

Edited Transcript of Proceedings of the Liberty Fund Inc Seminar on the Common Law History of Landlord-Tenant Law

Timothy P. Terrell

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EDITED TRANSCRIPT OF PROCEEDINGS OF
 THE LIBERTY FUND, INC.
 SEMINAR ON THE COMMON LAW HISTORY
 OF LANDLORD-TENANT LAW

Law and Economics Center
 Emory University
 March 12 and 13, 1983

Edited by
Timothy P. Terrell

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The following is a transcript of remarks made at the Liberty Fund, Inc., Seminar on The Common Law History of Landlord-Tenant Law held at the Emory University School of Law on March 12 and 13, 1983. The transcript has been heavily edited stylistically and organizationally in order to present these remarks in a more readable form.

The Table of Contents indicates the four major themes around which the seminar proceedings were organized. All are topics that continue to be debated among lawyers, judges, economists, and law professors. The unique format of the Liberty Fund Seminar affords the opportunity for some of this debate to be face-to-face, rather than in an extended series of articles or decisions. The first topic involves Professor Edward Rabin's claim in the primary seminar paper that over the last decade and a half we have witnessed a "revolution" in landlord-tenant law, a claim that provoked considerable discussion of the social, economic, political, and legal contexts in which the key judicial and legislative changes were introduced. The second topic concerns the controversial relationship between economic analysis and moral or normative conclusions. This topic brings into question the very relevance of economics as a legitimate element in debates over social issues.

The third topic also involves potential criticisms of economic analysis, but from an internal rather than external point of view. That is, the subjects in Part III all raise questions about the adequacy of the data base in the landlord-tenant area and, consequently, the conclusions to be drawn from econometric analysis of it.

The fourth topic demonstrates the ambitious scope of the seminar proceedings. Participants examined numerous legal doctrines—some judicially created, some legislative—during the two days of the conference, and Part IV places much of that discussion together to give some sense of the interrelationship of many of these topics.

The participants in the Seminar, in addition to the five individuals who submitted the papers set out above, were:

Professor Peter Aranson, Law and Economics Center, Emory University

Professor Bruce Bender, School of Business Administration, University of Wisconsin

Professor Walter Block, Senior Economist, Fraser Institute, Vancouver, B.C., Canada

Professor George E. Butler, Emory University School of Law

Professor Roger A. Cunningham, University of Michigan Law School

Professor Robert C. Ellickson, Stanford Law School

Professor William A. Fischel, Department of Economics, Dartmouth College

Professor Morley Gorsky, Faculty of Law, University of Western Ontario

Professor Douglas W. Kmiec, Special Assistant to the Secretary, Department of Housing & Urban Development

Professor Daniel R. Mandelker, Washington University School of Law

Professor Stephen E. Margolis, Department of Economics and Business, North Carolina State University

Professor Donald N. McCloskey, Department of Economics, University of Iowa

Professor Richard F. Muth, Department of Economics, Emory University

Professor Hugh Nourse, Department of Real Estate and Legal Studies, University of Georgia

Professor Edgar O. Olsen, Department of Economics, University of Wisconsin

Professor Timothy P. Terrell, Emory University School of Law

Dr. John C. Weicher, American Enterprise Institute, Washington, D.C.

Professor Stephen F. Williams, University of Colorado School of Law

I

HAS THERE BEEN A LEGAL "REVOLUTION" IN LANDLORD-TENANT DOCTRINE?

A. Explaining the "Revolution"

RABIN: Has there been a revolution? Since I applied that label to the legal changes we will be discussing, I guess I must justify it. What I see as the revolution in property law is based on the fact that without exception all of the changes have favored tenants as against landlords. Now, I don't think that it is likely that all of those changes were merely a reflection of applying the same attitudes to new factual situations. Indeed, in the 20s, 30s, 40s, and 50s the percentage of residential tenants was greater than it is today. What we have is a remarkable list of changes,

each one favoring tenants over landlords. I don't know what facts we need to call something a revolution; I think that there has been a very dramatic change in this area, regardless of whether there have been dramatic changes in other areas such as tort and contract law. And it is worth asking, Why did it happen? Surely, Judge Skelly Wright and most of the other judges when they wrote their opinions felt that they were taking very dramatic and important steps away from the way the law used to be. Certainly the Uniform Residential Landlord and Tenant Act was seen as a very dramatic way of changing preexisting law. In addition, antidiscrimination legislation was a dramatic change.

1. *Economic and Social Explanations*

FRIEDMAN: At the most abstract level what we are talking about is the nature of explanation in legal change. How does one explain legal changes? There is always a tremendous tension between generalizers, people who come up with general theories, and particularizers, people who will focus on individual incidents. While I prefer the generalizers, I think it is important sometimes to look at specific factors. For example, in California, Proposition 13 radically reduced property taxes. And while there was a tremendous and very widely publicized reduction in cost to people who owned their houses, renters made an immediate outcry, because they expected (and in fact in the campaign had been told) that their rents would be reduced, but they were not. My impression, based on newspaper accounts, is that in a number of communities, the rent control movement flared up out of this sense of outrage on the part of renters. They felt that a windfall was going to the landlords, and the landlords were not passing on the saving to the tenants.

My point is this: In addition to the general social factors that have been mentioned, there is one further necessary condition to explain rent control and similar changes in the law. This is a sense of unfairness, felt not just by renters, but by the wider public as well. That is, the homeowner was likely to react to Proposition 13 in this way: "My property taxes have gone way down. Why are renters not getting relief?" All of the changes in the law we discussed reflect some sense of unfairness, some sense that the landlords do not play fair.

RABIN: Yes, there is often a need for a catalyst. First, the conditions have to be right, and then some incident such as Proposition 13 or something else will catalyze the rent control ordinance. But if it weren't that, then some other spark may have set it off, so that in my mind at least, the basic, the general conditions are more important than the particular incidents.

KOMESAR: As a representative of the generalists, I agree that specific events are important, and they are important to an understanding of

political reactions—that is, the need to, and the difficulty of organizing to, effect legal change. The kinds of events that Professor Friedman was describing are the kind that will bring people together and begin the organization which is necessary to overcome the inabilities associated with dispersion. Although administration of laws is often less dramatic, less visible, concentrated groups with better organization may have relatively more advantage at that stage of the process. Perhaps all of the individual incidents we have been discussing contain in them some of the factors that put them within this general theory as well.

HIRSCH: I would suggest that one additional consideration for explaining this speedy and large-scale change in the law, whether we call it revolution or not, would be that information costs have so greatly been reduced during this period. The technology of the written and the broadcasted word has so greatly increased that the poor suddenly were able to see how the rich lived. It demonstrates the magnitude of the inadequacies.

ELLICKSON: An analyst should distinguish between the “law on the books” and people’s actual practices—what one might call custom or convention. In the landlord-tenant area there has undoubtedly been a major change in the law on the books. But if the law on the books, whatever its content, has not had much effect on actual landlord-tenant relations, we should be hesitant to use the word “revolution.”

As a landlord in Vermont, I have some anecdotal evidence that supports this hypothesis. When issues arise between our tenant and us, we never consult the formal law, but work out a solution that comports with shared norms of reasonable behavior.

There are many situations where one would not expect people to turn to the law on the books. The parties are involved in a continuing relationship that provides opportunities for self-help sanctions if the other party misbehaves (relational contracts are an example); and second, only small sums are at issue. One would expect people to act cooperatively because they can police each other through self-help sanctions. One would also expect them not to use formal law because litigation is a negative-sum game. Because it is costly for the parties to find out what the law is, they will prefer to work things out according to informal norms. I hypothesize that the implied warranty of habitability was a de facto norm in most American landlord-tenant relationships prior to the “revolution,” and that, if the revolution has had any effect, its effects have been concentrated in low income neighborhoods where tenants may receive free assistance from legal services offices. In other words, the reason that Ed Rabin couldn’t find much effect on the housing stock is perhaps that there may have been little real change in landlord-tenant relations.

My realist perspective prompts some additional comments. Lawrence Friedman suggested in his paper that many of the reforms we have been discussing grew out of law suits by middle and upper income tenants. I doubt it. There are about thirty million residential leaseholds in the United States every year, but only a handful of reported appellate cases involving these leases. My hypothesis suggests that, regardless of the formal law, a landlord tends to be responsive to a tenant's complaints about the conditions of the premises, especially when the tenant is middle income or above. Contrary to Professor Friedman's statement, almost all of the important cases in the "revolution" involved the lower end of the housing stock. The exceptions were probably concentrated in rent control jurisdictions, where one would not expect to see cooperative interaction between landlord and tenant, and where, therefore, a middle or upper income tenant would be more likely to have a grievance about habitability.

RABIN: I would agree with Professor Ellickson that the cases are all lower income cases. The only exception of any significance is *Lemle v. Breeden*¹ which involved a luxury vacation cottage in Hawaii on the beach.

FRIEDMAN: I would like to pick up on the point Professor Ellickson has made about the necessity of referring to the actual practices of the parties. If we try to analyze legal behavior chronologically, taking into account more than the formal law, we face an extraordinarily difficult problem of measurement. The data—if I can use "data" in this sense—are simply lacking. It is very easy to read the handful of appellate cases and look at statutes, but it is difficult to know what actually happens in the real world. I rather suspect that important recent changes in the law had roots in events in 1900 or 1942, or whatever; but we simply don't yet have enough perspective to recognize those events. A lot of what happens on the surface is ratification, though this is important in its own right and calls for explanation as well.

Let me give you an analogy. Over a fifteen year period there was a wave of no-fault divorce statutes, so that today almost all states allow consensual divorce. But this outburst of legislation was in one sense ratification of a prior change. Consensual divorce had actually been available since 1870. Although it is interesting to speculate about the contemporary factors that made it possible to ratify consensual divorce, it is also important to realize that consensual divorce first became possible in many states in the 1870s, as far as we can tell. Similarly, it is not only possible, it is likely that a lot of the changes in the landlord-tenant

¹ 51 Hawaii 426, 462 P.2d 470 (1969).

relationship have taken place on a level underneath the formal surface of the law.

MANDELKER: I have a very different view of what has happened in the landlord-tenant field than has been expressed. I view these changes in landlord-tenant law as largely derivative of what happened during the sixties and seventies in other public sectors. By the early sixties it was obvious that there was a general current of thought in critical American legal opinion that aggregates of power in the private and public sector had disadvantaged individuals, who were suffering. Local government tort law is one example. The shift toward removing immunity in local government tort liability began with a decision in 1962 in California. Another example was school finance reform where it was felt that lower income people suffered because of the use of economic power in the wrong ways.

Now, the area of law which is closest to landlord-tenant law was the welfare assistance area, where legal aid attorneys, beginning in the early sixties, mounted a major crusade against the welfare bureaucracy to discipline it and to establish various rights to, and regarding, welfare. In my judgment, to understand the operation of this landlord-tenant reform we must address the newly emerged institution of legal aid lawyers, who developed a strategy in the early 1970s of going to court to discipline what they saw as some of these power aggregates.

The reason this happened in housing, I think, is based in some history about housing codes and perceptions about actors in the housing market that are very important. There was an intellectual history in this country which saw the private supplier of housing in low income markets as a power aggregate and a pretty bad one at that. In the late fifties and early sixties, before the legal assistance people became interested in this, there was a reform movement in housing, a very different one, which I was part of, that pursued this problem with a very different perspective. They wanted to see changes in the housing code enforcement mechanism that would strengthen the power of the local code enforcement administrator, specifically, the receivership technique, but administered from the public side and not the private. Yet when the riots occurred in the sixties, these reformers were told by the minority leaders in New York and elsewhere that they did not trust the public administrators of these codes. The minority people perceived that they were losers in the administrative code enforcement process. And they demanded a shift in power from code enforcement by a public administrator to the private tenant.

FISCHEL: I would like to pick up on this theme of the general political background and events of the 1960s as explanations of the rise of a number of these changes in landlord-tenant law. I think that in the

mid-1960s we had a political event unusual in American history: at the federal level, a supermajority, that is, the same party holding a large majority in both houses of Congress and the presidency, and with that the opportunity to redistribute a lot of income and wealth. I believe they went and did so, quite deliberately. The Vietnam War slowed them down a little bit but had there been no Vietnam War, I think the Great Society would simply have been that much larger; the size of the deficit and the accommodation by the Federal Reserve would have been very much the same. In any event, I think there was a deliberate redistribution going on that found its way into housing law by the funding of legal aid programs. The redistribution that seems to have taken place, however, was from landlords to legal aid lawyers, rather than poor people. Another kind of redistribution, although I am not sure it was deliberate, was inflation. Under inflation, there is a rent to be had in increased property values. And when there is a rent to be had, there will be people who compete for it. They compete in political markets and in the local governments; in some cases, the landlords lose that battle, and we end up with rent control.

