant’s unequivocal offer of surrender was tantamount to an acceptance, thereby terminating the tenancy and any obligation to pay rent. As a result, he dismissed both the complaint and the counterclaim. The Appellate Division reversed in a per curiam opinion, 153 N.J.Super. 1 (1976), and we granted certification.

II

As the lower courts in both appeals found, the weight of authority in this State supports the rule that a landlord is under no duty to mitigate damages caused by a defaulting tenant. See Joyce v. Bauman, supra . . . . This rule has been followed in a majority of states . . . and has been tentatively adopted in the American Law Institute’s Restatement of Property. . . .
Nevertheless, while there is still a split of authority over this question, the trend among recent cases appears to be in favor of a mitigation requirement. ... The majority rule is based on principles of property law which equate a lease with a transfer of a property interest in the owner’s estate. Under this rationale the lease conveys to a tenant an interest in the property which forecloses any control by the landlord; thus, it would be anomalous to require the landlord to concern himself with the tenant’s abandonment of his own property. *Wright v. Baumann*, 398 P.2d 119, 120-21 (Or. 1965).

For instance, in *Muller v. Beck*, supra, where essentially the same issue was posed, the court clearly treated the lease as governed by property, as opposed to contract, precepts. The court there observed that the “tenant had an estate for years, but it was an estate qualified by this right of the landlord to prevent its transfer,” 110 A. at 832, and that “the tenant has an estate with which the landlord may not interfere.” *Id.* at 832. Similarly, in *Heckel v. Griese*, supra, the court noted the absolute nature of the tenant’s interest in the property while the lease was in effect, stating that “when the tenant vacated, ... no one, in the circumstances, had any right to interfere with the defendant’s possession of the premises.” 171 A. 148, 149. Other cases simply cite the rule announced in *Muller v. Beck*, supra, without discussing the underlying rationale. *See Joyce v. Bauman*, supra, 174 A. 693 . . .

Yet the distinction between a lease for ordinary residential purposes and an ordinary contract can no longer be considered viable. As Professor Powell observed, evolving “social factors have exerted increasing influence on the law of estates for years.” 2 *Powell on Real Property* (1977 ed.), § 221(1) at 180-81. The result has been that:

> [t]he complexities of city life, and the proliferated problems of modern society in general, have created new problems for lessors and lessees and these have been commonly handled by specific clauses in leases. This growth in the number and detail of specific lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient.

(*Id.* at 181). . . .

This Court has taken the lead in requiring that landlords provide housing services to tenants in accordance with implied duties which are hardly consistent with the property
notions expressed in Muller v. Beck, supra, and Heckel v. Griese, supra. See Braitman v. Overlook Terrace Corp., 346 A.2d 76 (1975) (liability for failure to repair defective apartment door lock); Berzito v. Gambino, 308 A.2d 17 (1973) (construing implied warranty of habitability and covenant to pay rent as mutually dependent); Marini v. Ireland, 265 A.2d 526 (1970) (implied covenant to repair); Reste Realty Corp. v. Cooper, 251 A.2d 268 (1969) (implied warranty of fitness of premises for leased purpose). In fact, in Reste Realty Corp. v. Cooper, supra, we specifically noted that the rule which we announced there did not comport with the historical notion of a lease as an estate for years. 251 A.2d 268. And in Marini v. Ireland, supra, we found that the “guidelines employed to construe contracts have been modernly applied to the construction of leases.” 265 A.2d at 532.

Application of the contract rule requiring mitigation of damages to a residential lease may be justified as a matter of basic fairness. Professor McCormick first commented upon the inequity under the majority rule when he predicted in 1925 that eventually:

the logic, inescapable according to the standards of a ‘jurisprudence of conceptions’ which permits the landlord to stand idly by the vacant, abandoned premises and treat them as the property of the tenant and recover full rent, [will] yield to the more realistic notions of social advantage which in other fields of the law have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided. (McCormick, The Rights of the Landlord Upon Abandonment of the Premises by the Tenant, 23 Mich. L. Rev. 211, 221-22 (1925)).

Various courts have adopted this position.

The pre-existing rule cannot be predicated upon the possibility that a landlord may lose the opportunity to rent another empty apartment because he must first rent the apartment vacated by the defaulting tenant. Even where the breach occurs in a multi-dwelling building, each apartment may have unique qualities which make it attractive to certain individuals. Significantly, in Sommer v. Kridel, there was a specific request to rent the apartment vacated by the defendant; there is no reason to believe that absent this vacancy the landlord could have succeeded in renting a different apartment to this individual.
We therefore hold that antiquated real property concepts which served as the basis for the pre-existing rule, shall no longer be controlling where there is a claim for damages under a residential lease. Such claims must be governed by more modern notions of fairness and equity. A landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant.

If the landlord has other vacant apartments besides the one which the tenant has abandoned, the landlord’s duty to mitigate consists of making reasonable efforts to relet the apartment. In such cases he must treat the apartment in question as if it was one of his vacant stock.

As part of his cause of action, the landlord shall be required to carry the burden of proving that he used reasonable diligence in attempting to re-let the premises. We note that there has been a divergence of opinion concerning the allocation of the burden of proof on this issue. See Annot., supra, s 12 at 577. While generally in contract actions the breaching party has the burden of proving that damages are capable of mitigation . . . here the landlord will be in a better position to demonstrate whether he exercised reasonable diligence in attempting to re-let the premises . . .

III

The Sommer v. Kridel case presents a classic example of the unfairness which occurs when a landlord has no responsibility to minimize damages. Sommer waited 15 months and allowed $4658.50 in damages to accrue before attempting to re-let the apartment. Despite the availability of a tenant who was ready, willing and able to rent the apartment, the landlord needlessly increased the damages by turning her away. While a tenant will not necessarily be excused from his obligations under a lease simply by finding another person who is willing to rent the vacated premises, see, e. g., Reget v. Dempsey-Tegler & Co., 216 N.E.2d 500 (Ill. App.1966) (new tenant insisted on leasing the premises under different terms); Edmands v. Rust & Richardson Drug Co., 77 N.E. 713 (Mass. 1906) (landlord need not accept insolvent tenant), here there has been no showing that the new tenant would not have been suitable. We therefore find that plaintiff could have avoided the damages which eventually accrued, and that the defendant was relieved of his duty to continue paying rent. Ordinarily we would require the tenant to bear the cost of any reasonable expenses incurred by a landlord in attempting to re-let the premises . . . but no such expenses were incurred in this case . . .
In assessing whether the landlord has satisfactorily carried his burden, the trial court shall consider, among other factors, whether the landlord, either personally or through an agency, offered or showed the apartment to any prospective tenants, or advertised it in local newspapers. Additionally, the tenant may attempt to rebut such evidence by showing that he proffered suitable tenants who were rejected. However, there is no standard formula for measuring whether the landlord has utilized satisfactory efforts in attempting to mitigate damages, and each case must be judged upon its own facts.

Compare . . . Carpenter v. Wisniewski, 215 N.E.2d 882 (Ind. App.1966) (duty satisfied where landlord advertised the premises through a newspaper, placed a sign in the window, and employed a realtor); Re Garment Center Capitol, Inc., 93 F.2d 667, 115 A.L.R. 202 (2 Cir. 1938) (landlord’s duty not breached where higher rental was asked since it was known that this was merely a basis for negotiations); Foggia v. Dix, 509 P.2d 412, 414 (Or. 1973) (in mitigating damages, landlord need not accept less than fair market value or “substantially alter his obligations as established in the pre-existing lease”); with Anderson v. Andy Darling Pontiac, Inc., 43 N.W.2d 362 (Wis. 1950) (reasonable diligence not established where newspaper advertisement placed in one issue of local paper by a broker); . . . Consolidated Sun Ray, Inc. v. Oppenstein, 335 F.2d 801, 811 (8 Cir. 1964) (dictum) (demand for rent which is “far greater than the provisions of the lease called for” negates landlord’s assertion that he acted in good faith in seeking a new tenant).

The judgment in Sommer v. Kridel is reversed.

Notes and Questions

1. **The basic law.** Today almost all states impose a duty to mitigate on residential landlords. The rule also applies to commercial tenancies in many states. The Restatement (Second) of Property § 12.1(3), however, continues to cling to the common law notion that a landlord can wait until the end of the term and then sue the tenant for all of the unpaid rent. The authors of the Restatement believe the traditional rule discourages abandonment, limits vandalism, and better protects the expectations of landlords.

2. **Tenants still on the hook.** Importantly, the duty to mitigate does not relieve an abandoning tenant of all liability. Even if a new tenant rents the unit, the
landlord can still recover damages for all of the costs of finding the replacement tenant and for any time that the unit remained empty. The landlord can also recoup any unpaid rent that accrued before the abandonment. Finally, if the rental market in the area has softened and landlord is forced to rent the unit at lower price, the tenant is responsible for the difference between the new rent and the original rent.

3. **Property v. Contract.** The lingering controversy over the duty to mitigate stems largely from the property/contract tension inherent in the nature of the lease. If a leasehold is primarily a property interest, then the landlord has few responsibilities to the tenant after ceding possession and control—the tenant is free to use the property or let it lay fallow. If, on the other hand, the lease is viewed through the lens of contract law, the parties clearly have a responsibility to mitigate damages. *But see* Edward Chase & E. Hunter Taylor, Jr., *Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571 (1985) (arguing the distinction is overstated).

4. **What’s a good faith effort?** Ken rents an apartment to Sarah for one year. Three months into the lease, Sarah gets a new job in a different state and turns the apartment back over to Ken. Ken puts an 8x11 “for rent” sign in the window of the unit. Has he made a good faith effort to mitigate damages? Does it matter how he advertises the other units? What if Tim offers to rent Sarah’s unit but Tim has bad credit: does Ken have to accept Tim?

5. **The Legend of Jim Kridel.** The woman Jim Kridel intended to marry came from a family with significant assets. When the engagement fell through, Kridel—who had no income of his own—could not afford the rent at the Pierre Apartments. The opinion mentions that Kridel notified Sommer of his predicament in writing, but does not reflect that Kridel and Sommer also had a heated discussion on the phone. During the telephone conversation, Kridel offered Sommer $750 of the pre-paid rent as compensation for breaking the lease (adjusted for inflation, that’s roughly equivalent to $3000 today). Sommer, however, knew that Kridel’s stepfather was a prominent (and presumably well-off) physician and demanded an additional $750. Kridel refused, and told Sommer, “If you don’t like it, you can sue me, baby!” Sommer did just that.
When the litigation began, Kridel was a first year law student at Rutgers. He initially represented himself but gradually picked up pro bono help from lawyers he met at summer jobs and partners in the firm where he worked after graduating. Kridel estimates that Sommer—a very wealthy landlord—spent over $500,000 on legal fees. Kridel also recalls that the law of New Jersey was firmly against his position that the lease should be governed by contract principles. On appeal, he relied primarily on a case from the state of Oregon, which opposing counsel disparaged as a place full of bumpkin fishermen and loggers. When Kridel won, he wrapped the opinion around an Oregon salmon and sent to Sommer’s lawyers. Asked why he pursued the case with such vigor, he replied, “Sommer was wrong. The rule was unfair. And I was probably the only tenant in New Jersey who could afford to pour that much time and attention into a case like that.” In the intervening years, Kridel has had a long and successful legal career in New Jersey and New York. He’s currently best known for representing *Real Housewives of New Jersey* star Teresa Giudice in her bankruptcy proceeding.

5. **Tenant Exit: Eviction**

If a tenant fails to pay rent or otherwise commits a material breach of the lease, the landlord can elect to terminate the leasehold and evict the tenant from the property. It is undoubtedly true that the eviction process and the subsequent scramble for a new place to live can be a traumatic, humiliating, and disruptive occurrence. Eviction displaces children from their schools, rends the social networks of the poor, and forces many families into shelters or onto the streets. Matthew Desmond, a sociologist at Harvard, has found that forced relocations are also shockingly common. In Milwaukee, the location of Desmond’s research, 17 percent of the moves undertaken by renters over a two-year period were forced relocations. See Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SCI. REV. 227 (2015). In response to the social cost of eviction, some American cities and many countries around the world make it difficult for landlords to remove tenants. Should more U.S. jurisdictions follow suit? Consider the following story:
A patient political scientist ... might be able to place American cities on a left-to-right spectrum according to how long tenants whose eviction has become a cause manage to stay where they are. It may be, for instance that some city like Houston is on the far right of the spectrum. . . . Houston's most powerful citizens are known for a devotion to private property so intense that they see routine planning and zoning as acts of naked confiscation. . . . San Francisco might qualify for the left end of the spectrum. [I]ts best-known evictees [are] the tenants of the run-down three-story building called the International Hotel . . . . In the fall of 1968, about a hundred and fifty people who were living in the hotel . . . were told to be out of the building by January 1, 1969. The building was finally cleared—in what amounted to a military operation requiring several hundred policemen—on August 4, 1977.