CUNNINGHAM: I would agree that there are probably very complex causes for the changes in the late sixties and early seventies in landlord-tenant law. I think the civil rights movement and the dissatisfaction about the Vietnam War were important factors. Maybe they were only triggers, but I lived through this period, and I had teenage children. For whatever reason, there were a lot of people who really thought that everything was wrong with the established order in the United States, that everything needed to be changed. The ideas that were ultimately embodied in *Javins* and in the Uniform Residential Landlord and Tenant Act had been around a long time. Law professors had been writing articles about this for a long time, but the energy to do something about it and a lot of other things developed in the social climate of the sixties.

MANDELKER: From my point of view, the so-called improvement in housing in the sixties and seventies is a statistical artifact. When you build a great deal of new housing and still leave the existing stock, of course it looks as if housing is improving. But in those submarkets where the existing stock predominates, particularly in black submarkets, all the statistics show housing is getting worse. *Javins* is a response to a housing market which is characterized by high density, highrise tenement buildings, which are managed by large businesses with no personal relationship, in which tenants are at an income and social disadvantage. That market model does not exist in the West, the Northwest, and the Southwest.

MUTH: I think it is simply not true that you don't have relatively poor

quality housing in southern and western cities. You may have somewhat less relative to the incomes of the tenants. But all you have to do is keep your eyes open when you go to the airport this afternoon, and you will see that there is relatively poor quality housing in Atlanta as well as any place else.

WEICHER: In response to Professor Mandelker, his statement about the housing of blacks and the housing in specific submarkets and how it changed over the sixties and seventies is simply not correct. Every measure we have of a population subgroup—a deprived subgroup, including blacks—is that their housing got better as fast as anybody else's. You can say that people who had low income then and have low income now don't live as well as the rest, but there was enormous improvement. And even if you go into geographic submarkets, you find the same thing is true. If you look at the data in the worst poverty areas, you find that the only places where there was a deterioration in housing was in the South where there was a hispanic influx: Cubans in Miami, Mexicans in south Texas. In areas which were predominantly black or in northern areas which were predominately hispanic, there was substantial improvement in the sixties, and, as far as we could tell, this continued in the seventies.

RABIN: It strikes me that one reason why these changes in the law did not occur sooner is that by the 1970s the quality of housing had been much improved over what it was in the fifties and early sixties, and therefore the negative impact of these changes in legal doctrine on the amount of housing available to people was much less severe and less obvious than it otherwise would have been ten or fifteen years earlier.

ARANSON: Also by 1970 a major investment in housing had already been made.

NOURSE: Which might not have occurred if these laws had been in effect sooner.

Also, with regard to the issue of the timing of these changes in the law, I would note what I saw in St. Louis in the early 1970s. When landlord-tenant law was being used to protect the tenant, it was to protect the public housing tenant, and that was because in St. Louis public housing was thirty years old by 1969. These units were in desperate need of repair because they were hard-used, as you can well imagine. The difficulty became that these units were uninhabitable—and what the legal aid lawyers were doing was trying to figure out how to get the public housing authority to put these houses in shape. The problem was, however, that there was no money with which to do that. They brought it to the public's attention by putting on a rent strike, and so

on—that is, by going through the procedures that will make it a political issue.

ARANSON: I want to offer a hypothesis from public choice theory. Over this period, when the ferment begins there had been a tremendous improvement in rental housing and also a very large increase in home ownership among the middle income groups. Any fundamental underlying conflicts in the preferences between, say, lower, middle, and upper-middle income renters would have been dissipated; a more cohesive and homogeneous group of renters emerged. Transactions costs and the cost of political organization and the like would have declined substantially. Such factors may explain at least some of the conditions leading up to or underscoring the political causes of these changes.

ELICKSON: I think Professor Aranson's theory is implausible. During the mid-1960s inner-city black youths were rioting summer after summer. Governments were under great political pressure to respond to the perceived needs of inner-city residents. Commissions were appointed in response to that pressure, not because of any general tenant movement.

GORSKY: What I have heard is simply a description of a series of triggers. I don't think at this particular point we can really know what was the fundamental and real cause of the "revolution" in landlord-tenant law. I think we will have to wait for a revisionist historian to supply us with that answer.

2. *The Relevance of the Rubin-Priest Models of Common Law Development*

ARANSON: We now have some models of legal change in jurisprudence, one of which is the Rubin-Priest model of common law processes. I had that model in the back of my mind when I read Judge Wright's letter to Professor Rabin. Despite the description Judge Wright gives in his letter of his general thought processes, I wonder whether that economic model can be applied in this situation; that is, does it make sense to apply that model of change in the common law to the landlord-tenant area?

RABIN: Although the Rubin-Priest hypothesis that the common law moves towards the most efficient rule is one that I thought about when I was working on this paper, I found that it had little relationship to what I understood to be the reality of the situation. Indeed, I had a fleeting thought that maybe this area of landlord-tenant law could disprove that particular theory. But I did not undertake that analysis.

KOMESAR: There are a couple of factors in the landlord-tenant area which I think deviate from the Rubin-Priest models as I recall them. One is the notion of the random judge, that is, one with no bias or inter-

est in a particular result or direction of results. Judicial randomness is important because, as I understand the theory, if there are inefficient results, they will be more often litigated, and therefore more often overturned. I am not sure whether in the particular instance of the *Javins* case we have instead of a random judge the imposition of a specific will or viewpoint. Another factor, of course is the possibility that public funds directed to legal services went into an operation that, contrary to the model, was not dominated by concern for economic efficiency. Still, the funds were there, and therefore rather than the most inefficient cases being litigated, the most redistributive cases were relitigated in this particular context.

ARANSON: In terms of the random judge, the Rubin-Priest model requires a judge who will maintain precedent greater than fifty percent of the time. So there are bounds between fifty and a hundred percent on the expectation of the judge's decision. Furthermore, the Rubin-Priest mechanism works, allegedly, if you can assemble all of the interest in litigation—for example, if I have to take on a big company and I am but one of the 10,000 potential litigants, then there is a free-rider problem of assembling all the litigants to come up with an adequate prosecution of the case. With that in mind, perhaps the legal services people provided the necessary assembly of those interests.

KOMESAR: With regard to the Rubin-Priest model, are you only interested in the evolution of court-made law or more generally in the evolution of the observed landlord-tenant law, some of which is statutory?

ARANSON: Both, and in particular the way in which the first works and then how the second constrains it.

KOMESAR: There really may be two different models involved here. If one assumes that the litigation model has the problems of organization that you are suggesting—that is, the difficulty of a dispersed interest that must be pulled together—at the same time, the political or legislative model has the problem where there is a certain threshold interest in the population of tending to overrepresent interests that you might consider to be dispersed. And now the question is: What are we observing in landlord-tenant law? A number of people have stressed the Uniform Residential Landlord and Tenant Act and the statutory material that has come out of it. If that view is accurate, it raises quite different questions concerning whose interests are being overrepresented in the sense of achieving something resembling economic efficiency over time. If statutes are the key to change in this area of law, then the Rubin-Priest model and its concern about the organizational difficulties in a political process will not be important; rather, the numerical problem of assem-

bling votes will be dominant. In the housing context, we have a situation in which it is more likely that people are aware of their interests because housing is a consumption activity that captures a significant part of people's budgets. Consequently, their political activity is greater, and the strength of a small organized group is not as critical for the creation of change through legislation rather than litigation.

RABIN: One issue involved in the economic models of common law development is the identification of the least cost bearer, or avoider, of liability in any situation. But Professor Komesar in his written comments stressed that it's quite difficult to determine the impacts of a legal change on the ultimate cost-bearer. He pointed out that merely because increased costs are imposed on landlords, it doesn't necessarily mean that they will be passed on to the tenants. They might be passed on to the owners of raw land or other factors of production, while some of the costs might remain with the landlords. My paper largely assumes that they would end up being borne by the tenants, and I think that is an oversimplification.

MCCLOSKEY: The costs end up being borne chiefly by the inelastic supplier or demander, whoever that is.

MARGOLIS: I think Professor McCloskey's world assumes that these new measures are of no value to the tenant, and that you are modeling it as a tax, implicitly.

RABIN: Wouldn't it mean then that the owners of raw land who supply it for housing would be the most inelastic?

MCCLOSKEY: It depends on what area you are talking about. If the "tax" is imposed on the central city of Atlanta the costs will end up on the owners of raw land, because they are by far the most immobile actors. But if the tax is imposed on the whole country, as it is, then you can't be so sure that the costs will end up on raw land. It depends very much on what experiment is contemplated. If there are controls or rents and impositions of higher costs of supplying housing all over the country, that is one thing. But if it is an experiment that just imposes it in Santa Monica, that is quite another.

MARGOLIS: Well, as a contrast, let me assume for just a moment that the benefits to the tenant were just equal to the costs. Then the tenants would bear the full costs, I believe, of those benefits; that is, we are talking about both a demand and a supply curve shifting in equal amounts.

ARANSON: If we really want to integrate the law and economics in this area concerning the question of who the cost-bearer will be, there might be some importance in distinguishing among the market period, the

short run, and the long run. In the market period the benefits might all be borne by the tenants, and the costs by the landlords. If so, then in the short run people will take property out of rentals—just simply refuse to rent or instead occupy them themselves—and in the long run we might see a reduction in the amount of rental housing coming on the market. Although legal reforms are usually justified under the police power, in the short run they look like takings. That is, they present a real transitional problem for people who have made investments in rental housing expecting a certain income flow in return. For those who make investments after the fact of the imposition of a law or regulation, that is not necessarily the case. So the real political opposition to rent control and these other changes in the law concerns precisely these transitional phenomena, in the sense that in the long run you might have a reduction in the amount of rental housing that was available compared to what it would have been in the absence of these rules.

B. Lessons From Comparative Experiences in the Development of the Landlord-Tenant Relationship

GORSKY: I would like to turn for a moment to the Canadian experience regarding the transformation of landlord-tenant law. The relevance of this experience is that it concerns the importance, if any, of knowing what judges and legislators thought they were doing when they effected the changes in the law that we have been discussing.

It is fascinating to me that all of the changes that have been referred to by Professor Rabin were hinted at before 1970; but then came the *Javins* case which started a kind of juggernaut. Professor Rabin did mention that these changes have been effected by both court cases and legislation, but the interesting thing is that there has been such remarkable uniformity in the court cases. Judges of many political and social persuasions have tended to adhere to the general principles that flowed out of *Javins*. And, as a lawyer, I wonder why there has been so little alteration in this juggernaut. I have a particular interest in this because it crossed borders. That is, this juggernaut, in the face of all the obvious problems that one can find upon doing an economic analysis of the law, affected all of North America. In Canada, particularly Ontario, legislation was enacted before *Javins* which introduced all of the changes that were referred to by Professor Rabin. What was the motivating force in the minds of the people who were doing the job, either as judges or as legislators?

Now, this must leave the economists and those lawyers who have a primary interest in the economic analysis of law quite cold because they often seem to overlook what the court was saying. The court in *Javins* was referring to something extremely dull and something that puts law students to sleep, but it represents the way in which lawyers were think-

ing. The court mentioned the fundamental reason that separates landlord and tenant law from other forms of consumer protection law, and it wasn't new; it was old. The idea was that the changes that must ultimately be introduced into landlord-tenant law required the particular concept of the "common law estate" to be, if not done away with, then considerably eroded. Thus, the first thing that had to be done was at least to go through the motions of eroding the power of the estate concept so that landlord-tenant law could then be incorporated in the general development of the principles of tort and contract law that have been discussed. Long after the realities of feudal tenure had vanished, vestiges of its law remained, now to be replaced to some degree by a new system based on the theory of contractual obligations.

Perhaps there were more fundamental reasons motivating the courts and legislatures. But they are not economists and they don't think as economists. They perceived instead that there were certain anachronistic legal concepts, specifically the concept of the leasehold estates governing the landlord-tenant relationship in almost all of its aspects, which led to—whether you like them or not—the rules that ultimately were overcome. Thus, in my opinion, from a lawyer's point of view, the initial basis for the revolution, if you will call it a revolution, was the ability to do away with the concept of the leasehold estate.

FRIEDMAN: It was valuable for Professor Gorsky to bring up the Canadian situation, although I am going to draw from it a rather different conclusion. The question we are discussing now is, How do we explain these changes in the law? I want to take issue with the earlier comments ascribing great influence to Skelly Wright in developments in this area of law. That is why Canada is so interesting to us. Two rather similar societies, at similar stages of development, are moving in the same direction. It gives us a kind of control group and it sheds considerable doubt on whether, in searching for social causes, we should place a great deal of emphasis on the peculiarly American organization of property law, or on the war in Vietnam, and so on; things that have, at best, only a dim echo in the Canadian experience, or on one American judge.

On the contrary, what is involved here has, I would say, relatively little to do with the civil rights movement or the war in Vietnam. It has a whole lot to do with complex changes in the organization of the landlord and tenant business, in the organization of residential housing, in the expectations of the parties, and so forth. But where should one go for more information? Professor Ellickson gave us a very important clue: As soon as we take our eyes away from formal legal materials and start looking at the organization of residential housing as a business, we begin to get quite a different chronology, and a different sense of what the motives are, what is at stake, and what the costs and benefits are on both sides.

RABIN: Professor Gorsky's observations about the Canadian experience trouble me quite a bit because they suggest that the changes in the law would have occurred without the civil rights movement or the Vietnam War movement. If so, then perhaps my paper has a misplaced emphasis. Another way of stating the issue is, Why did these changes occur in the sixties and seventies and not in 1900 or 1920? We had a vast number of residential units then that were not all farms under agricultural leases. As I noted earlier, we had a much larger proportion of our population as renters in the twenties and thirties than in the sixties and seventies, and so the changes perhaps should have occurred then. But maybe the answer is that while the stage may have been set, a catalyst for those changes was lacking. Perhaps the civil rights movement and the Vietnam War became the catalyst. In Canada, some other catalyst may have been at work.

BLOCK: Speaking as a transplanted American who has spent the last five years in Canada, I would assure Professor Rabin that the Canadian example is not a counterexample to his hypothesis. To say that these movements didn't happen or have an impact in Canada as well is wrong. While they might not have actually occurred in Canada in the same way, everything that happens in the United States is very well known to Canadians, even though very little about Canada is known to most Americans. For example concerning the war in Vietnam, there were a lot of escapees from the draft who immigrated to Canada.

My own belief is that the civil rights movement and the Vietnam War are not in and of themselves the explanation. It is rather the philosophy that made these social movements possible.

MCCLOSKEY: It may help us understand why and how these changes in the law occurred if we also consider the European situation. In accord with Professor Friedman's hypothesis, Europe, though a society similar to our own, has a long history of large apartment blocks, very small percentage of homeowners, and so on. It would be quite interesting to learn whether in the 1970s or earlier there was a change in the European attitude concerning the landlord-tenant relationship. As a resident of England at various times I have often been astonished at how considerate of the tenant's position English law and even English practice seem to be.

WILLIAMS: In partial response to Professor McCloskey, I think there have indeed been very similar movements in Europe. I don't know about European landlord-tenant law specifically, but certainly there has been a massive increase in the redistributive impulse, and its effectiveness, in Europe—that is, an enormous increase in the impulse from which the welfare state presumably arises.

ELICKSON: Also in response to Professor McCloskey, but to raise a rather different point, I offer an anecdote about Scandinavian housing policy. Government policy there has been skewed toward building multifamily housing despite what appears to be a greater demand for single family units. When I was there, some Scandinavians told me the reason is that the social-democratic politicians that are usually in power believe that people who remain residents in apartment buildings are more likely to vote social-democratic than are people who become property owners and begin worrying about property taxes and so on. I can't verify this story about Scandinavia but am willing to use it to illustrate the linkage between housing programs and political outcomes: housing policy is not only an outgrowth of politics, but the content of housing policy can also affect election results.

I can offer examples involving cities in the United States. For example, the political party that currently governs Santa Monica was organized around a tenants' rights platform; the conversion of rental buildings to condominiums in that relatively small city might tip the balance of power away from it. Therefore, the governing party's policy of condominium conversions can be seen as an effort to keep itself in power.

Similarly, rent control makes tenants' stakes in local politics much greater than they otherwise would be. The Santa Monica experience shows that the presence of control will motivate more tenants to turn out at the polls. In many central cities—Washington, D. C., might be an example—local political leaders may worry about the political consequences of gentrification and implement a package of policies (perhaps including rent control) that promises to slow the rate of gentrification. The feedback effects of housing policies on political outcomes should not be ignored.

C. The Legal Context of the "Revolution"

1. *The Place of Landlord-Tenant Doctrine Within the Modern Common Law of Tort and Contract*

GOETZ: I have heard some of my colleagues say that in their opinion there is no such thing as property law and no less landlord-tenant law; they claim it is all torts and contracts.

I think we should say that one of the functions of contract law is to spare people the trouble of actually bargaining out every essential detail of the relationship, so that if details are not rendered explicitly, the law will fill the holes. It is called the gap-filler function of contract rules. An example is where even if the parties don't specifically say that the electrical outlets are supposed to work it would reasonably be assumed that the electrical outlets are supposed to work. Some of us refer to this in a kind of homely fashion as the "off the rack" rules of contract—that is,

you get the “standard” terms unless you say something different. And if you do say something different, you can think of those contacts as being the equivalent of buying the custom made suit rather than the off-the-rack one.

Now, in contract situations, because one can always have the custom made contract, one could argue that it isn’t so important for the law to have “correct” off-the-rack, or standard, rules because if the law gets it wrong and, for example, imposes one kind of liability when you really want another one, all you need to do is speak up and change it by an explicit provision in the contract. In some instances we don’t allow that, however, and some of the cases that Professor Rabin has mentioned are very interesting in that regard. What is there that remains of landlord-tenant law that sets it apart from the ordinary rules of tort and contract law? What justifies these separate rules? And what should we expect to see in the future? Will this area be thoroughly integrated with tort and contract? What is your speculation about this?

RABIN: I wish I had a snappy comeback. I am really not sure that I have any answer at all. I think I am justified in saying that there are now few, or no, special rules in the tort context. Although I am not an expert on tort law, as I understand it there has been a general movement to amalgamate all tort rules into a general standard of due care, regardless of whether one is a trespasser or a municipality, and regardless of the status of the particular defendant. And that is now true of landlords as well. They have to take due care for the welfare of their tenants and for other people on the property; and that is, in my opinion, a good thing. There shouldn’t be any separate rules for landlord tort liabilities.

With respect to contract, there are important differences. Just the context of residence is different: the difficulty of moving, of changing your supplier. You can move your grocer by driving to the next shopping center if you want to. You cannot easily change your landlord or your neighborhood. There is therefore more of a feeling of some need for protection than exists in other areas. That perception is reflected in the tenant protections we are discussing at this conference.

GOETZ: Isn’t the landlord-tenant relationship now viewed in the law in the same manner as “relational contracts,” for instance, the franchisor-franchisee relationship? Is there anything peculiar or additional that you see in the landlord-tenant law beyond that?

RABIN: It does have a lot in common with relational matters; the growing body of additional protection for employees is analogous to the growing body of additional protections for tenants. But there are some differences that play a role in shaping rules that might not exist in other areas. For example, from the tenants’ side, there are the emotional at-

tachments to one's home and one's neighborhood that do not exist in a purely commercial context; and from the landlord's side, we have the large capital investments required and the need for long-term stability before anyone is going to invest the enormous sums necessary to put up an apartment house.

GOETZ: In preparing to write my paper for this conference, I was intrigued by the importance of self-help remedies in landlord-tenant law, because I thought there were interesting parallels between their use there and in other relational contracts. The idea in such situations is to use techniques like repair and deduct and other self-help remedies to make the contract to some extent self-enforcing and give the parties the incentives to deal equitably with each other without always having recourse to a legal mechanism.

RABIN: There is an irony here. At the very time that tenants developed some very substantial self-help remedies, such as not paying their rents whenever they were dissatisfied with a real or imagined landlord default, the landlord's abilities to use self-help remedies were reduced or eliminated. Recovery of the premises used to be quite an expeditious matter. The landlord watched until the tenant left, and then he ran in and changed the lock and told the tenant he could get back in if he would get out in ten minutes; and that would be that. Or if that didn't work, the landlord would cut off the tenant's electricity or his water or heat; and that would work within a few days. All these rather draconian methods of landlord self-help are eliminated now.

Another method that has been lost to some extent is the use of security deposits. This was, and in many communities still is, a very effective means of self-help. You don't have to go to court to keep the tenant's security deposit. And the tenant is likely to be cooperative on leaving in order to get back a substantial security deposit. That is a powerful landlord remedy. To the extent that that remedy has been weakened by regulation—and it has only been regulated in some states—that also is a serious matter.

BUTLER: Another point that has not been raised here in terms of the correlation between evolutions or developments in different areas involves the demise of the parol evidence rule. I view that as a significant development, since the law of property was so hamstrung by convergence of the statute of frauds and the parol evidence rule. Real estate law was one of the rule's last bastions, until by osmosis or adoption the UCC position has triumphed. Common law assumptions of integration have been revised so that extrinsic evidence may be introduced to establish implied warranties, for instance. I think that is an important aspect of the convergence between doctrine in various fields.

FRIEDMAN: I would like to comment on this notion of the assimilation of landlord-tenant law to the modern law of contracts and torts. The question has been raised, What is left of landlord-tenant law that is different from the modern law of contract? I think there *is* no modern law of contract. Classical contracts law—except as it is taught in classrooms, where it does not touch reality—has fragmented into a number of subsections: insurance contracts, employment contracts, commercial contracts, lease contracts, and so on. Landlord-tenant law has indeed been assimilated into the modern law of contract, but only in the sense that it has taken its place as one of the many subfields of arrangements between parties, more or less contractual, which have some special rules and a certain overall similarity.

ARANSON: I gather from all of the papers a general conclusion that there may, for very good reasons, be a different law applied to, for instance, a hotel or a large apartment house with fast turnover versus the rental of a single home. That is, in the apartment house no tenant has the incentive to take care of the common areas in such a way that people won't hurt themselves on it, and we therefore might want to place liability on the owner. Whereas, if we are looking at the other extreme of renting my house while I am on leave, my tenants would presumably know if a brick came loose on the front steps three months after they moved in which someone could trip on and hurt themselves. That seems to push liability in the other direction.

In contrast to this focus on the nature of premises, a second concern has crept into the discussion, and that is the nature of the contractual relationship itself—that is, its long-term or relational character—which seems to push the rules in the opposite direction. If you rent a home and are there for a long time, although you don't own it, you may do those things to the interior that create home-specific value for you and that the landlord would presumably try to expropriate at the end of the lease in some fashion or another. Whereas, if you are in a high turnover building like a large apartment, then certainly the opposite would be true. Thus, if we focus on the nature of the premises, the law would go in favor of the renter and against the landlord for the large impersonal apartment complex. But if we focus on the nature of the relationship, the opposite pattern would pertain for those contracts that will last a long period of time. So a basic question for me becomes whether or not there can be coherent landlord-tenant law to cover all situations.

RABIN: There should indeed be particularized leases to handle particular circumstances, and I think the law in large measure reflects this. There seems to be one set of rules for commercial leases, another for residential leases, another for agricultural leases, and so on.

KOMESAR: In response to Professor Aranson's observations, there does in fact seem to be a tension in this area regarding tenant incentives on the one hand and capital investment incentives on the other. But for me, the question becomes, Who should bear the risks here? Bearing in mind the various social institutions at work in this area, the answer to this question need not necessarily involve the law itself. That is, a judicial or other legal response is not necessarily the key to determining the bearer of the risk. Rather, here it will most probably come from some other institution such as the market.

ARANSON: Let me sharpen my point a bit. Let's take two substantive areas of landlord-tenant law: limitations on condominium conversion and tort liability. It seems to me that in the former the judge will favor, or be more concerned with, the long-term tenant than with the short-term tenant, while in the latter he will likely go in the other direction, favoring the short-term tenant by not imposing liability.

HIRSCH: I believe that much of the tension you have identified is captured in the issue of legal "entitlements" that is so often discussed. That is, the general tenor of the law, as Professor Friedman has described it, seems to be that the longer you are in some premises, the more duties are imposed on you *and* the more protections you are given.