**Notes and Questions**

1. Would you rather be a tenant in a place like Houston—where evictions happen quickly—or in San Francisco—where they do not?

2. Imagine you're a landlord in a jurisdiction where it takes a long time to remove a tenant for non-payment of rent. How would that change your business strategy? Would you ever take a chance on a tenant with bad credit or a history of being evicted?

We turn now to the procedure of eviction. When a landlord believes that a tenant has committed a material breach of the lease, how exactly does she go about removing a lessee from the property?

**Berg v. Wiley**

264 N.W.2d 145 (Minn. 1978)

ROGOSHESKE, Justice.
Defendant landlord, Wiley Enterprises, Inc., and defendant Rodney A. Wiley (hereafter collectively referred to as Wiley) appeal from a judgment upon a jury verdict awarding
plaintiff tenant, A Family Affair Restaurant, Inc., damages for wrongful eviction from its leased premises. The issues for review are whether the evidence was sufficient to support the jury’s finding that the tenant did not abandon or surrender the premises and whether the trial court erred in finding Wiley’s reentry forcible and wrongful as a matter of law. We hold that the jury’s verdict is supported by sufficient evidence and that the trial court’s determination of unlawful entry was correct as a matter of law, and affirm the judgment.

On November 11, 1970, Wiley, as lessor . . . executed a written lease agreement letting land and a building in Osseo, Minnesota, for use as a restaurant. The lease provided a 5-year term beginning December 1, 1970, and specified that the tenant agreed to bear all costs of repairs and remodeling, to “make no changes in the building structure” without prior written authorization from Wiley, and to “operate the restaurant in a lawful and prudent manner.” Wiley also reserved the right “at (his) option (to) retake possession” of the premises “(s)hould the Lessee fail to meet the conditions of this Lease.” In early 1971, plaintiff Kathleen Berg took assignment of the lease from the prior lessee, and on May 1, 1971, she opened “A Family Affair Restaurant” on the premises. In January 1973, Berg incorporated the restaurant and assigned her interest in the lease to “A Family Affair Restaurant, Inc.” As sole shareholder of the corporation, she alone continued to act for the tenant.

The present dispute has arisen out of Wiley’s objection to Berg’s continued remodeling of the restaurant without procuring written permission and her consequent operation of the restaurant in a state of disrepair with alleged health code violations. Strained relations between the parties came to a head in June and July 1973. In a letter dated June 29, 1973, Wiley’s attorney charged Berg with having breached lease items 5 and 6 by making changes in the building structure without written authorization and by operating an unclean kitchen in violation of health regulations. The letter demanded that a list of eight remodeling items be completed within 2 weeks from the date of the letter, by Friday, July 13, 1973, or Wiley would retake possession of the premises under lease item 7. Also, a June 13 inspection of the restaurant by the Minnesota Department of Health had produced an order that certain listed changes be completed within specified time limits in order to comply with the health code. The major items on the inspector’s list, similar to those listed by Wiley’s attorney, were to be completed by July 15, 1973.
During the 2-week deadline set by both Wiley and the health department, Berg continued to operate the restaurant without closing to complete the required items of remodeling. The evidence is in dispute as to whether she intended to permanently close the restaurant and vacate the premises at the end of the 2 weeks or simply close for about 1 month in order to remodel to comply with the health code. At the close of business on Friday, July 13, 1973, the last day of the 2-week period, Berg dismissed her employees, closed the restaurant, and placed a sign in the window saying “Closed for Remodeling.” Earlier that day, Berg testified, Wiley came to the premises in her absence and attempted to change the locks. When she returned and asserted her right to continue in possession, he complied with her request to leave the locks unchanged. Berg also testified that at about 9:30 p.m. that evening, while she and four of her friends were in the restaurant, she observed Wiley hanging from the awning peering into the window. Shortly thereafter, she heard Wiley pounding on the back door demanding admittance. Berg called the county sheriff to come and preserve order. Wiley testified that he observed Berg and a group of her friends in the restaurant removing paneling from a wall. Allegedly fearing destruction of his property, Wiley called the city police, who, with the sheriff, mediated an agreement between the parties to preserve the status quo until each could consult with legal counsel on Monday, July 16, 1973.

Wiley testified that his then attorney advised him to take possession of the premises and lock the tenant out. Accompanied by a police officer and a locksmith, Wiley entered the premises in Berg’s absence and without her knowledge on Monday, July 16, 1973, and changed the locks. Later in the day, Berg found herself locked out. The lease term was not due to expire until December 1, 1975. The premises were re-let to another tenant on or about August 1, 1973. Berg brought this damage action against Wiley . . . [for] intentional infliction of emotional distress . . . and other tort damages based upon claims in wrongful eviction . . . Wiley answered with an affirmative defense of abandonment and surrender and counterclaimed for damage to the premises . . . With respect to the wrongful eviction claim, the trial court found as a matter of law that Wiley did in fact lock the tenant out, and that the lockout was wrongful.

The jury, by answers to the questions submitted, found no liability on Berg’s claim for intentional infliction of emotional distress and no liability on Wiley’s counterclaim for damages to the premises, but awarded Berg $31,000 for lost profits and $3,540 for loss
of chattels resulting from the wrongful lockout. The jury also specifically found that Berg neither abandoned nor surrendered the premises. . . .

On this appeal, Wiley seeks an outright reversal of the damages award for wrongful eviction, claiming insufficient evidence to support the jury’s finding of no abandonment or surrender and claiming error in the trial court’s finding of wrongful eviction as a matter of law.

The first issue before us concerns the sufficiency of evidence to support the jury’s finding that Berg had not abandoned or surrendered the leasehold before being locked out by Wiley. Viewing the evidence to support the jury’s special verdict in the light most favorable to Berg, as we must, we hold it amply supports the jury’s finding of no abandonment or surrender of the premises. While the evidence bearing upon Berg’s intent was strongly contradictory, the jury could reasonably have concluded, based on Berg’s testimony and supporting circumstantial evidence, that she intended to retain possession, closing temporarily to remodel. Thus, the lockout cannot be excused on ground that Berg abandoned or surrendered the leasehold.

The second and more difficult issue is whether Wiley’s self-help repossession of the premises by locking out Berg was correctly held wrongful as a matter of law.

Minnesota has historically followed the common-law rule that a landlord may rightfully use self-help to retake leased premises from a tenant in possession without incurring liability for wrongful eviction provided two conditions are met: (1) The landlord is legally entitled to possession, such as where a tenant holds over after the lease term or where a tenant breaches a lease containing a reentry clause; and (2) the landlord’s means of reentry are peaceable. Mercil v. Broulette, 69 N.W. 218 (1896). Under the common-law rule, a tenant who is evicted by his landlord may recover damages for wrongful eviction where the landlord either had no right to possession or where the means used to remove the tenant were forcible, or both. See, e.g., Poppen v. Wadleigh, 51 N.W.2d 75 (1952) . . . .

Wiley contends that Berg had breached the provisions of the lease, thereby entitling Wiley, under the terms of the lease, to retake possession, and that his repossession by changing the locks in Berg’s absence was accomplished in a peaceful manner. In a memorandum accompanying the post-trial order, the trial court stated two grounds for
finding the lockout wrongful as a matter of law: (1) It was not accomplished in a peaceable manner and therefore could not be justified under the common-law rule, and (2) any self-help reentry against a tenant in possession is wrongful under the growing modern doctrine that a landlord must always resort to the judicial process to enforce his statutory remedy against a tenant wrongfully in possession. Whether Berg had in fact breached the lease and whether Wiley was hence entitled to possession was not judicially determined.

In applying the common-law rule, we have not before had occasion to decide what means of self-help used to dispossess a tenant in his absence will constitute a nonpeaceable entry, giving a right to damages without regard to who holds the legal right to possession. Wiley argues that only actual or threatened violence used against a tenant should give rise to damages where the landlord had the right to possession. We cannot agree.

It has long been the policy of our law to discourage landlords from taking the law into their own hands, and our decisions and statutory law have looked with disfavor upon any use of self-help to dispossess a tenant in circumstances which are likely to result in breaches of the peace. We gave early recognition to this policy in *Lobdell v. Keene*, 88 N.W. 426, 430 (1901), where we said:

> “The object and purpose of the legislature in the enactment of the forcible entry and unlawful detainer statute was to prevent those claiming a right of entry or possession of lands from redressing their own wrongs by entering into possession in a violent and forcible manner. All such acts tend to a breach of the peace, and encourage high-handed oppression. The law does not permit the owner of land, be his title ever so good, to be the judge of his own rights with respect to a possession adversely held, but puts him to his remedy under the statutes.”

To facilitate a resort to judicial process, the legislature has provided a summary procedure in Minn. St. 566.02 to 566.17 whereby a landlord may recover possession of leased premises upon proper notice and showing in court in as little as 3 to 10 days. As we recognized in *Mutual Trust Life Ins. Co. v. Berg*, 246 N.W. 9, 10 (1932), “(t)he forcible entry and unlawful detainer statutes were intended to prevent parties from taking the
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law into their own hands when going into possession of lands and tenements . . .”). To further discourage self-help, our legislature has provided treble damages for forcible evictions, ss 557.08 and 557.09, and has provided additional criminal penalties for intentional and unlawful exclusion of a tenant. § 504.25. In Sweeney v. Meyers, supra, we allowed a business tenant not only damages for lost profits but also punitive damages against a landlord who, like Wiley, entered in the tenant’s absence and locked the tenant out.

In the present case, as in Sweeney, the tenant was in possession, claiming a right to continue in possession adverse to the landlord’s claim of breach of the lease, and had neither abandoned nor surrendered the premises. Wiley, well aware that Berg was asserting her right to possession, retook possession in her absence by picking the locks and locking her out. The record shows a history of vigorous dispute and keen animosity between the parties. Upon this record, we can only conclude that the singular reason why actual violence did not erupt at the moment of Wiley’s changing of the locks was Berg’s absence and her subsequent self-restraint and resort to judicial process. Upon these facts, we cannot find Wiley’s means of reentry peaceable under the common-law rule. Our long-standing policy to discourage self-help which tends to cause a breach of the peace compels us to disapprove the means used to dispossess Berg. To approve this lockout, as urged by Wiley, merely because in Berg’s absence no actual violence erupted while the locks were being changed, would be to encourage all future tenants, in order to protect their possession, to be vigilant and thereby set the stage for the very kind of public disturbance which it must be our policy to discourage. . . .

We recognize that the growing modern trend departs completely from the common-law rule to hold that self-help is never available to dispossess a tenant who is in possession and has not abandoned or voluntarily surrendered the premises. Annotation, 6 A.L.R.3d 177, 186; 76 Dickinson L.Rev. 215, 227. This growing rule is founded on the recognition that the potential for violent breach of peace inheres in any situation where a landlord attempts by his own means to remove a tenant who is claiming possession adversely to the landlord. Courts adopting the rule reason that there is no cause to sanction such potentially disruptive self-help where adequate and speedy means are provided for removing a tenant peacefully through judicial process. At least 16 states have adopted this modern rule, holding that judicial proceedings, including
the summary procedures provided in those states’ unlawful detainer statutes, are the exclusive remedy by which a landlord may remove a tenant claiming possession.

While we would be compelled to disapprove the lockout of Berg in her absence under the common-law rule as stated, we approve the trial court’s reasoning and adopt as preferable the modern view represented by the cited cases. To make clear our departure from the common-law rule for the benefit of future landlords and tenants, we hold that, subsequent to our decision in this case, the only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord’s claim of breach of a written lease is by resort to judicial process. We find that Minn.St. 566.02 to 566.17 provide the landlord with an adequate remedy for regaining possession in every such case. Where speedier action than provided in §§ 566.02 to 566.17 seems necessary because of threatened destruction of the property or other exigent circumstances, a temporary restraining order under Rule 65, Rules of Civil Procedure, and law enforcement protection are available to the landlord. Considered together, these statutory and judicial remedies provide a complete answer to the landlord. In our modern society, with the availability of prompt and sufficient legal remedies as described, there is no place and no need for self-help against a tenant in claimed lawful possession of leased premises.

Applying our holding to the facts of this case, we conclude, as did the trial court, that because Wiley failed to resort to judicial remedies against Berg’s holding possession adversely to Wiley’s claim of breach of the lease, his lockout of Berg was wrongful as a matter of law. The rule we adopt in this decision is fairly applied against Wiley, for it is clear that, applying the older common-law rule to the facts and circumstances peculiar to this case, we would be compelled to find the lockout nonpeaceable for the reasons previously stated. The jury found that the lockout caused Berg damage and, as between Berg and Wiley, equity dictates that Wiley, who himself performed the act causing the damage, must bear the loss.

Affirmed.

Notes and Questions

1. Who did what wrong? Kathleen Berg, the tenant, never missed a rent payment. Why, exactly, did Wiley think he was entitled to enter the property and exclude the tenant? Is Rodney Wiley at fault for this dispute? If you were his lawyer at
the time, would you have given him different advice? If he was entitled to possession, how did he end up owing $34,500 to Berg?

2. **Tending to Cause a Breach of the Peace.** In case you aren’t convinced that repossession carries an inherent risk of a breach of the peace, consider the story of Erskine G. Bryce. In the summer of 2001, Mr. Bryce—a 66-year-old city marshal in Brooklyn, New York—arrived at the second-story apartment of 53-year-old JoAnne Jones to remove her from possession pursuant to a duly issued court order for her eviction. At the time, Ms. Jones owed about $14,000 in back rent. She violently attacked the marshal, knocking him over a stairwell railing down to the ground floor below. Mr. Bryce’s head hit a refrigirator on the way down. Ms. Jones grabbed an aluminum rod, ran down the stairs, and began beating Mr. Bryce with the rod. She then doused his body with paint thinner and set him on fire with a cigarette lighter. Almost as quickly as it had arisen, Ms. Jones’s rage subsided, and she attempted to put out the flames she had ignited by running back and forth to her apartment to fetch basins of water—but it was too late. The medical examiner concluded that Mr. Bryce died from a combination of blunt force injuries and the flames that quickly consumed his upper body—in other words, that he had been beaten to within an inch of his life and then burned alive. C.J. Chivers, *Tenant Held in Murder of Marshal*, N.Y. TIMES (Aug. 23, 2001).

3. Mr. Bryce had two decades of experience as a marshal and a reputation for dealing calmly and compassionately with those he evicted. He was a stranger to Ms. Jones until he arrived to evict her. But in the moment, the situation still exploded into horrific, deadly violence. How much more likely do we think such violence would be where a landlord—who has a personal stake in recovering possession, no particular professional experience in managing or defusing tense situations, no imprimatur of government authority, and a bitter history with the tenant—attempts to repossess?

4. **Do landlords love violence?** If the court here is correct that all self-help remedies contain the inherent potential for violence, why do landlords seem so eager to employ them? Why would a landlord ever resist going through the court process, which the Justice Rogosheske describes as “adequate and speedy”?
5. **Can landlords stand their ground?** Many states have so-called “stand your ground” laws. Stand your ground laws authorize individuals to use deadly force in self-defense when faced with a reasonable threat. There is no duty to retreat first. Why are legislatures concerned about violence in the landlord/tenant context but not in the self-defense setting?

6. **Costs.** Who does the demise of self-help hurt?

7. **Basic eviction procedure.** Every state has now enacted statutes—often referred to as forcible entry and detainer laws—that help landlords to promptly regain possession when a tenant holds over or commits a material breach of the lease. In most jurisdictions, statutes mandate that landlords pursue relief through the court system and refrain from self-help remedies. While these eviction procedures vary between jurisdictions, there are some significant commonalities between most states’ forced entry and detainer laws. In all jurisdictions, for example, a landlord who wishes to evict a tenant must first send the tenant proper written notice. The notice requirement generally obliges the landlord to accurately state the tenant’s name and address, and reveal the nature of the alleged breach. Most states also require the landlord to give the tenant an opportunity (often 3 days, but sometimes as long as 14) to either cure the default or move out. These are often referred to as “Cure or Quit” notices. If the tenant corrects the problem, they must be allowed to stay. However, if the tenant stays in the unit and does not cure the default, the landlord can file a petition for eviction with the local housing court. Upon the landlord’s request, the court will quickly set a trial date and a process server will deliver a summons and complaint to each tenant. Most tenants do not contest their evictions. If the tenant does not respond to the summons, the court will enter a judgment in favor of the landlord and the landlord will then hire a local sheriff to remove the tenant from the property. The entire process generally takes from 20 to 60 days.

8. **Defending against eviction.** Occasionally a tenant will mount a vigorous defense to an eviction notice. The most commonly raised defenses are (1) notice was faulty, (2) the tenant cured the default, (3) the landlord illegally
retaliated against the tenant, and, (4) the tenant had a right to withhold rent because the unit failed to meet certain minimum standards required by law.

6. Tenant Exit: Security Deposits

Most landlords require their tenants to pay a security deposit—a sum of money that the landlord can raid if the tenant defaults on the rent, leaves the unit untidy, or damages any property during the course of the tenancy. State law mandates that if the tenant has compiled with all terms of the lease and kept the unit in good order, the landlord must return the security deposit (generally within 30 or 60 days). If the tenant causes damage, the landlord has the right to use the security to restore the unit to its previous condition, but must provide the tenant with a list of damages and receipts for the repairs.

Although the law of security deposits is generally crystal-clear, a huge number of renters report that they have unfairly lost deposit money to their landlords. Why is this so? Game theorists argue that the structure of the landlord-tenant relationship makes disputes over security deposits almost unavoidable. The key insight is that while the tenancy is ongoing, landlords and tenants have incentives to get along and make compromises—the landlord wants the tenant to make timely rent payments and the tenant wants the landlord to respond quickly when problems arise. However, once the landlord and tenant decide to end their relationship, there are few checks to prevent bad behavior. If the landlord will never interact with the tenant again, why not fudge a little bit with security deposit? Additionally, the small amounts of money involved in security deposit disputes mean that it’s rarely worth hiring a lawyer or taking the time to sue the landlord in small claims court.

Notes and Questions

1. Tenant self help? If tenants recognize that landlords often cheat them out of their security deposits, why don’t more tenants respond by refusing to pay the last month’s rent? After all, eviction procedures almost always take longer than 30 days.

2. America v. England. To solve the security deposit dilemma, English law does not permit landlords to keep their tenants’ deposits. Rather, they must place
them with a government-approved holding agency. If a dispute arises over the
money at the end of the lease, the parties are referred to an arbitrator who works
for the organization that holds the money. The dispute resolution service does
not charge either party but they are bound by its decision. Should jurisdictions
in the U.S. move toward this model? Would it change your opinion to know
that English landlords routinely fail to comply with these rules? Are there other
solutions worth considering?

D. The Quest for Clean, Safe, and Affordable Premises

In feudal England, policy makers and government officials expressed little concern
over the housing conditions of renters. The law was well-settled: Once a landlord
turned over the right of possession, the tenant became responsible for maintenance of
the leased property. If a tenant decided to live in squalor rather than complete basic
repairs, that was the tenant’s problem, not the landlord’s worry. Although it may seem
counterintuitive to modern readers (who rely on landlords to fix nearly everything),
putting the burden on the tenant to maintain the property actually produced efficient
results in the medieval world: landlords often lived long distances from their lessees,
communication was slow, houses were simply constructed, and most tenants had the
knowledge and skills to complete basic repairs.

The basic principle that tenants are responsible for their own living conditions
remained unchallenged until the 1960s, when both academics and politicians expressed
growing concern about the rental housing stock in central cities. Many worried that
exploitative landlords were flouting safety regulations and taking advantage of tenants
who had few housing choices as a result of their poverty and the rampant
discrimination in the housing market. The problems in the poorest neighborhoods
also had spillover effects in surrounding communities—disease, vermin, and fires do
not respect municipal borders. In response to these problems, the law began to vest
tenants with a new series of rights against their landlords. This subsection traces the
evolution of these rights and explores the rise of legal tools to ensure minimum housing
standards for all renters.
1. The Covenant of Quiet Enjoyment

Traditional common law principles do not leave renters completely defenseless against unprincipled landlords. Every lease, whether residential or commercial, contains a *covenant of quiet enjoyment*. Often this promise is explicitly stated in the lease contract. Where it’s not specifically mentioned, all courts will imply it into the agreement. The basic idea is that the landlord cannot interfere with the tenant’s use of the property. Most courts state the legal test this way: A breach of the covenant of quiet enjoyment occurs when the landlord substantially interferes with the tenant’s use or enjoyment of the premises.

Consider the following hypothetical:

Little Bo Peep Detective Services rents the second floor of a four-floor building. A year into the five-year lease, the landlord suddenly begins a construction project designed to update the suites on the first floor. These renovations create loud noise and regular interruptions of electric service. The construction work has also made the parking lot inaccessible. Employees and customers need to walk a quarter-mile to access the building from a nearby parking garage.

Do these problems amount to a violation of the covenant of quiet enjoyment? To determine whether the interference is “substantial” courts generally consider the purpose the premises are leased for, the foreseeability of the problem, the potential duration, and the degree of harm. In this example, if the construction project lasts for more than a few days, then Little Bo Peep can most likely bring a successful claim against its landlord under the covenant of quiet enjoyment. The problems here are not mere trifles—the noise, lack of electricity, and inadequate parking fundamentally affect the company’s ability to use the property as they intended.

The difficult conceptual issue with the covenant of quiet enjoyment concerns the remedy. If the landlord breaks the covenant, what are the tenant’s options? After a breach, the tenant can always choose to stay in the leased property, continue to pay rent, and sue the landlord for damages.
Additionally, certain violations of the covenant of quiet enjoyment allow the tenant to consider the lease terminated, leave, and stop paying rent. Recall from earlier in the chapter that the landlord’s fundamental responsibility is to provide the tenant with possession (or, in some jurisdictions, the right to possession). From that principle, courts developed a rule that in cases where the landlord wrongfully evicts the tenant, all the tenant’s obligations under the lease cease. Imagine:

Landlord and tenant both sign a lease that reads, “Landlord agrees to provide Tenant with possession of 123 Meadowlark Lane for a period of 12 months beginning April 1. Tenant agrees to pay $100 per month.” After 4 months, however, the Landlord retakes possession of the property by forcing the tenant out and changing the locks.

Assuming the tenant hasn’t committed a material breach, the landlord’s actions constitute an obvious violation of the covenant of quiet enjoyment—the tenant can no longer use the property for any purpose. Thus, any eviction where the tenant is physically denied access to the unit ends the tenant’s obligation to pay rent and allows the tenant to sue for damages incurred from being removed from possession (A tenant could also sue to regain the unit). The law is very clear on this point. Relatedly, if the landlord denies the tenant access to some portion of the rented space (say, an allotted parking space) that, too, constitutes a breach of the covenant of quiet enjoyment. The tenant subject to such a partial eviction has the option to terminate the lease and sue for damages.

But what if the landlord doesn’t physically interfere with her tenant’s occupancy? What if the landlord creates an environment that’s so miserable that the tenant is forced to flee? Is this an “eviction” that would allow the tenant to consider the lease terminated or must the tenant stay and continue paying rent while he brings a damages lawsuit

Fidelity Mutual Life Insurance Co. v. Kaminsky
768 S.W.2d 818 (Tex. App. 1989)

MURPHY, Justice.
The issue in this landlord-tenant case is whether sufficient evidence supports the jury’s findings that the landlord and appellant, Fidelity Mutual Life Insurance Company [“Fidelity”], constructively evicted the tenant, Robert P. Kaminsky, M.D., P.A. [“Dr.
Dr. Kaminsky is a gynecologist whose practice includes performing elective abortions. In May 1983, he executed a lease contract for the rental of approximately 2,861 square feet in the Red Oak Atrium Building for a two year term which began on June 1, 1983. The terms of the lease required Dr. Kaminsky to use the rented space solely as “an office for the practice of medicine.” Fidelity owns the building and hires local companies to manage it. At some time during the lease term, Shelter Commercial Properties [“Shelter”] replaced the Horne Company as managing agents. Fidelity has not disputed either management company’s capacity to act as its agent.