KOMESAR: The problem is, however, that you may find various "entitlements" running in opposite directions here—for example, the entitlement to stay in your apartment and the entitlement to demand that it be repaired and maintained by the landlord. An additional question in this context is, How do we want such "entitlements," produced? Perhaps some should be created by law, either by statute or by court decision, and some by private contract. But if this is so, then someone who looked only at the law, and particularly judicial decisions, for a description of the landlord-tenant relationship would find something that on the surface at least appears to be quite uneven—perhaps skewed in favor of one party or the other. This unbalanced and inaccurate picture would be the result of a failure to take into account the real world of the market in the shaping of that relationship.

GOETZ: All statements of the law are dangerous as "data" because you never know how a court in the future will interpret them. Because of that uncertainty, the parties to contracts, and particularly leases, construct their relationship so as to avoid going to court—in a sense, they arrange things into a mutual hostage situation. But inevitably one or both parties may cut corners, and there are too many subtle ways for one party to disadvantage the other. Therefore, as a reflection of these difficulties, the terms of the contract tend to be tough. For example,

“hostages” such as security deposits and other self-help remedies are used in contracts when one party taking advantage of another is not easy to prove. These remedies may in a sense be “least worst” alternatives. But courts do not understand the situation and the difficulties the parties face, and they tend to see certain terms as unconscionable which the parties themselves did not.

HIRSCH: Regarding these discussions of property law, contract law, and tort law, Guido Calabresi’s ideas are instructive. In property and contract law we are interested in the voluntary exchange of entitlements; in torts we are concerned with involuntary exchanges. One of the differences, though, between property law and contract law is that the latter involves primarily nonreal property. Looking at it this way, property law really involves voluntary exchange of reasonably and reliably stable property rights that, due to the historical background and continuity of real property law, were much less risky. Now, as I read Professor Rabin’s paper and listen to these discussions, I find that there is a great weakening of these property rights, that the difference between the entitlements associated with real property under property law and the entitlements associated with nonreal property under contract law are meshing.

2. *The Common Law Context of the Javins Decision: The Doctrines of Independent Covenants, Constructive Eviction, Mitigation of Damages, and Surrender*

RABIN: The traditional rule was that the covenants in a lease were independent of each other. That is, the mere fact that the landlord wasn’t performing his bargain was no excuse for the tenant not to perform his. So if the landlord did not provide heat, the tenant had to pay the rent anyway and then go to court to sue for whatever damages arose from lack of heat. You could say that apart from transactions costs the rule wasn’t all that bad. It made sense except that it took time and money and effort to bring an independent lawsuit against your landlord for his failure to live up to his promises.

The *Javins* case and later cases adopted the opposite approach—a rule of dependent covenants in which the landlord’s failure excused the tenant’s failure to pay rent. There are, however, a number of variations to that rule.

The old common law rule of independence, however, was tempered by another doctrine called constructive eviction, which provided that if the landlord did not perform the important covenants and made the place uninhabitable, it was as if he had evicted the tenant, and the tenant would have a legal excuse for moving out and being relieved of any further obligations. This rule required the tenant actually to leave the premises to prove that they had become uninhabitable. In many in-

stances, however, tenants would prefer to stay in premises than to go to the trouble and expense of moving. So one of the significant aspects of the *Javins* decision is that not only were covenants held to be dependent, but tenants could stay on the premises and use the dependency of their covenant to pay rent as a defense in a landlord action for rent.

WILLIAMS: The doctrine of independent covenants was at least in principle symmetrical, in that if the tenant stopped paying rent, the landlord could not recover the property. Of course, landlords obviously put clauses in the leases altering that, so the apparent symmetry was not real. But the courts might have thought that what they were doing was symmetrical.

CUNNINGHAM: Landlords were mainly responsible for the contents of leases, and so they always put in provisions that gave them the power to terminate the lease and recover possession whenever the tenant violated any of the covenants on his part contained in the lease. Tenants generally didn't have enough power to insist on a reciprocal kind of clause; hence, the courts had to develop the doctrine of constructive eviction as a substitute for the missing provision that would have allowed the tenant to terminate when there was a serious breach of duty on the part of the landlord. Eventually, legislatures everywhere came around to the point of enacting the statutes that gave the landlords a very expeditious remedy when there was a breach by the tenant. Instead of bringing a formal ejectment action that might take 6, 9, or 12 months to get through the courts, they all adopted summary dispossession or summary eviction statutes that were designed to allow the landlord to recover possession at low cost and typically within a period of a week or two.

RABIN: Another important old common law rule involves mitigation of damages. The old rule, which still has some support, was that if the tenants abandoned the premises, the landlord had no obligation to find a substitute tenant, but could just sit back and as the months passed sue for the rent that accrued. This would appear to be a prime example of an inefficient rule in the sense of permitting premises to remain vacant. The very strong modern trend imposes a duty on the landlord to mitigate, or to be very strictly accurate, it says that the landlord's damages are only those that he could not have avoided had he worked at finding a new tenant.

FRIEDMAN: I just wanted to add a legal footnote. The absence of a duty to mitigate damages in landlord-tenant law was exceptional; generally, in the law of contracts and commercial law the rule was quite the opposite. You were supposed to replace the goods if they weren't deliv-

ered, and recover only the difference between contract and market price.

CUNNINGHAM: The no-duty-to-mitigate rule is clearly inefficient. But it is one of these rules that was based on the notion that a tenant had an estate in the land, a legally protected interest like ownership, except limited as to time. And the reason why the landlord was not required to go out and try to find a new tenant was, simply, that the tenant still had his estate, which carried with it an exclusive right to possession. He could come back and take possession anytime he wanted. It was his own business if he didn't want to occupy the premises, he still had the benefit of ownership of the estate; therefore, he ought to pay the rent. That is a perfectly logical conclusion if you assume that the dominant factor here is the existence of his estate in the land.

In addition, the tenant normally could sublet at will unless there was an express provision in the lease which denied that privilege. Usually, however, those provisions wouldn't absolutely deny the right but would say that he couldn't sublet without the landlord's consent. Modern leases sometimes say, in addition, that the landlord shall not unreasonably withhold his consent, and if the lease is silent on this point, some courts have read that limitation on the consent clause into the lease anyway.

KOMESAR: When the common law was being developed, tenants usually had substantial, longer length interests, and that could have meant that the party in the best position to mitigate damages by finding a replacement may very well have been the tenant under those circumstances. In the standard contractual circumstance, it is presumed that the party best able to mitigate is the provider of the goods. That may not have been such a good idea in some landlord-tenant settings. The real problem with mitigation came up in the face of clauses that refused the tenant the ability to assign or sublet without the landlord's permission. Those are still often enforced, and they are not necessarily inefficient. It really is a comparative institutional question. These places are not going to sit empty because the tenant has a substantial incentive to buy the landlord off to take a replacement tenant. There is therefore a market mechanism functioning, and the question is whether its reaction is better than the judiciary determining who is a reasonable tenant.

CUNNINGHAM: The common law was not always as bad as it has been made out to be. The courts did work out another rule that was designed to protect the tenant from heavy liability for rent after he had abandoned the premises and had failed to make any direct arrangement with the landlord to find a new tenant. In general, if the landlord simply took possession of the premises, and at some later time found a new

tenant on his own and gave him a new lease, that action was so inconsistent with the old relationship that the old lease was terminated; there had been a "surrender" of the old estate by operation of law. The landlord could avoid this, however, by notifying the tenant that he was doing these actions to reduce the tenant's obligations.

GOETZ: I think it deserves emphasis that the old doctrine that the landlord did not have to mitigate is not necessarily inefficient. We should tie this doctrine into Professor Friedman's argument in his paper that the change in the law here can be explained on the basis of a variance in what he calls the modal facts. Under present circumstances, where the tenant often lives in a large apartment complex where you have a business of leasing and advertising, and so on, there is a technological advantage in reselling the apartment which shifts to the landlord, and makes the new mitigation rule efficient.

CUNNINGHAM: The doctrine of independent covenants has not, for a long time, caused problems of additional transaction costs where a landlord is simply suing the tenant to recover rent, because the tenant had the right to counterclaim or to put it in a defense of set-off or recoupment for his damages for breach of any covenant by the landlord. The problem was that in most jurisdictions if the landlord chose to bring an action to evict the tenant under a summary eviction statute because of nonpayment of rent, the prevailing rule was that any breach of the landlord's duties could not be introduced as a defense or by way of mitigation in that action.

KOMESAR: Again, what we are really talking about are assumptions about a problem with the bargaining process. In theory, if it were a perfectly even bargaining situation in which both parties were sophisticated, the tenant could put in a clause which said: If you don't supply *X*, *Y*, and *Z*, I don't have to pay you the rent; and you cannot recover possession on that basis. The problem is that when we observe the lease, the independent covenants concept has been altered in the sense that there is a covenant put in by the landlord, but no parallel covenant for the tenant's benefit. The question then is, Does this result reflect something wrong with the market process at that point?

3. *The "Revolutionary" Nature of the Javins Opinion Itself*

BUTLER: I don't consider *Javins* a revolutionary opinion and would argue that it is really—when technically analyzed—a relatively mild step forward. But this small step, because it (1) happened to have been made by a very distinguished judge in a prestigious United States circuit court, (2) received, as a result, substantial legal publicity, and (3) formed

part of a clear stream of development, was transmuted into a great legal leap forward. The *Javins* opinion became a sort of doctrinal flagship.

Analysis dims the heroic quality of *Javins*. For instance, Professor Rabin says that perhaps the "most significant contribution" of the opinion was that Judge Wright decided not only to employ "warranty of habitability" analysis, but also to make the tenant's duty to pay rent *dependent* upon the landlord's fulfillment of that warranty. Professor Rabin says that Judge Wright asserted the dependence of the tenant's duty to pay rent in a very revolutionary sense—that is, the tenant gets to have his cake and consume it, too. He gets to stay in occupancy indefinitely and need not pay rent. And, yet, to the extent that such revolutionary dependence is implied in Wright's opinion, it is pure dicta.

At no point did Wright expressly decide on the basis of general principles of law to reject the common law rule and hold that the tenant's duty is dependent in the sense Professor Rabin suggests, because he had no need to grasp that nettle. Section 4(c) of the D.C. Landlord and Tenant Procedural Code, reproduced in footnote 3 of the opinion, clearly stated that in an FED action for nonpayment of rent the tenant had a *statutory right* to defend on the basis of a claim of set-off or recoupment. That provision, as pointed out in the earlier case of *Saunders v. First National Realty Corp.*,² had already changed the common law rule of the independence of lease covenants. So, to the extent that Skelly Wright found dependence, he was merely applying established local law and precedent, not breaking new ground.

Second, Professor Rabin makes the point that a further revolutionary implication of *Javins* was the nonwaivability of the implied warranty, especially as far as it pertains to patent defects that violate the housing code and exist on day one of the lease. If the landlord stupidly allows you to enter into a lease of substandard premises, he is in big trouble. You can simply force him to make the necessary repairs, without an increase in the negotiated rent. I suggest that that is not the inference one need draw from *Javins*. Indeed, *Javins* embraces the holding in *Brown v. Southall Realty Co.*,³ namely, that if there are any patent defects in existence on day one, the lease is void ab initio. Now, Judge Wright does indicate in footnote 42 that to the extent (1) defects are obvious on day one of the lease and (2) there exists a housing shortage, then perhaps the court's proper interpretation of the contract should be that the tenant entered into the lease with the honest and reasonable implied-in-fact expectation that the landlord would repair those patent defects promptly after occupancy.

All that says, I submit, is that if the tenant enters on day one *and*

² 245 A.2d 836 (D.C. 1968).

³ 237 A.2d 834 (D.C. 1968).

there are patent defects, *Brown* does not apply if circumstances suggest that the actual, implied-in-fact understanding would not violate the housing code. But if the clear implication is that the tenant and the landlord both deliberately entered into an illegal lease on day one, with no intention that the defects be cured, *Brown* applies. They are in *pari delicto*, if you will, and the lease is void ab initio. In *Javins*, of course, we were not considering premises that were defective on day one. So, again, in the final analysis *Javins* does not directly support the revolutionary principle Professor Rabin would deduce from it.

RABIN: I don't claim that every development in the warranty of habitability area appeared with perfect clarity in *Javins*, and that all we have to do is read *Javins* to know what happens thereafter. I see *Javins* as symbolic—and as a convenient starting place. But you have to read *Javins* not simply in light of what it held, but also in light of what it has been interpreted to mean, and in light of all of the cases that drew sustenance from it. And I would stand by my view that, as interpreted, rightly or wrongly, all of these revolutionary changes grew out of, or at least occurred at the same time as, *Javins*. So I think that *Javins* is just a convenient symbol for a revolution that took a fair number of cases to work out in all of its implications.