The parties agree that: (1) they executed a valid lease agreement; (2) Paragraph 35 of the lease contains an express covenant of quiet enjoyment conditioned on Dr. Kaminsky’s paying rent when due, as he did through November 1984; Dr. Kaminsky abandoned the leased premises on or about December 3, 1984 and refused to pay additional rent; anti-abortion protestors began picketing at the building in June of 1984 and repeated and increased their demonstrations outside and inside the building until Dr. Kaminsky abandoned the premises.

When Fidelity sued for the balance due under the lease contract following Dr. Kaminsky’s abandonment of the premises, he claimed that Fidelity constructively evicted him by breaching Paragraph 35 of the lease. Fidelity apparently conceded during trial that sufficient proof of the constructive eviction of Dr. Kaminsky would relieve him of his contractual liability for any remaining rent payments. Accordingly, he assumed the burden of proof and the sole issue submitted to the jury was whether Fidelity breached Paragraph 35 of the lease, which reads as follows:

_Quiet Enjoyment._

Lessee, on paying the said Rent, and any Additional Rental, shall and may peaceably and quietly have, hold and enjoy the Leased Premises for the said term.

A constructive eviction occurs when the tenant leaves the leased premises due to conduct by the landlord which materially interferes with the tenant’s beneficial use of
the premises. See Downtown Realty, Inc. v. 509 Tremont Bldg., 748 S.W.2d 309, 313 (Tex.App.—Houston [14th Dist.] 1988, n.w.h.). Texas law relieves the tenant of contractual liability for any remaining rentals due under the lease if he can establish a constructive eviction by the landlord. . . .

In order to prevail on his claim that Fidelity constructively evicted him and thereby relieved him of his rent obligation, Dr. Kaminsky had to show the following: 1) Fidelity intended that he no longer enjoy the premises, which intent the trier of fact could infer from the circumstances; 2) Fidelity, or those acting for Fidelity or with its permission, committed a material act or omission which substantially interfered with use and enjoyment of the premises for their leased purpose, here an office for the practice of medicine; 3) Fidelity’s act or omission permanently deprived Dr. Kaminsky of the use and enjoyment of the premises; and 4) Dr. Kaminsky abandoned the premises within a reasonable period of time after the act or omission. E.g., Downtown Realty, Inc., 748 S.W.2d at 311 . . . .

[T]he jury found that Dr. Kaminsky had established each element of his constructive eviction defense. The trial court entered judgment that Fidelity take nothing on its suit for delinquent rent.

Fidelity raises four points of error. . . .

Fidelity’s first point of error relies on Angelo v. Deutser, 30 S.W.2d 707 (Tex.Civ.App.—Beaumont 1930, no writ), Thomas v. Brin, 38 Tex.Civ.App. 180, 85 S.W. 842 (1905, no writ) and Sedberry v. Verplanck, 31 S.W. 242 (Tex.Civ.App.1895, no writ). These cases all state the general proposition that a tenant cannot complain that the landlord constructively evicted him and breached a covenant of quiet enjoyment, express or implied, when the eviction results from the actions of third parties acting without the landlord’s authority or permission. Fidelity insists the evidence conclusively establishes: a) that it did nothing to encourage or sponsor the protestors and; b) that the protestors, rather than Fidelity or its agents, caused Dr. Kaminsky to abandon the premises. Fidelity concludes that reversible error resulted because the trial court refused to set aside the jury’s answers to the special issues and enter judgment in Fidelity’s favor and because the trial court denied its motion for a new trial. We disagree. . . .

The protests took place chiefly on Saturdays, the day Dr. Kaminsky generally scheduled
abortion. During the protests, the singing and chanting demonstrators picketed in the building’s parking lot and inner lobby and atrium area. They approached patients to speak to them, distributed literature, discouraged patients from entering the building and often accused Dr. Kaminsky of “killing babies.” As the protests increased, the demonstrators often occupied the stairs leading to Dr. Kaminsky’s office and prevented patients from entering the office by blocking the doorway. Occasionally they succeeded in gaining access to the office waiting room area.

Dr. Kaminsky complained to Fidelity through its managing agents and asked for help in keeping the protestors away, but became increasingly frustrated by a lack of response to his requests. The record shows that no security personnel were present on Saturdays to exclude protestors from the building, although the lease required Fidelity to provide security service on Saturdays. The record also shows that Fidelity’s attorneys prepared a written statement to be handed to the protestors soon after Fidelity hired Shelter as its managing agent. The statement tracked TEX.PENAL CODE ANN. § 30.05 (Vernon Supp.1989) and generally served to inform trespassers that they risked criminal prosecution by failing to leave if asked to do so. Fidelity’s attorneys instructed Shelter’s representative to “have several of these letters printed up and be ready to distribute them and verbally demand that these people move on and off the property.” The same representative conceded at trial that she did not distribute these notices. Yet when Dr. Kaminsky enlisted the aid of the Sheriff’s office, officers refused to ask the protestors to leave without a directive from Fidelity or its agent. Indeed, an attorney had instructed the protestors to remain unless the landlord or its representative ordered them to leave. It appears that Fidelity’s only response to the demonstrators was to state, through its agents, that it was aware of Dr. Kaminsky’s problems.

Both action and lack of action can constitute “conduct” by the landlord which amounts to a constructive eviction. E.g., Downtown Realty Inc., 748 S.W.2d at 311. In Steinberg v. Medical Equip. Rental Serv., Inc., 505 S.W.2d 692 (Tex. Civ. App.—Dallas 1974, no writ) accordingly, the court upheld a jury’s determination that the landlord’s failure to act amounted to a constructive eviction and breach of the covenant of quiet enjoyment. 505 S.W.2d at 697. Like Dr. Kaminsky, the tenant in Steinberg abandoned the leased premises and refused to pay additional rent after repeatedly complaining to the landlord. The Steinberg tenant complained that Steinberg placed trash bins near the entrance to the business and allowed trucks to park and block customer’s access to the tenant’s
medical equipment rental business. The tenant’s repeated complaints to Steinberg yielded only a request “to be patient.” Id. Fidelity responded to Dr. Kaminsky’s complaints in a similar manner: although it acknowledged his problems with the protestors, Fidelity, like Steinberg, effectively did nothing to prevent the problems.

This case shows ample instances of Fidelity’s failure to act in the fact of repeated requests for assistance despite its having expressly covenanted Dr. Kaminsky’s quiet enjoyment of the premises. These instances provided a legally sufficient basis for the jury to conclude that Dr. Kaminsky abandoned the leased premises, not because of the trespassing protestors, but because of Fidelity’s lack of response to his complaints about the protestors. Under the circumstances, while it is undisputed that Fidelity did not “encourage” the demonstrators, its conduct essentially allowed them to continue to trespass. The general rule of the Angelo, Thomas and Sedberry cases, that a landlord is not responsible for the actions of third parties, applies only when the landlord does not permit the third party to act. See e.g., Angelo, 30 S.W.2d at 710 [“the act or omission complained of must be that of the landlord and not merely of a third person acting without his authority or permission” (emphasis added) ]. We see no distinction between Fidelity’s lack of action here, which the record shows resulted in preventing patients’ access to Dr. Kaminsky’s medical office, and the Steinberg case where the landlord’s inaction resulted in trucks’ blocking customer access to the tenant’s business. We overrule the first point of error. . . .

In its [final] point of error, Fidelity maintains the evidence is factually insufficient to support the jury’s finding that its conduct permanently deprived Dr. Kaminsky of use and enjoyment of the premises. Fidelity essentially questions the permanency of Dr. Kaminsky’s being deprived of the use and enjoyment of the leased premises. To support its contentions, Fidelity points to testimony by Dr. Kaminsky in which he concedes that none of his patients were ever harmed and that protests and demonstrations continued despite his leaving the Red Oak Atrium building. Fidelity also disputes whether Dr. Kaminsky actually lost patients due to the protests.

The evidence shows that the protestors, whose entry into the building Fidelity failed to prohibit, often succeeded in blocking Dr. Kaminsky’s patients’ access to his medical office. Under the reasoning of the Steinberg case, omissions by a landlord which result in patients’ lack of access to the office of a practicing physician would suffice to
establish a permanent deprivation of the use and enjoyment of the premises for their leased purpose, here “an office for the practice of medicine.” Steinberg, 505 S.W.2d at 697; accord, Downtown Realty, Inc., 748 S.W.2d at 312 (noting jury’s finding that a constructive eviction resulted from the commercial landlord’s failure to repair a heating and air conditioning system in a rooming house).

Texas law has long recited the requirement, first stated in Stillman, 266 S.W.2d at 916, that the landlord commit a “material and permanent” act or omission in order for his tenant to claim a constructive eviction. However, as the Steinberg and Downtown Realty, Inc. cases illustrate, the extent to which a landlord’s acts or omissions permanently and materially deprive a tenant of the use and enjoyment of the premises often involves a question of degree. Having reviewed all the evidence before the jury in this case, we cannot say that its finding that Fidelity’s conduct permanently deprived Dr. Kaminsky of the use and enjoyment of his medical office space was so against the great weight and preponderance of the evidence as to be manifestly unjust. We overrule the fourth point of error.

We affirm the judgment of the trial court.

Notes and Questions

1. **Evolution of the doctrine.** As discussed above, English judges widely recognized that tenants could terminate the lease (and sue for damages) if the landlord physically denied them possession of the rented property. Eventually the basic concept was expanded to situations where the landlord commits some act that, while it falls short of an actual eviction, so severely affects the value of the tenancy that the tenant is forced to flee. This is known as constructive eviction.

2. **Basic constractive eviction law.** To make a claim of constructive eviction a tenant must show that some act or omission by the landlord substantially interferes with the tenant’s use and enjoyment of the property. The tenant also needs to notify the landlord about the problem, give the landlord an opportunity to cure the defect, and then vacate the premise within a reasonable amount of time.
3. **Stay or go?** Why might a tenant contemplating bringing a constructive eviction claim worry about the requirement to vacate the premises? Is constructive eviction a more powerful remedy in a place like San Francisco, which has a very tight housing market, or Houston, which has more open units?

4. **Landlord’s wrongful conduct.** To make use of the doctrine of quiet enjoyment, the tenant must show that the landlord committed some wrongful act. There’s wide agreement that any affirmative step taken by the landlord that impedes the tenant’s use of the property can meet the requirement of an “act.” Examples would include burning toxic substances on the property, prolonged construction activities, or a substantial alteration of an essential feature of the leased premises. The trickier doctrinal question is whether a landlord’s failure to act can ever qualify as the wrongful conduct. Traditionally, courts hesitated to impose liability on landlords for their omissions, but the law of most states now asserts that a “lack of action” can constitute the required act. For example, a landlord’s failure to provide heat in the winter months is generally found to violate the covenant of quiet enjoyment. Some courts, nervous about unjustly expanding landlords’ potential liability, deem omissions wrongful only when the landlord fails to fulfill some clear duty—either a duty bargained for in the lease or a statutory duty.

5. **Troublesome tenants.** Suppose your landlord rents the floor above your apartment to the members of a Led Zeppelin cover band. If the band practices every night between the hours of 3:00 am and 4:00 am, could you bring a successful constructive eviction claim against the landlord?

6. **Third parties.** What if the Led Zeppelin cover band played every night at a club across the street? If the noise from the bar kept you awake, could you sue your landlord for constructive eviction?

2. **The Implied Warranty of Habitability**

Although the covenant of quiet enjoyment offers tenants some protections, the doctrine—without more—can leave renters exposed to dreadful living conditions.
What if cockroaches invade a tenant’s apartment? Or a sewer pipe in the basement begins to leak? What if a storm shatters the windows of the apartment? Or a wall of a building falls down? Unless the landlord somehow caused any of these disasters (or had a clearly articulated duty to fix them) a tenant cannot bring a successful case under the covenant of quiet enjoyment. In *Hughes v. Westchester Development Corp.*, 77 F.2d 550 (D.C. Cir. 1935), for example, vermin invaded the tenant’s apartment, making it “impossible to use the kitchen and toilet facilities.” Despite the infestation, the court found that the tenant remained responsible for the rent because the landlord was not to blame for the bugs’ sudden appearance. Leases, the court ruled, contained no implied promise that the premise was fit for the purpose it was leased. If tenants desired more and better protection, they had the burden to bargain for such provisions in the lease.