With regard to your analysis of the opinion itself, I would note that Judge Wright tells us that the tenants claimed that there were over one thousand housing code defects in that single apartment house. Now, I think that it is just beyond belief that they all sprang up after the tenants moved in. Judge Wright knew that many of them must have existed before, and many of them must have been quite patent. But in the context of the law that he was concerned with at that time, it was easier for him to pretend that they all sprang up afterwards.

KOMESAR: I don't think *Javins* can be tamed in the manner suggested in the last two comments. In *Javins*, it is quite correct that rent abatement, the ability to set off, existed before the case. But I believe that before that case there was no implication that the housing code would define the amount of that set-off. And that holding in *Javins* is a significant implication.

I don't fully understand why the no-waiver provision isn't significant. That seems to me to be the most significant part of the decision. Existing judicial decisions had begun the idea of reading implications into leases. But in *Javins* the implication was a seventy page housing code document, and it would be nonwaivable, and that seems to me to be a significant step forward. Although this was dicta, if I were a lawyer in the District of Columbia, and I had to come up before Skelly Wright again, I would take that dicta quite seriously. So I don't think that, in fact, *Javins* can be so tamed.

FISCHEL: What Judge Wright accomplished with the *Javins* decision, at least as I understand it, is that he essentially put the tenants—he hoped poor tenants—in the position of the housing inspector. Now, in a number of instances, I have heard that housing inspectors collect side payments. They come and inspect the house, find a defect, tell the landlord and give a choice between injunction and damages, the damages going to him. The building inspector sets the rate in such a way that it is worthwhile for the landlord to pay the fine rather than fix the violation. Similarly tenants can go to their landlord and say, “Hey, I know you are violating the housing code. How about lowering the rent a little bit? Or how about doing something else for me? Or how about just being nice to me or not complaining when I miss a rent payment now and then”—or whatever. And, in that sense, we might say that we really haven’t had a revolution in landlord-tenant relations since the landlord is liable for the same kind of damages he was always liable for under a housing code. We have simply changed the nature of the party that gets the damages.

ARANSON: After *Javins* there was also a prisoners’ dilemma structure among all tenants. That is to say, if all of them agreed individually with the landlord to live in that substandard housing at lower costs, any one of them could chisel on the cartel by going to court, thus raising the rent of all the other tenants.

FISCHEL: Concerning common area problems, I think that does happen and that may be the one area where you want them to chisel, where in fact you want the injunction rather than the tenant being paid off, because there are other people involved. In these situations the landlord will find it profitable to eliminate the problem rather than to pay off.

KOMESAR: I think Professor Fischel is wrong because I don’t see that the housing inspector’s rights have been altered at all. After all, *Javins* didn’t say that now only tenants can enforce the housing code, if, indeed, they ever could enforce the housing code. It said in effect that both tenants and housing code inspectors can enforce the housing code. It sounds to me as though it just becomes more difficult to make a deal with anybody. The landlord, now faced with having to make so many arrangements, may just decide not to pay anybody.

GORSKY: One of the key elements of the *Javins* opinion is the eroding of the common law concept of the lease being a kind of real estate conveyance rather than a contract. In footnote 13 of his opinion, Judge Wright referred to the way in which landlord-tenant matters have been treated under civil law systems, and he noted that the lease was always viewed as a contract, and therefore would be interpreted as a contract would be

interpreted. In my judgment, that perspective has proved superior to that of the common law. And later in the opinion Judge Wright concluded that he would now treat the leasehold interest as a commodity, and he would therefore attach to it a warranty similar to the kind of warranty that one would attach to goods purchased from a merchant. Only thereafter does Judge Wright go on to ask what standard we will use for this warranty in the lease, and he then makes use of the D.C. Housing Code in the same manner that warranty provisions of the Uniform Commercial Code would be used in the sale of goods.

WILLIAMS: It would be a serious mistake to think that *Javins* actually involved application of contract law, particularly the law relevant to the sale of commodities. There are two implied warranties for commodities under the UCC. One of them is fitness for the purpose intended. That's a very narrow warranty that requires that there be some special selection by the vendor for the benefit of the purchaser. One would really be stretching a point to say that that has gone on in the landlord-tenant context. The other implied warranty is merchantability, and to apply that to a lease situation, which is really a sale of a series of services over a long period of time, one would have to ask what the series looked like on day one. But far from showing any interest in the nature of the premises on day one, Judge Wright very emphatically swept that under the rug. He simply states that there is no allegation that there were any defects at the beginning of the lease. If he were applying the UCC, he would be interested in getting the facts and would not be able to arrive at his decision until those facts were developed. His opinion just does not involve the application of contract law at all.

CUNNINGHAM: Let me say a little bit more about the cases and what actually happened with legal doctrine. The early cases, like *Pines v. Perssion*⁴ and *Lemle v. Breeden*⁵ did not involve poor tenants. *Pines* involved college students at the University of Wisconsin. Although there is no reason to think they were poor, the housing was kind of run down, which is often the case with student housing. Neither of those cases was truly revolutionary. They involved latent defects. They both involved a holding that the existence of these latent defects justified the tenant in terminating the lease and any further liability under it. That didn't really go very far beyond the old law. I think *Kline v. Burns*⁶ was the same kind of case. It wasn't until *Javins* that you get some real change in doctrine. As I read *Javins*, it says that it doesn't make any difference whether the defects in the premises are latent or patent. Moreover,

⁴ 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

⁵ 51 Hawaii 426, 462 P.2d 470 (1969).

⁶ 111 N.H. 87, 276 A.2d 248 (1971).

there was a continuing duty to maintain the premises in a state of repair based on existing housing code standards. The court also held that this implied warranty couldn't be waived. In other words, it was imposing a new duty by law which has nothing to do with contract really. Moreover, it does seem to me that Judge Wright was responding to a concrete situation with which he was familiar, namely the plight of largely black slum-dwelling inhabitants in the District of Columbia. I think that explains why his reaction went much further than that in any of these other cases.

However, I also think *Javins* is more important symbolically than actually because after *Javins* most of the change in the law came from legislation. If you look at it chronologically, Julian Levi and his group at the ABA Foundation produced a tentative draft of a model residential landlord and tenant code in either 1968 or 1969, a year or two before the *Javins* case. Their model code adopted two features that were picked up in *Javins* and then later included in the Uniform Residential Landlord and Tenant Act. Specifically, they put in a statutory warranty against both latent and patent defects, and a continuing duty to maintain the premises in a habitable condition. Unfortunately, the Model Code got very little publicity. *Javins*, on the other hand, was important at least in part simply because it got a lot of publicity; it was a bombshell at the time. Then two years later, the Commissioners on Uniform State Laws adopted an act that went somewhat beyond the model act produced by the ABA Foundation, and this Uniform Act largely codified *Javins*, but with a lot more detail. The number of states where we now have an implied warranty of habitability because the courts changed the law is relatively small. There are probably three or four times as many states where the change was made by statute, and the predominant factor there was the promulgation of this Uniform Residential Landlord and Tenant Act in 1972. That has formed at least a pattern for later legislative change.

Now, one thing that I do not know is the precise extent to which the Uniform Act tracks *Javins*. That is, the Act makes this new statutory warranty applicable across the board—single family home leases, multiple family dwelling unit leases, etc.—and this warranty, at least with respect to housing code standards, is made unwaivable. There is no distinction between latent and patent defects. Rent withholding is authorized, although the language is a little elliptical. The Act therefore contains in statutory form the whole panoply of new doctrinal ideas and new remedies from *Javins*. So while I would say *Javins* was revolutionary, in terms of effect throughout the country, it was somewhat aborted because the Uniform Act came in and the states practically fell over themselves over the next eight to ten years, adopting some form of it.

I also think that the people who promulgated the Uniform Act, and

probably Judge Wright, mainly had in mind a redistributive purpose, doing distributive justice as they saw it. I don't think in either case there was very much thought about economic efficiency. There was a certain tendency on the part of all the proponents of the implied or statutory warranty of habitability to think that there was such a thing as a free lunch and that it was going to be fairly easy to improve the condition of poor tenants by simply changing the case law or adopting legislation.

D. The Impact on the "Revolution" of the Kaiser Committee and Douglas Commission

ELLICKSON: I happen to have served on the staff of the Kaiser Committee. As with President Reagan's Commission on Housing, most Committee members were appointed to represent specific interest groups. There were representatives of the building trade unions, two bankers, the president of the National Association of Home Builders, two blacks, and so on. Basically, the Committee saw its role to be to increase the fraction of gross national product going into housing construction. As a staff member I had the sense that what we were doing wouldn't affect anything. I was startled to read Professor Rabin's statement that the Committee was actually pulling the puppet strings of national housing policy. I frankly think the Committee report came too late to have much of an impact on housing legislation.

MANDELKER: I think you undervalue the work of the committee. Your committee report established this notion of a goal of some twenty million units—something like ten million in ten years—which became part of the ongoing debate in housing for a long period of time.

WEICHER: I wanted to offer a footnote to Professor Rabin's discussion in his paper on the Douglas Commission and the Kaiser Committee. Professor Rabin points out that the data show steady improvement in housing quality over this period, even as everyone was talking about a crisis in housing. But at the time the Douglas Commission and Kaiser Committee were working, the latest data were five and six and seven years old. You only had the decennial census, and people were looking at it and trying to make guesses about what had happened since then. As it turned out, the projections that they offered for the magnitude of the housing problem in the next decade were shown to be quite high when the 1970 census came out, but no one then went back to refigure it. In the absence of data, what was driving the reform movement was a reaction to the civil rights movement, a belief that if we are having riots in Watts and elsewhere, we are having them partly because housing is bad. And if we are having riots now that we did not have before, housing must be getting worse. There was no very hard data at the time that these commissions were working. But there was a social phenomenon

that was thought by many people to be partly the result of the deterioration in the housing situation. And when data did later become available, no one went back to revise either the hypothesis or the policy. If you go through the congressional hearings on the 1968 Act, only two witnesses make any reference to the 26 million unit figure as a feature of the law at all. And only one member of either house says anything about it at all. No one else on either side was interested in that number or, as far as I can tell, thought it was anything more than something nice for the builders. And five years later Congress changed the terminology with which they surrounded that number so as to make it essentially meaningless. It was always ignored in policy. President Johnson set up a scale for reaching twenty-six million units in ten years which threw all the weight of the production in the later years long after he would be gone, as several members of his administration have said privately. Thereafter no one ever again paid much attention to that number, except the builders.

II

THE RELEVANCE OF NORMATIVE AND ECONOMIC THEORIES TO CHANGES IN LANDLORD-TENANT LAW

A. Rights, Liberty, and Redistribution

ARANSON: I would argue that changes in the law alone do not necessarily signify a revolution. Assume, for example, that we are concerned with a Posnerian judge who was faced with a set of cases over time that involved finding the least-cost accident avoider or a variant of that problem, and he started off by allocating liability to tenants, and then things change over the years perhaps because different kinds of habitations were being built, and in twenty years or so, he changed his mind and started allocating liability to landlords.

Now, would we call that a revolution? My tentative answer is no. While the judge may have changed the rule of liability, the function that produces the rule of liability hasn't changed, just the values of the variables. By contrast, a real revolution would have occurred if the judge had said somewhere along the line, "I am no longer interested in risk-bearing or risk-avoiding, I am interested in equity."

KMIEC: I think there has been a revolution, and I think the revolution relates directly to the point Professor Aranson has raised—the normative theory that is implied in this area. As I read Professor Rabin's discussion, I kept searching for the normative theory that was going to prevail in each particular area of landlord-tenant law. I think in many ways his summary suggests that he turns out to be a contractarian,

which may be a less reactionary word than "libertarian." However, in many cases the two terms turn out to mean much the same thing in the sense that if people are viewed as having certain valid property rights to begin with, then they have the right to make contracts with respect to those rights. Professor Rabin seems to be a contractarian primarily with respect to implied-in-fact warranties upholding the intent of the parties. With respect to an interest in human freedom, that's a very valid outcome, because it enhances the capability of individuals to seek an arrangement that moves toward autonomy and freedom.

Regarding other issues discussed by Professor Rabin, however, I am rather confused and troubled because there seems to be a more egalitarian focus in his paper. For example, with respect to exculpatory clauses and waivers of such clauses, even where the intent of the parties is clear, and hence freedom has been exercised, Professor Rabin seems to be socially troubled. He concludes that the courts in those situations have the authority to announce that the parties did not really intend that result, and therefore, we—for egalitarian or social purposes—will not allow parties to make these agreements. Moreover, there is a Posnerian flavor in part of Professor Rabin's reasoning as well in situations where, although the intent of the parties is clear, the courts, following Judge Posner's reasoning, disallow that intent because they believe it is uneconomic or inefficient. In this category, one would put rent control, the condominium conversion prohibitions, and the implied-in-law warranties. Here, in other words, we are not going to allow individual freedom because notions of good economics and wealth maximization supersede freedom in that context.

I am troubled as we move away from the contractarian and individual freedom model into either the egalitarian or Posnerian models largely because I am not particularly confident that courts have the ability to make those egalitarian or Posnerian judgments. I am not sure these judgments rest on any notion of property rights or an any analytic or philosophic conception of constitutional rights that may have preexisted the decision. I think that it does ignore, as Professor Komesar points out, the institutional variances and capabilities among judges, legislatures, and the executive branch. Moreover, I think there are inherent contradictions between the egalitarian and Posnerian positions that should force us to make specific choices. But at the end of Professor Rabin's paper there is the statement that perhaps we should tolerate antidiscrimination provisions, for example, not on economic grounds, but for noneconomic, apparently egalitarian, reasons. This suggests that we are just picking and choosing our normative theory as we go along, whereas if we were going to be consistent Posnerians, we would recognize that, in fact, antidiscrimination provisions against families with children, for example, are much like rent control provisions: they end

up disfavoring landlords and prospective tenants without families in favor of the economic interests of tenants with children. So in my view there has indeed been a revolution, one that is part of a continuum from property to contract to status which reflects an underlying willingness to jettison, too cavalierly for my tastes, the normative theories that underlie the property rights and libertarian notions of freedom.

GOETZ: I think I may be a contractarian; at least I take an instrumentalist view of society: the state exists to give people what they want. But I guess I am not a libertarian, if what that means is that we must always defer to the kinds of contracts that individuals make. One purpose of the state, or one example of its instrumental character, is to give people those things that cannot be obtained through private contract. Therefore, various kinds of egalitarian provisions—perhaps antidiscrimination provisions, charitably interpreted in some instances—can be viewed as increasing the amount of liberty that people have, or at least allowing them to get to goals that cannot otherwise be achieved. Of course the difficulty with using the state in this apparently “positive” manner is that you have to take the bitter with the better: that is, part of the price of using the state as an instrument is that there may be oppression and loss of liberty around the edges. And this applies to law made either by a court or a legislature. But when the legislature is, in my opinion, wrong-headed, I have less objection to the legislature making the mistake than to courts making it. My view is that the courts ought to be operating in a gap-filling fashion.

KOMESAR: I am led to wonder whether when we say that there is, or ought to be, some normative theory expressed or at work in this area, we are really expressing a sense of a long range goal, whether contractarian or egalitarian or wealth maximization. But that doesn't really tell me very much in terms of analyzing the law. The statement of the goal tells me something that I need to know, but it is only a basic first step. For example, one thing that concerns me is this: If we were to ask whether a given judicial decision is consistent with any of those final goals, would we be asking whether the judge was in fact concerned with contractarian principles or would we be asking whether what he did was consistent with contractarian principles? I find the second more interesting, and Professor Kmiec did note his perception that reliance on the market was more consistent with contractarian principles. But I would stress that that is a choice of and among imperfect institutions. I don't think that it is crystal clear that that would always be the case were our goal to maximize contractarian principles, nor do I think that reliance on the market is inconsistent with the achievement of the goal of egalitarianism. The correlation between institutions and goals is not as clear as many people seem to think it is.

TERRELL: The questions that are being raised here concern issues of right and wrong, and the underlying assumption of so much of economic analysis is that there is a correlation between efficiency and correctness, and inefficiency and wrongness. That is, there is an unstated premise that there is a connection between the descriptive world of economics and normative judgments. But while a Posnerian analysis may tend to blur this distinction, the contractarian position is also in need of deeper investigation. For example, the remarks of Professor Kmiec seemed to suggest that there is an independent, fundamental, philosophical justification for private property that could call into question the use of economic efficiency itself as a goal to be pursued by the courts or legislatures. That position, however, would require a deep working out of the issue of private property itself, and that has not been done at this conference, nor is it on the agenda. For example, the notion of sharing could be found to be as fundamental to the concept of property as are notions of exclusivity or "privateness," and if so, that would suggest that there would be substantial philosophical justification for various kinds of welfare programs. In the context of landlord-tenant relationships, such an investigation would have much to say about what each party could be said to "own," and therefore about what the contract between landlord and tenant could be about.

I would also disagree rather strenuously with the point made by Neil Komesar that all of this normative theory stuff is simply talk about long range goals. I would argue that there are distinct differences between goal-based political theories on the one hand, like economic efficiency, and rights-based political theories on the other hand, like contractarianism. These two types of theories do share the characteristic of having an "aim" or "purpose" in the most general sense, but their priorities are vastly different. A goal-based theory places rights in a secondary, derivative position—for example, under the goal of maximizing wealth you have only those rights that will lead to achievement of that goal. Under a rights-based theory, rights are primary and goals are secondary. Using the example of contractarianism that has been raised, the rights associated with entering into and enforcing contracts are sacrosanct, while the impact of those rights on efficiency is not of key importance. The particular set of rights chosen dictate, in a sense, the extent to which economic efficiency will matter.

These issues do not seem to be of primary concern to this conference's task of analyzing the trends in landlord-tenant law, but they are important nevertheless as a separate issue underlying the discussion of economic efficiency itself.

KOMESAR: I did not claim that the sole purpose here was to discuss economic efficiency. My paper suggested that if we were to take the goals as articulated in the landlord-tenant area, then redistribution of

income seems to be one of them. My purpose is not to isolate any particular goal or system of normative judgments about rights; rather, I am interested in assessing the validity of past and future changes in the law. To do that, we need a bridge between any normative theory and those assessments of the law.

GOETZ: I do not have any difficulty with Professor Terrell's assertion that economic efficiency is not the entire substance of what is right and wrong. But when you say that it has nothing to do with what is right and wrong, we part company. Moreover, I always have difficulty with notions that meaningful analyses can be done in a system in which all you are trying to do is "maximize rights." It turns out that when we attempt to specify them, rights often wind up being in conflict. Therefore, one of the very next issues you confront is what kinds of trade-offs are to be made between rights, and this is precisely what economic analysis is about. If you tell me what your value system is, including the rights that you want to maximize in some way, and you explain to me articulately whether and to what extent you are willing to trade off one right for the other, then we are back in an efficiency analysis that is appropriate for the analytic tools of economics.

OLSEN: Regarding the desirability of efficiency, my view is that inefficiency is unambiguously bad, and that conclusion follows just from the economic definition of efficiency. To say that an allocation of resources is inefficient is to say that it is feasible to make everyone better off. And I think that to fail to make everyone better off when that is possible is unambiguously bad.

MCCLOSKEY: I would just emphasize that, of course, if everyone unanimously agrees that the position they are about to come into is superior, then most of us would accept that we are better off and that the position is desirable. But if there is one person who objects, and he isn't compensated, then I would say that there is no longer a moral justification for making the move. That is, efficiency in the Hicks-Kaldor sense of potential compensation for a hurt from an efficient move is unpersuasive, I think, on moral grounds.

BLOCK: With regard to the separate theories that have been mentioned—contractarianism, egalitarianism, and wealth maximization—I would argue that the contractarian or the liberty-oriented philosophy will lead better to wealth maximization than the explicit Posnerian theory of wealth-maximization via central planning through the courts. I would defend the extreme position that not only is there a correlation between that which is efficient or wealth maximizing and that which is right; I would say that I have never seen any divergence from this corre-

lation. I can't think of a more explicit case of denial of liberty than the compulsion to deal with people against one's will. And this holds for any of the usual criteria: race, sex, national origin, sexual preference, and so on. As long as you don't coerce such "minorities" or initiate force against them, but instead just refuse to deal with them for any reason, you have not violated their rights. Being allowed to discriminate is what liberty is all about; at least it is an important part of liberty. Certainly, the works of Thomas Sowell and Walter Williams have indicated a correlation between liberty on the one hand and welfare for blacks and other minorities on the other.

Now let me address the idea of sharing that Professor Terrell raised. I suggest that private property is antecedent to the question of sharing. Surely we have to distinguish between voluntary sharing and forced sharing, where the latter is merely plunder. Sharing seems to me to be secondary because as long as people are not forced to share, they can do so with their own rightfully owned property. So establishing exactly what is rightfully owned property, and what is not, must logically be determined before the question of voluntary sharing can even arise.

As an example of what I am concerned about, I am not at all happy with Lawrence Friedman's treatment of the phenomenon of the depersonalization of the landlord-tenant relationship. I appreciate the fact that he is both reporting and analyzing. Nevertheless, he seems to make a distinction where I don't think any distinction is valid. To me, liberty is indivisible. If there is liberty for an individual, such as a small landlord living in a two-story home, then there ought to be liberty for a person who has bought a fifty story building. I don't see any distinction at all on that basis. Professor Friedman tries to convince us of such a distinction by resort to examples like babysitters versus hiring for other jobs, or inviting a white person or black person to dinner in your own home versus in a restaurant, but I am completely unconvinced by all of that. As far as I am concerned, there are no public restaurants, there are only private restaurants that the government has said shall be open to the public. If individuals have a liberty of association, this liberty of association should transcend the size of the individual's holdings or how many people they interact with because, ultimately, you can only deal with one person at a time. And if you have a fifty story apartment house, you are merely dealing with 500 people one at a time, instead of with only one person. But the principle should be invariant.

KMIEC: I share Professor Block's belief that the principle of liberty ought to be invariant. Some have argued that those things that are more remote and depersonalized, and larger and more commercial in nature, are not worthy of protection. I think this is a distinction that is totally and philosophically untenable. Nevertheless, I think that it does mirror what has happened as we have gone from private property rights

to this concept of “new” property, which is of course nothing more than old property following redistribution. Therefore, I think that Professor Friedman’s discussion of the depersonalization of the landlord-tenant relationship, while troubling philosophically, is nevertheless a helpful descriptive device.

BLOCK: Another general issue that is often raised in the context of legal protections intended for the protection of indigents is the concept of “market failure.” For example, some of our discussion has suggested, perhaps, some relationship between information costs and market failure. I find no more relationship here than exists between market failure and the cost of wood or the cost of chalk or blackboards, or the cost of anything else. I don’t see why, from the fact that information is an economic good, i.e., that it has a cost, that this implies market failure.

In addition, I see no relationship between market failure and so-called unequal bargaining power. It seems to me that for a price, people who are poor can get any clause in a lease that they want if they are willing to pay for it. Nor do I see external economies, either of a positive sort or a negative sort, as a market failure. For example, miniskirts impose a positive external economy on people who like to look at women in miniskirts. Why is this a problem? Should the government intervene here and subsidize miniskirt wearing and tax other people? In the case of external diseconomies, we must distinguish between violations of property rights—for example, crime, trespass, pollution—and other kinds of diseconomies. For example, prejudiced people might have a diseconomy because of the existence of blacks or Jews. Or prudes might have a diseconomy imposed on them because of the existence of, say, pornography or prostitution. But it would be completely unjustified, on this ground, for the government to prohibit blacks or prostitution, Jews or pornography. Cases involving violations of property rights are legitimate for our concern with liberty, while the other sorts of cases are irrelevant, not only for our concern with liberty, but for a clear understanding of what that market failure is. The existence of a black person or pornography is not a market failure. And, yet, this is the logical implication of this “externalities” philosophy.

KOMESAR: It will probably take another conference to answer that. I think the problem with the term “market failure” is that the word “failure” is of very little use. But it is true, whether it is information cost or the cost of chalk or the cost of blackboards or anything else, that costs are costs. What we are really concerned about is whether there is an alternative means of achieving the same end goal by another mechanism, whether it is called the market or the nonmarket, or whether it is called the *X* firm or the *Y* firm within the market. In other words, is there another mechanism for achieving the end goals associated with

these bargaining circumstances besides the bargaining situation? That's the issue raised by information costs in this context.

MUTH: I think we are arguing about something that is really very important and fundamental, namely, to what extent do we as a society wish to interfere with individual freedom to achieve so-called Pareto optimality, to use the economist's word. One of my favorite examples: Suppose I like to eat spinach, but this makes other people sick. Should I be prohibited from eating spinach in a restaurant? I don't think so. But if you follow the logic of much economic analysis in this area, you are led to the conclusion, "Yes, you should." It is a very real and difficult question how far you want to go in this direction.