All of this changed in the late 1960s and early 70s. The most lasting accomplishment of the tenants’ rights movement was the widespread adoption of the *implied warranty of habitability*. In the United States, only Arkansas has failed to adopt the rule. In a nutshell, the implied warranty of habitability imposes a duty on landlords to provide residential tenants with a clean, safe, and habitable living space.

**Hilder v. St. Peter**

478 A.2d 202 (Vt. 1984)

BILLINGS, Chief Justice.

Defendants appeal from a judgment rendered by the Rutland Superior Court. The court ordered defendants to pay plaintiff damages in the amount of $4,945.00, which represented “reimbursement of all rent paid and additional compensatory damages” for the rental of a residential apartment over a fourteen month period in defendants' Rutland apartment building. Defendants filed a motion for reconsideration on the issue of the amount of damages awarded to the plaintiff, and plaintiff filed a cross-motion for reconsideration of the court's denial of an award of punitive damages. The court denied both motions. On appeal, defendants raise [two] issues for our consideration: first, whether the court correctly calculated the amount of damages awarded the plaintiff; secondly, whether the court's award to plaintiff of the entire amount of rent paid to defendants was proper since the plaintiff remained in possession of the apartment for the entire fourteen month period. . . .
The facts are uncontested. In October, 1974, plaintiff began occupying an apartment at defendants’ 10–12 Church Street apartment building in Rutland with her three children and new-born grandson. Plaintiff orally agreed to pay defendant Stuart St. Peter $140 a month and a damage deposit of $50; plaintiff paid defendant the first month’s rent and the damage deposit prior to moving in. Plaintiff has paid all rent due under her tenancy. Because the previous tenants had left behind garbage and items of personal belongings, defendant offered to refund plaintiff’s damage deposit if she would clean the apartment herself prior to taking possession. Plaintiff did clean the apartment, but never received her deposit back because the defendant denied ever receiving it. Upon moving into the apartment, plaintiff discovered a broken kitchen window. Defendant promised to repair it, but after waiting a week and fearing that her two year old child might cut herself on the shards of glass, plaintiff repaired the window at her own expense. Although defendant promised to provide a front door key, he never did. For a period of time, whenever plaintiff left the apartment, a member of her family would remain behind for security reasons. Eventually, plaintiff purchased and installed a padlock, again at her own expense. After moving in, plaintiff discovered that the bathroom toilet was clogged with paper and feces and would flush only by dumping pails of water into it. Although plaintiff repeatedly complained about the toilet, and defendant promised to have it repaired, the toilet remained clogged and mechanically inoperable throughout the period of plaintiff’s tenancy. In addition, the bathroom light and wall outlet were inoperable. Again, the defendant agreed to repair the fixtures, but never did. In order to have light in the bathroom, plaintiff attached a fixture to the wall and connected it to an extension cord that was plugged into an adjoining room. Plaintiff also discovered that water leaked from the water pipes of the upstairs apartment down the ceilings and walls of both her kitchen and back bedroom. Again, defendant promised to fix the leakage, but never did. As a result of this leakage, a large section of plaster fell from the back bedroom ceiling onto her bed and her grandson’s crib. Other sections of plaster remained dangling from the ceiling. This condition was brought to the attention of the defendant, but he never corrected it. Fearing that the remaining plaster might fall when the room was occupied, plaintiff moved her and her grandson’s bedroom furniture into the living room and ceased using the back bedroom. During the summer months an odor of raw sewage permeated plaintiff’s apartment. The odor was so strong that the plaintiff was ashamed to have company in her apartment. Responding to plaintiff’s complaints, Rutland City workers unearthed a broken sewage pipe in the basement of defendants’ building. Raw sewage littered the floor of the
basement, but defendant failed to clean it up. Plaintiff also discovered that the electric service for her furnace was attached to her breaker box, although defendant had agreed, at the commencement of plaintiff’s tenancy, to furnish heat.

In its conclusions of law, the court held that the state of disrepair of plaintiff’s apartment, which was known to the defendants, substantially reduced the value of the leasehold from the agreed rental value, thus constituting a breach of the implied warranty of habitability. The court based its award of damages on the breach of this warranty and on breach of an express contract. Defendant argues that the court misapplied the law of Vermont relating to habitability because the plaintiff never abandoned the demised premises and, therefore, it was error to award her the full amount of rent paid. Plaintiff counters that, while never expressly recognized by this Court, the trial court was correct in applying an implied warranty of habitability and that under this warranty, abandonment of the premises is not required. Plaintiff urges this Court to affirmatively adopt the implied warranty of habitability.

Historically, relations between landlords and tenants have been defined by the law of property. Under these traditional common law property concepts, a lease was viewed as a conveyance of real property. See Note, Judicial Expansion of Tenants’ Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases, 56 Cornell L.Q. 489, 489–90 (1971) (hereinafter cited as Expansion of Tenants’ Rights). The relationship between landlord and tenant was controlled by the doctrine of caveat lessee; that is, the tenant took possession of the demised premises irrespective of their state of disrepair. Love, Landlord’s Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?, 1975 Wis. L. Rev. 19, 27–28. The landlord’s only covenant was to deliver possession to the tenant. The tenant’s obligation to pay rent existed independently of the landlord’s duty to deliver possession, so that as long as possession remained in the tenant, the tenant remained liable for payment of rent. The landlord was under no duty to render the premises habitable unless there was an express covenant to repair in the written lease. Expansion of Tenants’ Rights, supra, at 490. The land, not the dwelling, was regarded as the essence of the conveyance.

An exception to the rule of caveat lessee was the doctrine of constructive eviction. Lemle v. Breeden, 462 P.2d 470, 473 (Haw. 1969). Here, if the landlord wrongfully interfered with the tenant’s enjoyment of the demised premises, or failed to render a
duty to the tenant as expressly required under the terms of the lease, the tenant could abandon the premises and cease paying rent. *Legier v. Deveneau*, 126 A. 392, 393 (Vt. 1924).

Beginning in the 1960’s, American courts began recognizing that this approach to landlord and tenant relations, which had originated during the Middle Ages, had become an anachronism in twentieth century, urban society. Today’s tenant enters into lease agreements, not to obtain arable land, but to obtain safe, sanitary and comfortable housing.

> [T]hey seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.


Not only has the subject matter of today’s lease changed, but the characteristics of today’s tenant have similarly evolved. The tenant of the Middle Ages was a farmer, capable of making whatever repairs were necessary to his primitive dwelling. *Green v. Superior Court*, 517 P.2d 1168, 1172 (Cal. 1974). Additionally, “the common law courts assumed that an equal bargaining position existed between landlord and tenant. . . .” Note, *The Implied Warranty of Habitability: A Dream Deferred*, 48 UMKC L.REV. 237, 238 (1980) (hereinafter cited as *A Dream Deferred*).

In sharp contrast, today’s residential tenant, most commonly a city dweller, is not experienced in performing maintenance work on urban, complex living units. *Green v. Superior Court*, supra, 517 P.2d at 1173. The landlord is more familiar with the dwelling unit and mechanical equipment attached to that unit, and is more financially able to “discover and cure” any faults and break-downs. *Id.* Confronted with a recognized shortage of safe, decent housing, see 24 V.S.A. § 4001(l), today’s tenant is in an inferior bargaining position compared to that of the landlord. *Park West Management Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979). Tenants vying for this limited housing are “virtually powerless to compel the performance of essential services.” *Id.*
In light of these changes in the relationship between tenants and landlords, it would be wrong for the law to continue to impose the doctrine of caveat lessee on residential leases.

The modern view favors a new approach which recognizes that a lease is essentially a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. These promises constitute interdependent and mutual considerations. Thus, the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition.


Recognition of residential leases as contracts embodying the mutual covenants of habitability and payment of rent does not represent an abrupt change in Vermont law. Our case law has previously recognized that contract remedies are available for breaches of lease agreements. *Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, 381 A.2d 1063, 1065 (Vt. 1977). . . . More significantly, our legislature, in establishing local housing authorities, 24 V.S.A. § 4003, has officially recognized the need for assuring the existence of adequate housing.

> [S]ubstandard and decadent areas exist in certain portions of the state of Vermont and . . . there is not . . . an adequate supply of decent, safe and sanitary housing for persons of low income and/or elderly persons of low income, available for rents which such persons can afford to pay . . . this situation tends to cause an increase and spread of communicable and chronic disease . . . [and] constitutes a menace to the health, safety, welfare and comfort of the inhabitants of the state and is detrimental to property values in the localities in which it exists . . . .

24 V.S.A. § 4001(4). In addition, this Court has assumed the existence of an implied warranty of habitability in residential leases. *Birkenhead v. Coombs*, 465 A.2d 244, 246 (Vt. 1983).
Therefore, we now hold expressly that in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation. This warranty of habitability is implied in tenancies for a specific period or at will. *Boston Housing Authority v. Hemingway*, *supra*, 293 N.E.2d at 843. Additionally, the implied warranty of habitability covers all latent and patent defects in the essential facilities of the residential unit. *Id*. Essential facilities are “facilities vital to the use of the premises for residential purposes. . . .” *Kline v. Burns*, 276 A.2d 248, 252 (N.H. 1971). This means that a tenant who enters into a lease agreement with knowledge of any defect in the essential facilities cannot be said to have assumed the risk, thereby losing the protection of the warranty. Nor can this implied warranty of habitability be waived by any written provision in the lease or by oral agreement.

In determining whether there has been a breach of the implied warranty of habitability, the courts may first look to any relevant local or municipal housing code; they may also make reference to the minimum housing code standards enunciated in 24 V.S.A. § 5003(c)(1)–5003(c)(5). A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of the warranty of habitability. “[O]ne or two minor violations standing alone which do not affect” the health or safety of the tenant, shall be considered *de minimus* and not a breach of the warranty. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082 n. 63. . . . In addition, the landlord will not be liable for defects caused by the tenant. *Javins v. First National Realty Corp.*, *supra*, 428 F.2d at 1082 n. 62.

However, these codes and standards merely provide a starting point in determining whether there has been a breach. Not all towns and municipalities have housing codes; where there are codes, the particular problem complained of may not be addressed. *Park West Management Corp. v. Mitchell*, *supra*, 391 N.E.2d at 1294. In determining whether there has been a breach of the implied warranty of habitability, courts should inquire whether the claimed defect has an impact on the safety or health of the tenant. *Id*.

In order to bring a cause of action for breach of the implied warranty of habitability, the tenant must first show that he or she notified the landlord “of the deficiency or
defect not known to the landlord and [allowed] a reasonable time for its correction.”
*King v. Moorehead*, supra, 495 S.W.2d at 76.

Because we hold that the lease of a residential dwelling creates a contractual relationship between the landlord and tenant, the standard contract remedies of rescission, reformation and damages are available to the tenant when suing for breach of the implied warranty of habitability. *Lemle v. Breeden*, supra, 462 P.2d at 475. The measure of damages shall be the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition. *Birkenhead v. Coombs*, supra, 465 A.2d at 246. In determining the fair rental value of the dwelling as warranted, the court may look to the agreed upon rent as evidence on this issue. *Id.*

“[I]n residential lease disputes involving a breach of the implied warranty of habitability, public policy militates against requiring expert testimony” concerning the value of the defect. *Id.* at 247. The tenant will be liable only for “the reasonable rental value [if any] of the property in its imperfect condition during his period of occupancy.” *Berzito v. Gambino*, 308 A.2d 17, 22 (N.J. 1973).

We also find persuasive the reasoning of some commentators that damages should be allowed for a tenant’s discomfort and annoyance arising from the landlord’s breach of the implied warranty of habitability. See Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1470–73 (1974) (hereinafter cited as *A New Doctrine*); *A Dream Deferred*, supra, at 250–51. Damages for annoyance and discomfort are reasonable in light of the fact that:

the residential tenant who has suffered a breach of the warranty . . . cannot bathe as frequently as he would like or at all if there is inadequate hot water; he must worry about rodents harassing his children or spreading disease if the premises are infested; or he must avoid certain rooms or worry about catching a cold if there is inadequate weather protection or heat. Thus, discomfort and annoyance are the common injuries caused by each breach and hence the true nature of the general damages the tenant is claiming.

Moskovitz, *A New Doctrine*, supra, at 1470–71. Damages for discomfort and annoyance may be difficult to compute; however, “[t]he trier [of fact] is not to be deterred from this duty by the fact that the damages are not susceptible of reduction to an exact money standard.” *Vermont Electric Supply Co. v. Andrus*, 315 A.2d 456, 459 (Vt. 1974).
Another remedy available to the tenant when there has been a breach of the implied warranty of habitability is to withhold the payment of future rent. *King v. Moorehead, supra*, 495 S.W.2d at 77. The burden and expense of bringing suit will then be on the landlord who can better afford to bring the action. In an action for ejectment for nonpayment of rent, 12 V.S.A. § 4773, “[t]he trier of fact, upon evaluating the seriousness of the breach and the ramifications of the defect upon the health and safety of the tenant, will abate the rent at the landlord’s expense in accordance with its findings.” *A Dream Deferred, supra*, at 248. The tenant must show that: (1) the landlord had notice of the previously unknown defect and failed, within a reasonable time, to repair it; and (2) the defect, affecting habitability, existed during the time for which rent was withheld. See *A Dream Deferred, supra*, at 248–50. Whether a portion, all or none of the rent will be awarded to the landlord will depend on the findings relative to the extent and duration of the breach. *Javins v. First National Realty Corp., supra*, 428 F.2d at 1082–83. Of course, once the landlord corrects the defect, the tenant’s obligation to pay rent becomes due again. *Id.* at 1083 n. 64.

Additionally, we hold that when the landlord is notified of the defect but fails to repair it within a reasonable amount of time, and the tenant subsequently repairs the defect, the tenant may deduct the expense of the repair from future rent. 11 Williston on Contracts § 1404 (3d ed. W. Jaeger 1968); *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970).

In addition to general damages, we hold that punitive damages may be available to a tenant in the appropriate case. Although punitive damages are generally not recoverable in actions for breach of contract, there are cases in which the breach is of such a willful and wanton or fraudulent nature as to make appropriate the award of exemplary damages. *Clarendon Mobile Home Sales, Inc. v. Fitzgerald, supra*, 381 A.2d at 1065. A willful and wanton or fraudulent breach may be shown “by conduct manifesting personal ill will, or carried out under circumstances of insult or oppression, or even by conduct manifesting . . . a reckless or wanton disregard of [one’s] rights . . . .” *Sparrow v. Vermont Savings Bank*, 112 A. 205, 207 (Vt. 1921). When a landlord, after receiving notice of a defect, fails to repair the facility that is essential to the health and safety of his or her tenant, an award of punitive damages is proper. *111 East 88th Partners v. Simon*, 434 N.Y.S.2d 886, 889 (N.Y. Civ. Ct. 1980).
The purpose of punitive damages . . . is to punish conduct which is morally culpable. . . . Such an award serves to deter a wrongdoer . . . from repetitions of the same or similar actions. And it tends to encourage prosecution of a claim by a victim who might not otherwise incur the expense or inconvenience of private action. . . . The public benefit and a display of ethical indignation are among the ends of the policy to grant punitive damages.


In the instant case, the trial court’s award of damages, based in part on a breach of the implied warranty of habitability, was not a misapplication of the law relative to habitability. Because of our holding in this case, the doctrine of constructive eviction, wherein the tenant must abandon in order to escape liability for rent, is no longer viable. When, as in the instant case, the tenant seeks, not to escape rent liability, but to receive compensatory damages in the amount of rent already paid, abandonment is similarly unnecessary. *Northern Terminals, Inc. v. Smith Grocery & Variety, Inc.*, supra, 418 A.2d at 26–27. Under our holding, when a landlord breaches the implied warranty of habitability, the tenant may withhold future rent, and may also seek damages in the amount of rent previously paid.

In its conclusions of law the trial court stated that the defendants’ failure to make repairs was compensable by damages to the extent of reimbursement of all rent paid and additional compensatory damages. The court awarded plaintiff a total of $4,945.00; $3,445.00 represents the entire amount of rent plaintiff paid, plus the $50.00 deposit . . .

Additionally, the court denied an award to plaintiff of punitive damages on the ground that the evidence failed to support a finding of willful and wanton or fraudulent conduct. *See Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, supra, 381 A.2d at 1065. The facts in this case, which defendants do not contest, evince a pattern of intentional conduct on the part of defendants for which the term “slumlord” surely was coined. Defendants’ conduct was culpable and demeaning to plaintiff and clearly expressive of a wanton disregard of plaintiff’s rights. The trial court found that defendants were aware of defects in the essential facilities of plaintiff’s apartment, promised plaintiff that repairs would be made, but never fulfilled those promises. The court also found that plaintiff continued, throughout her tenancy, to pay her rent, often in the face of verbal threats made by defendant Stuart St. Peter. These findings point to the “bad
spirit and wrong intention” of the defendants, *Glidden v. Skinner*, 458 A.2d 1142, 1144 (Vt. 1983), and would support a finding of willful and wanton or fraudulent conduct, contrary to the conclusions of law and judgment of the trial judge. However, the plaintiff did not appeal the court’s denial of punitive damages, and issues not appealed and briefed are waived. *R. Brown & Sons, Inc. v. International Harvester Corp.*, 453 A.2d 83, 84 (Vt. 1982).

Notes and Questions

1. **Residential v. commercial.** Unlike the covenant of quiet enjoyment, the implied warranty of habitability only applies to residential leases. Commercial tenants still largely operate under common-law legal rules. Commonly, commercial landlords and tenants do not rely on the default rules, but rather assign the duty of upkeep and repair with an express provision in the lease.

2. **What is habitability?** Do all defects in an apartment amount to violations? What is the standard of habitability as laid out in *Hilder*?

3. **Paternalism?** Is the implied warranty of habitability too paternalistic? Some economists argue that the poorest Americans should have more freedom over how they spend their limited dollars. Isn’t it possible that some individuals might want to occupy a really cheap (if slightly dangerous) dwelling so that they have more money to spend on healthy foods, transportation, and clothes? Would it matter if the evidence showed that such apartments were in fact cheaper than “habitable” apartments?

4. **Necessary?** Do you agree with the arguments made by the court in *Hilder* about the necessity of the implied warranty of habitability? Don’t landlords already have excellent incentives to maintain their buildings?

5. **Arkansas and beyond.** As mentioned above, Arkansas is the one state that has not adopted the implied warranty of habitability—either by statute or judicial fiat. Is Arkansas a Mad Max-style hellscape for renters? Are tenants there worse (or worse off) than the tenants in other states? Some people think so. *Vice* magazine recently dubbed Arkansas, “The Worst Place to Rent in America.” You can see the report on renting in Arkansas at:
https://www.youtube.com/watch?v=9G2Pk2jZP-E. But does the implied warranty of habitability provide much practical protection? Do poor tenants know about it? Do they have the resources to push back against aggressive landlords who threaten lawsuits and other forms of retaliation? Professor David Super has suggested that the decision of tenants’ rights movement to focus on habitability over affordability and overcrowding was a strategic mistake. See David A. Super, The Rise and Fall of the Implied Warranty of Habitability, 99 CAL. L. REV. 389-463 (2011). Is there a nirvana for renters anywhere?

6. **Procedure & remedies.** If a tenant believes his apartment does not meet the standard of habitability, he must first must notify the landlord of the defects and give the landlord a reasonable amount of time to cure the problems. If the landlord either cannot or will not make repairs, the implied warranty of habitability offers the renter a menu of options. Each option presents a different combination of costs and risks to the tenant. If the landlord breaches, the tenant may:

   a. *Leave, terminate contract.* The tenant may consider the lease terminated and move out.

   b. *Stay and sue for damages.* As with the covenant of quiet enjoyment, a tenant may stay in the unit and pay rent, while suing the landlord for damages. There is significant disagreement among jurisdictions about how to calculate damages. In *Hilder*, the court uses the difference between the rental price of the dwelling if it met the standard of habitability and the value of the dwelling as it exists; the rent charged is not evidence of actual value, but rather evidence of the appropriate price if it met the standard of habitability. [Note that given the court’s calculation, the value was apparently zero?] Other courts look at the difference between the amount of rent stated in the lease and the fair market value of the premises. What is the better approach? Should the rent charged be considered evidence of fair market value? If not, why not?

   c. *Stay and charge the cost of repair.* A tenant has the option to fix the defect and then deduct the cost of repair from the rent.
d. *Stay and withhold rent.* In most jurisdictions, a tenant can withhold the entire rent for violations of the implied warranty of habitability (although, a cautious tenant should pay the rent into an escrow account). This is a very powerful remedy. First, it gives the landlord strong incentive to respond to valid complaints from tenants. Second, it puts the burden on the landlord (rather than the tenant) to initiate a lawsuit when contested issues arise. Finally, if the landlord does move to evict the tenant for non-payment, violations of the implied warranty of habitability can serve as a defense.

e. *Extreme violations.* Tenants have won punitive damages in cases where the landlord committed repeated or gruesome violations of the implied warranty.

**Problem**

1. The Mad Hatter and the Alice each decide to rent an apartment in Wonderland. The Mad Hatter walks into a large apartment and sees a hole in the roof, but he decides to rent the unit anyway. The apartment that Alice decides to lease has no obvious problems. The next day, however, some mold spots appear by one of the vents. The mold grows rapidly and Alice starts to have regular headaches and some trouble breathing. Additionally, an unknown troublemaker smashed Alice’s air conditioning unit and it no longer works. Can either the Mad Hatter or Alice win a lawsuit against their landlord if their problems aren’t fixed?

2. **Retaliatory Eviction**

   **Imperial Colliery Co. v. Fout**
   
   373 S.E.2d 489 (W. Va. 1988)

Danny H. Fout, the defendant below, appeals a summary judgment dismissing his claim of retaliatory eviction based on the provisions of W.Va.Code, 55–3A–3(g), which is our summary eviction statute. Imperial Colliery had instituted an eviction proceeding and Fout sought to defend against it, claiming that his eviction was in retaliation for his participation in a labor strike.
This case presents two issues: (1) whether a residential tenant who is sued for possession of rental property under W.Va.Code, 55–3A–1, et seq., may assert retaliation by the landlord as a defense, and (2) whether the retaliation motive must relate to the tenant’s exercise of a right incidental to the tenancy.

Fout is presently employed by Milburn Colliery Company as a coal miner. For six years, he has leased a small house trailer lot in Burnwell, West Virginia, from Imperial Colliery Company. It is alleged that Milburn and Imperial are interrelated companies. A written lease was signed by Fout and an agent of Imperial in June, 1983. This lease was for a primary period of one month, and was terminable by either party upon one month’s notice. An annual rental of $1.00 was payable in advance on January 1 of each year. No subsequent written leases were signed by the parties.

On February 14, 1986, Imperial advised Fout by certified letter that his lease would be terminated as of March 31, 1986. Fout’s attorney corresponded with Imperial before the scheduled termination date. He advised that due to various family and monetary problems, Fout would be unable to timely vacate the property. Imperial voluntarily agreed to a two-month extension of the lease. A second letter from Fout’s attorney, dated May 27, 1986, recited Fout’s personal problems and requested that Imperial’s attempts to oust Fout be held “in abeyance” until they were resolved. A check for $1.00 was enclosed to cover the proposed extension. Imperial did not reply.

On June 11, 1986, Imperial sued for possession of the property, pursuant to W.Va.Code, 55–3A–1, et seq., in the Magistrate Court of Kanawha County. Fout answered and removed the suit to the circuit court on June 23, 1986. He asserted as a defense that Imperial’s suit was brought in retaliation for his involvement in the United Mine Workers of America and, more particularly, in a selective strike against Milburn. Imperial’s retaliatory motive was alleged to be in violation of the First Amendment rights of speech and assembly, and of the National Labor Relations Act, 29 U.S.C. § 151, et seq. Fout also counter-claimed, seeking an injunction against Imperial and damages for annoyance and inconvenience.

respect be related to, exercise by the tenant of rights incident to his capacity as a ‘tenant’.” Since Fout’s participation in the labor strike was admitted unrelated to his tenancy, the defense was dismissed and possession of the property was awarded to Imperial. It is from this order that Fout appeals.

Our initial inquiry is whether retaliation by the landlord may be asserted by the tenant as a defense in a suit under W.Va.Code, 55–3A–3(g). We addressed this issue in Criss v. Salvation Army Residences, supra, and stated without any extended discussion that this section “specifically provides for the defense of retaliation.” 173 W.Va. at 640, 319 S.E.2d at 409. We did not have occasion in Criss to trace the development of the retaliatory eviction defense.