B. Goal-Achievement as a Normative Theory

RABIN: I think we need to make explicit the connection between this discussion of philosophy or rights and the question of evaluating the desirability of changes in the law of landlord and tenant. We have had a fair amount of discussion that points out that you can start with different philosophical premises. The question becomes, What are you trying to do: maximize wealth, maximize liberty, redistribute wealth? We could apply all or any one of these particular criteria to judge desirability, but I think it is useful to ask a more limited question: Did the change in the law achieve its ostensible aim—that is, did it further the welfare of tenants, primarily poor tenants? To answer that question, you don't really have to go into deep theories of private property or economic analysis. It is a much more descriptive inquiry. I favor the position that in most instances the welfare of poor tenants would be promoted if we enforced the real contract of the parties rather than imposing a contract that they never made. I did part company with that position when I was talking about antidiscrimination laws because those laws were not passed to create more housing; instead, their goals were quite different and in fact I think they were largely successful. In that sense, then, I favor the antidiscrimination laws, because I think they achieved their goals, while I am against, for example, the strong implied warranty of habitability not based on a true agreement, because I don't think it fulfills its purported goal of creating more and better housing for people who need legal protection.

HIRSCH: I am nonplussed by this idea that all of the landlord-tenant relation laws, other than antidiscrimination, are designed to create housing. It seems to me that what we have been saying most of the time, particularly insofar as court-made laws are concerned, is that they are designed to redistribute wealth rather than to create new housing.

III

ON THE ADEQUACY OF ECONOMETRIC MODELING AND
ANALYSIS IN THE LANDLORD-TENANT AREAA. Some Comments on the Work Summarized in Professor
Werner Hirsch's Paper

HIRSCH: In a nutshell, using 1976 as the year for which we have done the work, as far as all indigent tenants are concerned, the receivership laws are counterproductive in that they have a largely negative effect on tenants. And that holds particularly for black tenants, but it does not hold for senior citizens. If you ask, however, a slightly different question—What have receivership laws done for us lately in terms of reducing the dilapidated housing over time?—you end up with a positive answer. As one would expect, those states that have receivership laws were able disproportionately to reduce the amount of substandard housing, *ceteris paribus*.

1. *Preferences, Economics, and Rights: Housing and the Aged*

BLOCK: Concerning Professor Hirsch's work, I am perturbed by the following point. Milton Friedman in his book *Capitalism and Freedom* talks about Volkswagen health care and Cadillac health care. I suppose we could borrow a leaf from him and talk about Volkswagen and Cadillac apartments. But implied warranties of habitability and receivership laws discourage the creation and retention of Volkswagen apartments. If, *ceteris paribus*, receivership laws indeed lead to a reduction in substandard housing, we cannot thereby deduce an improvement in economic welfare. Rather, we must deduce a *diminution*, because some people, who in their own minds had no better opportunities than Volkswagen apartments, are now being forced into Buick apartments or something slightly better, and consequently being forced to pay high rents. But if they regarded Volkswagen apartments at low prices as preferred to Buick dwellings at medium rentals—and this is the only interpretation consistent with their own actions—such legislation will harm them.

MCCLOSKEY: I too would like to quarrel some with Professor Hirsch's interesting paper. The particular point of my quarrel is where he announces that for old people it may be that habitability laws and other tenant protections are not counterproductive. The trouble I have with that is that my presumption is that if making the quality of the house better for old indigent people would have been profitable it would have been done without the impositions of the law. To accept Professor Hirsch's econometric results one would have to suppose that the landlord didn't know that these old poor tenants would be willing to pay more for a somewhat more habitable apartment, or that the tenants

themselves didn't understand their own preferences, or perhaps that everybody is ignorant of certain externalities. I am, therefore, very doubtful of the econometric findings in favor of these laws. They don't square with my conception of how profit-seeking landlords would behave in the housing market.

MARGOLIS: If we regard these tenant-protection laws as shifting the demand curve, what we are saying is that somehow people preferred a contract that was just too costly for them to negotiate, that they preferred some assurances that certain things would be delivered, and though they would be willing to pay the cost of these assurances, the private costs of contractual innovation were too high. So it wasn't a matter of people preferring to buy Volkswagens and being forced to buy Cadillacs, but rather, people preferring to buy Volkswagens with air conditioning along with guarantees that the air conditioning will be there. Let us imagine that there's no way that I can write a contract like that, that the courts will enforce. From such a starting point, there is the possibility that legal innovation would increase wealth. Now, that might strike you as silly, that in fact, there's no problem; you just write guarantees into the contract, and they are enforceable. But this is the sort of interpretation you must use if the tenant protections are conceivably advantageous innovations at all. That is, that there were costs of contracts that have been diminished.

Regarding Professor McCloskey's comments, there is an attempt in this empirical work to control for the amount of housing consumed. So it is not simply that these old people ended up buying bigger bundles of housing. It is that for a given sized bundle, somehow they value it more highly than before, perhaps because they have more reason to expect that the apartment will remain in good condition, that if certain things break, they will be taken care of.

The empirical work of trying to control for what is in the bundle is very difficult. Professor Hirsch's paper talked about the "hedonic" approach. I think the hedonic approach is still in an embryonic state, and we should be careful about putting a lot of faith in the results that come out of it.

HIRSCH: If you look at the supply function of senior citizens for housing, they have some characteristics that are very different from the rest of the population. Insofar as a landlord is concerned, as he looks at aged tenants, he finds that they prefer relatively stable occupancy, they make little noise, they have low repair costs and maintenance costs, and there is a relatively low risk of payment delinquency. Now, that really means that the supply function is lower than, let's say, for young blacks. Therefore, the imposition of a receivership law will lead to a smaller vertical shift of the supply function of aged tenants compared to young blacks.

MCCLOSKEY: You mean it will raise the price of servicing old people by less than servicing young blacks?

HIRSCH: Right.

MCCLOSKEY: Why wouldn't it be to the advantage of the landlord to improve the property anyway?

ARANSON: It seems to me that when people build houses, except in Florida and other such places, they don't say: "This apartment house is to rent to senior citizens, and this is to rent to the youthful poor." If an area's population is heterogeneous and some thinning of the aged population occurs, you may be set up for a situation in which, recognizing the market forces that you are suggesting, you improve the property in contemplation of having aged people move in, and you end up with the youthful poor instead. The logical implication is that you would never have made the improvement in the first place; and so part of the explanation, although I don't have much faith in it, may be that the market will not work very well simply because the landlord does not have a full expectation of recouping those expenditures.

MCCLOSKEY: You mean he is, as it were, in a common carrier position.

ARANSON: Yes, he has to accept anybody. If he could discriminate, the market would work, but other laws do not permit discrimination.

BLOCK: On the receivership laws, I am in complete agreement with Professor McCloskey's criticism of Professor Hirsch's view that reducing an option for aged and indigent people can help them. No matter what, if you hold everything else constant, and you just take one option away from people—Volkswagen housing—you have reduced their options; you have made them worse off. So I cannot have much faith in econometric findings that purport to show the opposite of that.

However, with regard to several other points, I must disagree. Professor McCloskey seemed to say that this finding only holds if there is full information, and Professor Margolis said in effect, that it only holds if there are no costs of contracting. I think both of these are unfortunate distillations from the model of economics called "perfect competition" that has been plaguing our profession for many years. I don't believe that a market's failure to live up to the perfectly competitive model of full information, etc., is at all relevant. For example, with regard to Professor Margolis's comment, I fail to see how the lack of full information or existence of contracting costs or any other of these deviations from perfect competition can get around the point that when an option is taken away from people, their welfare can't possibly be improved thereby.

MARGOLIS: To accept my argument, you need not assume that there are small transacting costs. What I said was that there was at least the conceptual possibility that the costs of transacting were so high that you couldn't bring about the contract that you wanted, and that therefore some judicial intervention might conceivably reduce contracting costs.

MUTH: With respect to the indigent aged, I think one has to draw a distinction between people who are simply old and have low money incomes currently, and people who are both old and poor. One of the things about housing demand is that people's housing depends upon some measure of permanent or lifetime incomes as opposed to what they currently happen to be receiving in the form of income receipts. It may well be that those people who appear to be poor are not really poor, if you measure their income correctly. Indeed, they are already in a position where what the habitability laws supply them is just what they are willing to pay for them. They are not really poor in the sense that, say, certain minority groups on the average are poor.

BUTLER: It seems to me there may be a transactions costs phenomenon at work, in that the aged poor may be less interested in having their own unit fixed up than in having the entire apartment building fixed up. The latter should entail the need for higher building-wide rents; and hence troublesome elements would be less able to live there and the tenant premises would be more secure and more attractive to boot. In short, the aged poor, as opposed to the youthful poor, are likely to be more interested in that corporate phenomenon of enhanced overall security and appearance.

Professor Hirsch establishes that for poor blacks the upward shift of the supply curve for improved units was three and a half times the size of the outward shift of the demand curve for that group, and you also point out that, and I quote, "consumer surplus, i.e., the gap between total utility and total market value," has been reduced for that group. The inference from such analysis seems to be that total social welfare is diminished. But as for the first analysis of the relative shift in the curves, one can make the argument—on the basis of the diminishing marginal utility of wealth—that the extra dollar that this poor black person is being asked to pay for these improved premises is actually worth three and a half times more to that person than the one dollar of expense is worth to the landlord who incurred it in improving the premises and is trying to pass it on to the tenant. And if the demand curve is highly elastic, the landlord will be forced to absorb most of the added expense so that *true* overall welfare is arguably enhanced—especially since the demand curve doesn't take into adequate account third party effects on children. But I am also troubled by your use of the term "total ability and willingness to pay," and then your failure to address the relevance

of the marginal utility of money in the context of an individual's own private calculus. The apparent diminution in the consumer surplus of an individual on both the pre- and post-improvement equilibrium curves derives from comparing a smaller increase in marginal units of utility with a larger increase in inframarginal units of costs. But arguably that is comparing apples and oranges. The willingness to pay your last \$10 for improved housing doesn't mean you aren't better off when told that the new equilibrium point between supply and demand allows you to keep that last \$10 and requires only that you pay \$15 more in inframarginal units for the same improvements. And, you ask, if he is truly better off why didn't he purchase those extra improvements voluntarily under the old equilibrium? Arguably because the free-rider effects he now enjoys from the corporate benefits of forced building-wide improvements weren't available before.

2. *Econometrics and "Legal" Data*

ELLICKSON: I have questions about Professor Hirsch's data. He faced the difficult problem of quantifying the legal environment in a state, and attempted to solve it by looking for the presence or absence of a certain statute. The first problem with this approach is that statutes have lots of nuances. The implied warranty of habitability doctrine in New Hampshire is a good example. That state has such a doctrine but the measure of damages is the difference between the contract rent and the fair rental value of the premises. If one looks at this formula carefully, it essentially allows the tenant to waive the implied warranty of habitability by agreeing to a low contract rent. Second, a law may have real teeth, but, for a variety of reasons, almost never be enforced. Yet despite difficulties of interpretation and enforcement, the announced existence of the rule is the only "fact" counted in this form of econometric study.

CUNNINGHAM: Just to pick up on this point, Michigan has had a receivership law for at least fifteen years, enacted quite early, about 1964 or '65; but as far as I know, it has almost never been used. So any correlation that you might believe that you found between the existence of the law in Michigan and what happened to the housing supply would, I think, be very untrustworthy.

B. The Adequacy of Bureau of Labor Statistics Data

MARGOLIS: Professor Rabin makes some observations that seem surprising. For example, after the introduction of tenant protections, rent for units that are substandard decline, which is contrary to the expectations that we might have formed and contrary to what he identifies as the mainstream. I just want to suggest that the kinds of houses whose prices would have risen would be the houses at the very bottom of the housing

spectrum, the worst stuff. It is above this very low level house for which these legal innovations would have some effect. When you recognize that, several of the observations that you make begin to fall into place in a slightly different light.

MUTH: The Bureau of Labor Statistics [(BLS)] does not price only a single standard house or standard apartment. What the BLS does is collect rental information (or changes in rental information, really) on a wide variety of different kinds of dwelling units. The overall index that comes out of the weighted average of all these presumably applies to both very poor and very good dwellings.

MARGOLIS: But isn't the sample urban wage earners, and wouldn't we want to exclude them, most likely, from the very poor people who are likely to be in very bad units?

MUTH: There are two separate indices. There is one for urban housing in general, which I think is the one more commonly used. But there is also another one for urban wage earners. Essentially, the differences are in the weights that are implied, not the data that are collected.