It appears that the first case that recognized retaliatory eviction as a defense to a landlord’s eviction proceeding was Edwards v. Habib, 397 F.2d 687 (D.C.Cir.1968), cert. denied, 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560 (1969). There, a month-to-month tenant who resided in a District of Columbia apartment complex reported to a local health agency a number of sanitary code violations existing in her apartment. The agency investigated and ordered that remedial steps be taken by the landlord, who then advised Edwards that her lease was terminated. When the landlord sued for possession of the premises, Edwards alleged the suit was brought in retaliation for her reporting of the violations. A verdict was directed for the landlord and Edwards appealed.

On appeal, the court reviewed at length the goals sought to be advanced by local sanitary and safety codes. It concluded that to allow retaliatory evictions by landlords would seriously jeopardize the efficacy of the codes. A prohibition against such retaliatory conduct was therefore to be implied, even though the regulations were silent on the matter.

Many states have protected tenant rights either on the Edwards theory or have implied such rights from the tenant’s right of habitability. Others have utilized statutes analogous to section 5.101 of the Uniform Residential Landlord and Tenant Act, 7B U.L.A. 503 (1985), which is now adopted in fifteen jurisdictions. Similar landlord and tenant reform statutes in seventeen other states also provide protection for tenancy-related activities.
Under W.Va.Code, 37–6–30, a tenant is, with respect to residential property, entitled to certain rights to a fit and habitable dwelling. In *Teller v. McCoy*, 162 W.Va. 367, 253 S.E.2d 114 (1978), we spoke at some length of the common law right of habitability which a number of courts had developed to afford protection to the residential tenant. We concluded that these rights paralleled and were spelled out in more detail in W.Va.Code, 37–6–30. In Teller, we also fashioned remedies for the tenant where there had been a breach of the warranty of habitability. However, we had no occasion to discuss the retaliatory eviction issue in *Teller*.

The central theme underlying the retaliatory eviction defense is that a tenant should not be punished for claiming the benefits afforded by health and safety statutes passed for his protection. These statutory benefits become a part of his right of habitability. If the right to habitability is to have any meaning, it must enable the tenant to exercise that right by complaining about unfit conditions without fear of reprisal by his landlord. *See* Annot., 40 A.L.R.3d 753 (1971).

After the seminal decision in *Edwards*, other categories of tenant activity were deemed to be protected. Such activity was protected against retaliation where it bore a relationship to some legitimate aspect of the tenancy. For example, some cases provided protection for attempts by tenants to organize to protect their rights as tenants. Others recognized the right to press complaints directly against the landlord via oral communications, petitions, and “repair and deduct” remedies. . . .

A few courts recognize that even where a tenant’s activity is only indirectly related to the tenancy relationship, it may be protected against retaliatory conduct if such conduct would undermine the tenancy relationship. Typical of these cases is *Winward Partners v. Delos Santos*, 59 Haw. 104, 577 P.2d 326 (1978). There a group of month-to-month tenants gave testimony before a state land use commission in opposition to a proposal to redesignate their farm property from “agricultural” to “urban” uses. The proposal was sponsored by the landlord, a land developer. As a result of coordinated activity by the tenants, the proposal was defeated. Within six months, the landlord ordered the tenants to vacate the property and brought suit for possession.

The Hawaii Supreme Court noted that statutory law provided for public hearings on proposals to redesignate property, and specifically invited the views of the affected tenants. The court determined that the legislative policy encouraging such input would
be jeopardized “if ... [landlords] were permitted to retaliate against ... tenants for opposing land use changes in a public forum.” 59 Haw. at 116, 577 P.2d at 333. It relied on Pohlman v. Metropolitan Trailer Park, Inc., 126 N.J.Super. 114, 312 A.2d 888 (Ch.Div.1973), which involved a similar fact pattern where tenants’ intervention in zoning matters to protect their tenancy was sufficiently germane to the landlord-tenant relationship to support the defense of retaliatory eviction. See also S.P. Growers Ass’n v. Rodriguez, 17 Cal.3d 719, 552 P.2d 721, 131 Cal.Rptr. 761 (1976) (retaliation for suit by tenant charging violation of Farm Labor Contractor Registration Act, 7 U.S.C. § 2041, et seq.).

The Legislature, in giving approval to the retaliation defense, must have intended to bring our State into line with the clear weight of case law and statutory authority outlined above. We accordingly hold that retaliation may be asserted as a defense to a summary eviction proceeding under W.Va.Code, 55–3A–1, et seq., if the landlord’s conduct is in retaliation for the tenant’s exercise of a right incidental to the tenancy.

Fout seeks to bring this case within the Windward line of authority. He argues principally that Imperial’s conduct violated a public policy which promotes the rights of association and free speech by tenants. We do not agree, simply because the activity that Fout points to as triggering his eviction was unrelated to the habitability of his premises.

From the foregoing survey of law, we are led to the conclusion that the retaliatory eviction defense must relate to activities of the tenant incidental to the tenancy. First Amendment rights of speech and association unrelated to the tenant’s property interest are not protected under a retaliatory eviction defense in that they do not arise from the tenancy relationship. Such rights may, of course, be vindicated on other independent grounds.

For the reasons discussed above, the judgment of the Circuit Court of Kanawha County is affirmed.

Notes and Questions

1. The basic law. In states that recognize retaliatory eviction, a landlord may not punish tenants when they exercise legal rights incidental to their tenancy. Generally, this means that a landlord cannot raise the rent, reduce services, refuse to renew a lease, or bring an eviction action for the purpose of retaliating
against a tenant who has complained about the condition of the unit, filed a lawsuit concerning the fitness of the unit, contacted a local agency, or exercised rights under the implied warranty of habitability.

2. **Legal change.** Under the traditional English common law, a landlord could raise the rent or refuse to renew a tenant’s lease for any reason. How does the court in *Imperial Colliery* justify changing a long-settled rule?

3. **Rise of the doctrine.** The doctrine of retaliatory eviction came to prominence around the same time as the implied warranty of habitability. What’s the link between these two rules?

4. **Retaliate for what?** West Virginia, like most states, protects tenants from retaliatory eviction. In the case above, Fout presented evidence that he lost his tenancy as a result of retaliation by his landlord. Why then did Fout lose? Do you agree with the limitations that West Virginia has put on the doctrine of retaliatory eviction? Why should tenants fear losing their homes if they exercise their First Amendment rights?

5. **Property serves human values?** Recall the *Marsh* case (company owned town cannot prevent distribution of pamphlets on sidewalk) and the *Shack* case (property owners cannot bar social service workers from meeting with migrant laborers) from earlier in the semester. In those opinions we saw that property rights are occasionally trumped other values. Why don’t Fout’s rights under the First Amendment and the National Labor Relations Act outweigh his landlord’s desire to kick him out? Can you distinguish *Imperial Colliery* from *Marsh* and *Shack*?

6. **Is housing special?** Is housing a good like any other, or is it somehow different from most things we buy and sell on the market? In continental European countries there’s a tentative national consensus that all housing—even privately owned apartments—has a uniquely public or social dimension. As a result, many European nations grant citizens strong protections against forced relocations. For example, “good faith” eviction schemes are pervasive. In a “good faith” jurisdiction, a landlord can only refuse to renew a tenancy for a
good reason—generally some faulty behavior on the part of the tenant (damaging the premise, creating a nuisance, breaching a material term in the lease) or the landlord’s desire to remodel the unit. Should U.S. states adopt such a rule?

7. **Remedies.** What’s the appropriate remedy for a tenant who wins a retaliatory eviction case?

8. **Establishing motive.** Peter Pan calls his local Board of Health to complain about the conditions in The Neverland Apartments, where he rents a two-bedroom unit. The landlord, Hook, is furious at Pan. They get into a heated screaming match in front of the building. If Hook waits a year and then dramatically raises Pan’s rent, will Pan be able to win a retaliatory eviction case? What if Hook waits six months? Three months? Some states require the tenant to show that the landlord would not have taken action “but for” the tenant exercising a right. Because of the difficulties in establishing motive, other states employ a burden-shifting model in retaliatory eviction cases. In these jurisdictions, the law presumes that the landlord has acted with a retaliatory motive if the landlord raises the rent (or takes another retaliatory action) within a certain amount of time after the tenant has availed himself of a legal entitlement. The window of time varies from three months to a year, but many states use a six-month period. Importantly, the presumption against the landlord is rebuttable.

9. **How common is retaliation?** In his book, *Evicted: Poverty and Profit in the American City*, Matthew Desmond recounts an anecdote about a landlord who would immediately begin preparing eviction papers as soon as his tenants complained about their living conditions.

4. **Landlord’s Tort Liability**

A landlord’s responsibility for injuries sustained on the leased premise has dramatically expanded in the last 50 years. As discussed in the previous subsection, under the traditional common law rule, the tenant had the duty to undertake all repairs and
maintenance on the rented property. As a result, the law absolved landlords from liability for injuries sustained because of dangerous conditions in the unit. The costs of damage (to both property and persons) sustained from rotted decks, falling plaster, and collapsing walls all fell squarely on tenants.

Almost every jurisdiction now imposes greater duties on landlords. At the very least, landlords must exercise reasonable care in keeping common areas safe, use reasonable care when making repairs, and warn tenants about latent defects—unsafe conditions that would not be obvious upon an inspection. Other jurisdictions, following the logic of the implied warranty of habitability, have gone farther. They reason that since the landlord now has a duty to provide tenants (and their guests) with safe and clean premises, a failure to comply with this obligation may amount to negligence. The basic rule in these states is that a landlord must take reasonable steps to repair defects of which the landlord becomes aware. Failure to comply exposes landlords to liability for injuries that result from the defective conditions.

Landlords sometimes attempt to avoid the obligation to repair by inserting into the lease a clause stating that the lessor is not responsible for personal injury or property damage that occurs on the premise. While such exculpatory clauses are typically upheld in commercial settings, courts increasingly strike them from residential leases as violations of public policy.
5. **Gentrification & Rent Control**

Defined broadly, gentrification is the movement of wealthier people into a poor neighborhood, which results in a subsequent increase in rents and the ultimate displacement of longtime residents. The stereotypic progression starts when artists and gay couples move into a run-down but centrally located neighborhood in the urban core. They fix up houses, open trendy cafes, and start galleries. The newcomers also demand better public services and police protection from the local government. As the number of amenities grows, home prices and rents begin to rise. Married couples without children start to flow into the area, followed quickly by bankers, lawyers, and families attracted the neighborhood’s beautiful older homes and terrific location. As rents continue to rise, many of the original residents—who are often poor and black—can no longer afford the neighborhood. They are forced to either move or pay an enormous percentage of their income toward rent.

One resident of a gentrifying neighborhood in Portland gives a personal account of the basic problem:

Last week I heard a shuffle at my front door and saw that my building manager was slipping a notice under my door. I opened it only to read that my rent was being raised by 10% . . . [In the last year], my rent has gone up a total of 14%. If it continues at this pace, I’ll have to find another place to live because I’ll be priced out of my very walkable, very centrally-located neighborhood.

[Gentrification is] an emotional tinderbox. People who are just going about their lives are having to face eviction, displacement, or just have to spend a lot more on housing if they want to stay where they are because of forces completely out of their control. In other words, you could be doing everything “right” in your life – being a responsible citizen, earning a viable income and doing your best –
but it still isn’t good enough. Not unlike the tragedy of having your house destroyed by a natural phenomenon like a hurricane or a flood, you could become a victim of the “greed phenomenon” where developers look with dollar signs in their eyes at the house you live in with the intention of razing it and building a hugely profitable and expensive condo building there instead.

For low-income individuals pushed out of their neighborhoods, the process of gentrification often produces traumatic effects. In addition to the financial costs of an unwanted move, gentrification often shatters valuable personal networks. People who have lived their entire lives within a small geographic area may suddenly find themselves separated from the friends and family who provide emotional support and economic resources that serve as a vital buffer against the ills of poverty.

Many activists have suggested that rent control laws are the best solution to problems spawned by gentrification. Rent control legislation comes in a variety of forms but most often puts caps on the amount of rent that a landlord can charge (first-generation controls) and/or requires that prices for rented properties do not increase by more than a certain percent each year (second-generation controls). Rent controls, activists argue, allow existing tenants to stay in their homes while continuing to devote the same percentage of their incomes to rent has they have in the past.

Economists have a very different perspective on fighting gentrification with rent control mechanisms. American legal economists are typically opposed to rent controls. Often heatedly so. To understand why, put yourself in the shoes of a landlord in a city that holds the price of rent below what the market will bear. How would you respond if you were forced to provide a service for less than the market price? First and foremost, you probably wouldn’t build any new rental housing units. Why? Because you’d almost certainly make more money if you used your capital to build something that’s not regulated by the government. Ultimately, the lack of proper incentive to build apartments lowers the supply of rental housing and thereby increases the price (for anyone who doesn’t qualify for rent controls). Second, you might decide to skimp on the maintenance of your rent-controlled unit in order to recoup some of the lost profits. After all, will a tenant in a rent-controlled apartment really give up their unit if you don’t respond to their request to fix the sink?
So goes the theory, at any rate—and it is a theory that has found expression in judicial opinions, particularly among those judges of the U.S. Court of Appeals for the Seventh Circuit who moonlight as academic legal economists of the so-called “Chicago School.” See Chicago Board of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 741-42 (7th Cir. 1987) (Opinion of Posner, J.). In apparent agreement with these theoretical arguments, very few American jurisdictions today maintain rent control policies—only New York, Los Angeles, and a few places in the Bay Area have significant rent control laws. State and local governments are much more likely to attack problems of affordable housing by either giving rent vouchers to the poor or building government-owned housing projects (are these better options?).

But perhaps the legal economists of a generation ago were mistaken—or at least insufficiently sensitive to the potential variety of rent control measures and the diversity of urban environments in which they can be deployed. While first-generation rent control measures have few academic defenders in the United States, there is some suggestion that the actual empirics of second-generation rent controls and other tenant protections may diverge from the dire theoretical predictions of the Chicago School. In particular, the effects of rent control on the supply, quality, and distribution of rental housing may depend significantly on the nature of the protective regulation imposed, the density of existing housing stock, availability of vacant land, the mix of other regulatory constraints on land use in general and housing in particular, and idiosyncrasies of the local economy—particularly the degree of competition among landlords. See generally Richard Arnott, Time for Revisionism on Rent Control?, 9 J. ECON. PERSPECT. 99 (1995); Bengt Turner & Stephen Malpezzi, A review of empirical evidence on the costs and benefits of rent control, 10 SWED. ECON. POLICY REV. 11 (2003). Outside of the United States, moreover, economists and politicians are less antagonistic toward rent control. Paris, for example, recently passed a law capping many rents. Germany, the Netherlands, and Sweden also have widespread limitations on how much rent landlords can charge.

Notes and Questions

1. Europe v. America. What do you think accounts for the different views on rent control between European policy makers and their American counterparts?
2. **Getting to Affordability.** If rent control isn’t the answer, what steps should government take to ensure access to affordable housing? Should the government have any role at all in the housing market? Before the Great Depression the federal government played almost no part housing policy. How should government housing policy regarding affordable housing fit into the mix of economic regulations addressing problems of poverty and equity?

**E. Wrapping Up**

The following rental agreement is modeled on an actual lease that a friend of the casebook authors was asked to sign. Do you see any potential problems for a tenant? Would you sign this lease?

**Residential Rental Agreement and Contract**

THIS AGREEMENT (hereinafter known as the “Lease” or the “Agreement”) is made and entered into this 1st day of September 2015, between Peter Rabbit (hereinafter referred to as the “Tenant”) and Mr. McGregor (hereinafter referred to as the “Landlord”). In exchange for valuable consideration, the landlord and tenant agree to the following:

1. **Property.** The landlord owns certain real property and improvements at 123 Vegetable Garden Way, Potterville, Beatrixia (hereinafter referred to as the “Property” or the “Premise”). The Landlord wishes to lease the Premise to the Tenant upon the terms and conditions stated in this Lease. The Tenant wishes to lease the Premise from the Landlord upon the terms and conditions stated in this Lease.

2. **Term.** This agreement shall commence on September 1, 2015 and shall commence on August 31, 2018 at 11:59 PM. Upon any termination of the Agreement, the Tenant will pay off all outstanding bills, remove all personal property from the Premise, bring the leased premise back to the condition it was in upon move-in (excepting normal wear and tear), peacefully vacate the premise, return all keys to the Landlord, and give the Landlord a forwarding address.
3. Holdovers. If the Tenant holds over after the termination of the lease, a new tenancy from month-to-month shall be created. Under the new month-to-month lease the Tenant shall be responsible for double the agreed upon rent.

4. Rent. The Tenant shall pay the landlord $1000 per month as rent for the entire term of the agreement. The rent shall be due on the 1st day of each calendar month. Weekends, holidays, and religious observances do not excuse the Tenant’s obligation to make timely payments.

5. Delivery of Possession. The Landlord shall not be held liable for any failure to deliver possession of the Premise by the starting date of the agreed upon term.

6. Late Fees. A late fee of 5% shall be due if the rent is received after the 5th day of the month. A late of 10% shall be due if the rent is received after the 10th day of the month. Acceptance of a late fee does not affect or waive any other right or remedy the Landlord may exercise for Tenant’s failure to timely pay rent.

7. Returned Checks. In the event that any payment by the Tenant is returned for insufficient funds or if the Tenant stops payment, the Tenant will pay $100 to the Landlord for each such event, in addition to the Late Fees described above.

8. Security Deposit. The Tenant shall deposit with the Landlord $1500 as a security deposit for this Agreement. All interest that accrues on such a security deposit shall belong to the Landlord alone. The Landlord may use the deposit money for any and all purposes allowed by law.

9. Utilities. It is the responsibility of the Tenant to obtain all utilities for the leased Property. Tenant’s failure to make any payment for the utilities shall constitute a material breach of the agreement. The Landlord shall not be held liable for any failure to deliver any utility service or for any damage caused by a problem with any utility service, whatever the cause of such problem. The Tenants do hereby waive any claim for damages that result from any problem with utility service.

10. Keys. The Tenant shall not install any new locks anywhere on the property or make any copies of the keys. The Tenant also shall refrain from providing any keys to
any person not listed on this Agreement. When the lease terminates, the Tenant shall return all keys to the Landlord.

11. Pets. No pets of any kind, type, or breed shall be allowed on the property without the Landlord’s express written consent. This consent, if given, will require an additional pet deposit.

12. Use of the Premise. The premise shall be used and occupied solely by the Tenant. Tenant shall not allow any other person to use or occupy the premise without first obtaining Landlord’s written consent. No part of the Premise shall be used at any time during the term for any business, trade, or other commercial purpose. Additionally, the tenant agrees to comply with all local, state, and federal laws, regulations, and ordinances. No part of the property may be used in any way that aids or advances a criminal enterprise.

13. Assignments and Subletting. The Tenant shall not license, assign, or sublet the Property and/or this agreement without the written consent of the Landlord. An assignment, subletting or license without the Landlord’s written consent shall be considered absolutely null and void and, at the Landlord’s option, terminate this Agreement.

14. Alterations. The Tenant shall make no alterations to the Premise without written consent of the Landlord. If the Tenant makes any unauthorized improvement, modification, or change to the Property, the landlord has the option to charge the Tenant the cost of restoring the Premise to its original condition. In the event that the Landlord approves an alteration made by the Tenant, such alternations shall become the property of the Landlord and remain on the Property.

15. Maintenance & Repair. Except for normal wear and tear, the Tenant shall maintain the Premise in the condition it was upon the starting date of the Agreement. Should any damages, malfunctions, breakages, or other problems occur during the course of the Lease, the Landlord shall have a reasonable amount of time to complete such repairs. During that time, the Tenant’s rent shall remain due in full and on time despite any hardships such repairs or delays may cause. Tenant also has a contractual duty to (1) notify Landlord of any problems with the leased premise, (2) Deposit all trash,
rubbish, refuse, and garbage in the trash cans provided by the city, (3) keep all windows, doors, and locks in good order, (4) inspect the fire alarms each and every month.

16. Noise. The Tenant and the Tenant’s guests shall at all times keep the level of sound down to a level that does not annoy or interfere with other residents or neighbors.

17. Sale of the Property. The Landlord shall have the right to sell or transfer his ownership of the Property and this Agreement at any time and without restriction. Upon sale or transfer of the Landlord’s interest, this agreement may be terminated by either the Landlord or the party who purchases the Landlord’s interest. The Tenant agrees to release, waive, and hold harmless the Landlord and the Landlord’s successor from all liability if such a transfer occurs.

18. Access. The Landlord and his agents shall have the right to enter the Property without notice to inspect the property, make repairs, or show the property to prospective tenants or purchasers.

19. Condition of the Premise. The Landlord makes no guarantees or warranties about the condition of the leased premise. The Tenant assumes all risk of injury or harm stemming from any accidents or criminal acts occurring on or around the Premise. The Tenant agrees to hold the Landlord harmless for all liability stemming any injury or harm to the Tenant, Tenant’s property, or Tenant’s guests. The Tenant further agrees to indemnify, defend, and hold harmless the Landlord from any and all claims over the condition of the premise. Should the Tenant damage the Premise, he shall indemnify the Landlord for all costs of repair or replacement within 30 days.

20. Natural Disaster. In the event of a natural disaster, fire, or other catastrophic event, the Landlord may choose not to repair the Premise, in which case the Lease shall terminate. The Landlord may also elect to fix the Premise, in which case the Tenant must continue to pay the full monthly rent so long as the repairs are completed within a reasonable time. In either case, any and all damages and injuries connected to acts of the Tenant, his guests, or property shall be the sole financial responsibility of the Tenant.
21. Eminent Domain. If a government or private entity takes the Premise or any part of the Premise by eminent domain, this Lease shall terminate. The new termination shall be the date of the final taking order. Any award or court judgment in favor of the Landlord in an eminent domain case or any settlement award stemming from an eminent domain proceeding shall belong to the Landlord in full. The Tenant shall have no claim over such awards.

22. Attorney’s Fees. Tenant agrees to pay all reasonable attorney’s fees, court costs, and other expenses if it becomes necessary for the Landlord to enforce any of the conditions of covenants of this Lease, including but not limited to eviction proceedings, collection of rents, and damage to the Premise caused by the Tenant. The Tenant also agrees to indemnify the Landlord for all attorney’s fees, court costs, and other expenses that the Landlord may incur while successfully defending a lawsuit brought by the Tenant.

22. Abandonment. If at any time during the term of this Lease the Tenant abandons the Premise, the Landlord may obtain possession of the Premise in any manner provided for by law. Any personal property left behind shall be considered abandoned. The Landlord may dispose of such personal property in any manner he deems fit and is released of all liability for doing so.

23. Severability. If any portion of this Lease shall be found unenforceable, invalid, or void under any law or public policy, that portion of the Lease shall be severed from the remainder of the Agreement. All remaining portions of the Agreement will remain in effect and enforceable.

24. Governing Law. This lease shall be governed and interpreted under the laws of the Commonwealth of Beatrixia.

25. Non-Waiver. No delay or non-enforcement of any term of this Agreement by the Landlord shall not be deemed a waiver. All terms and conditions of this Agreement shall remain fully enforceable should the Landlord seek to enforce any condition or covenant at a later date, even if the Landlord has intentionally or unintentionally neglected to do so in a previous instance.
26. Notices. Any notice required or permitted under this Agreement must be written on 8½ x 11 paper and sent by United Parcel Service (UPS). Notice shall be sent to the address of the Property for the Tenant or to 345 Bunny Pie Lane, Potterville, Beatrixia for the Landlord.

27. Spelling and Grammar. Any mistakes in spelling, grammar, punctuation, or gender usage shall not be fatal to the Agreement. Rather, they shall be interpreted to carry out the intent of the parties.

28. Default. Tenant shall be in default of this Agreement if he fails to comply with any covenant, condition or term and/or fails to pay rent when due and/or causes damage to the Premise during the term which cumulatively equals or exceeds $100. Should the Tenant ever default, the Landlord may with or without notice either (1) terminate the Lease or (2) terminate the Tenant’s right to possession of the Premise while leaving this Agreement operative. If the Landlord elects option (2), the Landlord will have the immediate right to possess the Premises and the Tenant shall lose all possessory rights and have the obligation to immediately vacate the Premise. However, the Tenant shall still have the duty to pay all rents, fees and expenses mandated under this Agreement and/or by the judicial system until either the agreed upon term concludes or the property is re-rented at a monthly rate not less than the amount owned under this Agreement with any negative balance owed by the Tenant.

____________________                _____________________
Tenant Signature                Date

____________________                _____________________
Landlord Signature              Date