WEICHER: The BLS rental index was based on a sample of units that was originally collected shortly after the war and that was very seldom updated and was very heavily biased toward the bottom end of the rental and, presumably, the quality distribution. This was in the CPI for wage earners up to about 1975, when they finally got a better sample. Unfortunately, that improvement in data was introduced at about the time that some of these legal reforms were starting to bite and we would then get a new sample of data. But up until about 1975, the rental index was heavily oriented toward the central city, toward the bottom end of the rent distribution in the central city, and it is a sample that is diminishing over time because some of those units are dropping out of the stock and not being replaced very systematically. So for what it is worth, and as far as that data series goes, it is more or less relevant to the issue that is being raised here. But it is lousy data.

C. The Use and Abuse of Vacancy Rates in the Analysis of Housing Market Conditions

MUTH: I am in general agreement with the main point of Professor Rabin's analysis of vacancy rates. For a long time there has been a gross misunderstanding that these rates are somehow an indication of the tightness or slackness in the housing market. For example, I looked up some numbers in Houston, Texas: in 1970, the vacancy rate for all housing was 8.5% and in 1980, it was 11.4%. At first glance, this seems incredible. Houston has been one of the most rapidly growing areas in

this country. You would think that housing markets would therefore be tight. The reason that vacancy rates do not reflect this tightness is that vacancy essentially measures the degree of turnover rather than excess stock in exactly the same way that unemployment rates are associated principally with job turnover—entering and leaving the labor force and so forth—rather than, necessarily, with a Marxian pool of unemployed.

It is by no means clear to me even that vacancy rates really did decline during the seventies. One reason you might expect a decline in vacancy rates is, of course, the introduction of rent controls. In 1950, vacancy rates were on the order of one percent in many cities, and that was principally because of the hangover of rent controls from World War II.

NOURSE: Historically, during the 1960s and 1970s, in the inner cities where most low income families were, there was certainly a surplus of housing because this was the period of abandonment. And what you are not going to find in your vacancy statistics is the fact that there was a surplus hanging over the market. But it was shown by the number of houses being demolished. If you had tried to put into effect these landlord-tenant reforms back in the 1950s, there would have been a terrible problem because there wouldn't have been places for people to go; whereas, in the 1970s, there was this surplus, and the landlord was in a much weaker bargaining position relative to the tenant.

FISCHEL: Dick Muth saw an analogy between vacancy rates and unemployment rates. If there is an analogy, it seems that we ought to pay more attention to vacancy rates than he and Professor Rabin suggest. Surely *changes* in unemployment rates have something to do with the tightness of the labor market, although I do recognize that there are secular changes that relate to changing labor market conditions.

BENDER: You could look at the vacancy rate somewhat like the fictional unemployment rate. Furthermore, there has been some evidence that the natural rate of unemployment has grown with the expansion of unemployment insurance benefits. You could therefore draw an analogy and say that the vacancy rate would go down if you were effectively taxing the returns on rental housing. The right-hand tail of the distribution of rental prices facing landlords is truncated, thereby reducing the landlord's expected marginal benefit of searching for a higher rental price. In fact, we interpret rent control as having effects similar to such a tax.

ELICKSON: During economic recessions there is a downward stickiness in wages. This poses a puzzle in economic theory: Why don't labor markets clear? Why don't wages fall instead of unemployment rates

rise? Rental housing markets seem to exhibit an analogous phenomenon: an upward stickiness in rents during inflationary times or during other times when landlords could raise rents. Landlords who have long-term relationships with tenant households seem to be reluctant to exploit, in the short-term anyway, their economic advantage, just as employers are reluctant to reduce wages when unemployment rates rise. The literature on the downward stickiness of wages might help us understand the upward stickiness of rents.

FISCHEL: We may encounter a countervailing process: You lower the price, which, *ceteris paribus*, should decrease the vacancy rate, but at the same time the reason you are lowering the price is so you can be more selective, which may increase the vacancy rate.

RABIN: I don't think the market works that way, and here I draw mostly from my own experiences as a very small landlord. What happens is that if you ask top dollar for rents, it takes a long time before you find that one person out there who is willing to pay the outrageous rent that you are asking. You end up holding on to the vacant apartment for awhile until you get the one person whose needs exactly match that apartment. But if you lower the rents, you sell the product faster, like holding a clearance sale. So if you advertise lower rents, you get many applicants, and it doesn't take very long to sort out the one you want, especially if you do it partly on intuition. So I think the effect of lowering the rents is to lower the vacancy rates rather than to present you with this difficult problem of selecting the right tenant, which would take a long time and increase vacancy rates.

BUTLER: I understood Professor Rabin to make a comparison between the decline in the vacancy rate and the counterintuitive decline in rents as they relate to the Consumer Price Index over the decade of the seventies. (The CPI went up 87%, and gross rent only 81%.) And I think that discrepancy motivated some of Professor Rabin's hypothesizing. I was curious, though, why he omitted from his discussion of alternative explanations any consideration of the effect of rent control—especially since he says in the paper that during the seventies a substantial percentage of the nation's multifamily rental housing stock was subjected to rent control. Wouldn't rent control explain some of that small failure of rents to keep up with the CPI during that decade? As a result of rent controls those in the rental spaces would tend to occupy more space, which was one of the phenomena Professor Rabin pointed out. Also, rent controls would make the uncontrolled units more expensive, which would fuel the diversion into the housing market that Professor Rabin noted.

RABIN: Your observations could be correct. I guess I was more strongly

influenced by the literature that I read that wealthy tenants were fleeing and that landlords were therefore left with poor tenants which had a severe depressing effect on rents. That there was also rent control during that period also must have depressed rents. I have no way of measuring which was more important.

WEICHER: As part of a larger project that we did a couple of years ago at the Urban Institute, we found that the vacancy rate is higher in a place where there has been a lot of recent new construction, because some of those units are available for rent at the moment, and they haven't been absorbed. But that is obviously a short-term phenomenon and doesn't tell you much cross sectionally.

The impact of rent control suggested by Professor Butler doesn't happen to be borne out by the work we did. In general, I think Professor Rabin's conclusions are absolutely on target. The vacancy rate is not a useful indicator for any of the things that he has been trying to study in the housing market. It doesn't seem to explain anything, and nothing seems to explain it. But it is used all the time. It is one of the standard indicators of housing market tightness, looseness, conditions—what you will. For example, at the moment, the rental vacancy rate is going up as rents are going up in real terms and as rental construction is beginning to turn up a little bit. And we have just gone through a period in which the vacancy rate was at a historic low, rents were very flat, and nobody was building anything.

NOURSE: In the 1930s at Columbia they did work on a housing project. The study showed that at that time when the market was falling apart, rent stayed constant as vacancy rates were rising dramatically. And you can just anticipate when the landlord is thinking: "I don't anticipate this is going to last long. Why rent at the lower rate, when I might be able to absorb these units at future higher rates?" And this relates to the point Professor Weicher was making: the vacancy rate is high when new units are just coming into the market. Although apartments are vacant, the landlord does not want to drop the rent in order to fill them when he anticipates that within another year he will have them all filled at present or higher rates.

Rents stayed relatively constant until somewhere in the mid-thirties when things started to turn around. Rents dropped a shade, and then as the vacancy rate started to fall, rents stayed down relatively constant for a long time. Then as we progress into World War II and the post-War period, rents started shooting up as we got up to 95%, 96%, 97% occupancy rates, and we experienced inflation and the other factors that have been mentioned.

MUTH: There is a fairly strong relation, at least among large cities, be-

tween population growth rates and vacancy rate. Now, this is for all housing, not just for rental housing. It is partly the phenomenon that Professor Nourse mentioned concerning the owner of new units delaying in filling them. But there is also a relatively high degree of population turnover. When people first arrive in a new area, they move more frequently, in part because they may change jobs more frequently than people who have lived in the area a long time.

But at the same time, vacancy rates are not a very useful indicator because when they reflect these processes of market adjustment, they relate to the dynamic properties of markets, not their equilibrium properties. These dynamic properties haven't really been studied very carefully.

RABIN: I get the impression from these comments that various people think that I was saying in my paper that vacancy rates don't tell us anything about anything. I don't believe that. I think that they are very helpful in telling us where rents are going to go. That is, if you have low vacancy rates, that enables you to predict higher rents. But my point is that that doesn't tell us anything about how well people are housed.

MUTH: Again, what you mean is higher rents relative to what would be an equilibrium. But you can have vastly different equilibrium rents.

MANDELKER: I just don't find the vacancy rate analysis helpful in this context at all. I think that the two-way correlations Professor Rabin has used are too simple, statistically, for the problem. My general feeling is that there were so many structural changes in the rental market during the sixties and seventies that trying to apply an equilibrium analysis of this kind just isn't sensible. For example, I know you have seen Sternlieb's work on some of this, but in addition to the flight of the wealthier tenants into owner occupancy housing, income increases began stagnating in the mid-1970s, which particularly affected those groups that were left in the rental stock. In addition, when we attempted to carry out in St. Louis a study of the impact of occupancy permit requirements and code enforcement on housing prices and on rents, the analysis was swamped by the changes in price levels that were triggered by the energy crisis. That single factor so swamped the regression that we couldn't get any meaningful results.

IV

THE SCOPE OF THE "REVOLUTION": THE IMPACT OF
CHANGES IN VARIOUS AREAS OF LANDLORD-
TENANT LAWA. The Nature, Origin, and Impact of Housing Codes on Housing
and Neighborhood Quality

KOMESAR: The housing code is intended to do more than protect tenants. The housing code is supposed to protect neighborhoods and even entire cities. In addition, on a more cynical level, housing codes contain—or at least building codes attached to the housing codes contain—provisions that have been placed there by special interest groups. Therefore, some of the enforcement is associated with promoting particular labor or product interests. Under those circumstances, to employ private contracts to enforce that code, rather than putting funds into public enforcement, may seem all right, except that it has some odd, quite unfortunate, quite unfair distributional results to the extent that the costs are borne by low income tenants who pay for the enforcement of a code for which they are only, even in theory, partial beneficiaries, and in practice perhaps very low beneficiaries.

RABIN: Professor Komesar raises an interesting point concerning externalities. If the code is not designed primarily to help tenants but to help people nearby, neighborhoods, or whole cities, then you can make a good argument that whether the tenant agrees with its enforcement or not is beside the point. He shouldn't be allowed to agree *not* to have it enforced because by agreeing to live in unhealthy premises he is injuring his neighbor by possibly spreading disease or fire or whatever. There was little evidence showing that relatively small violations have any neighborhood effects, that is, any negative externalities. But that is a rather weak way of putting it because it doesn't prove that there aren't any negative externalities.

FRIEDMAN: The question of housing codes is very interesting. There are two situations that you have to distinguish. One situation is a really horrible, festering slum in which not a single building for blocks around meets the housing code. This situation lends propaganda to the movement for housing codes, but is not really important in the *enforcement* of housing codes. Then there is the other situation: a neighborhood is middle class or lower middle class, and one building starts running down. The housing code potentially has the same effect that a covenant running with the land has in a subdivision—that is, the neighbors start complaining because they see that this deterioration has an impact on them.

A second point about the codes is this: while units are rented by

individuals, most units have families in them. And families include small children. There is an argument that they need some protection, and that the contractual decisions of parents is not enough.

I would also like to make another point about housing codes that is, in some ways, more cynical. A housing code, as I argued once in print, is a marvelous solution to a political problem. The political problem stems from the slums and the widespread, diffuse demand on the part of the public that the slums be removed—coupled with, of course, an unwillingness to pay for this task. The best solution politically is to pass an ordinance or statute that says, let the landlords do it. Having done this, we announce that we have solved the housing problem because we have made substandard housing illegal. Passage of the ordinance or law costs the state nothing, and it shifts the onus onto an unpopular class: slum landlords. That then ends the matter. Enforcement is sporadic and corrupt or nonexistent, although every once in awhile there is a brief flurry in the newspapers. This account, I think, goes a long way toward explaining the genesis of housing codes historically.

HIRSCH: I agree with the cynical view, but I would like to be more positive and say that in view of the prisoners' dilemma, which makes it very difficult for individual competitors individually to reach an optimum solution, housing codes if they are properly defined and implemented, can have very positive effects, namely, they are preventative. If the landlord knows that there is a reasonable minimum standard that is insisted upon, then we might in some circumstances prevent the area reaching blighted status because the prisoners' dilemma makes it difficult for each and every landlord on his own to decide to maintain his buildings. I think the reason that the cynical view is justified is that legislatures in the past basically have accepted the industry's building code. That supports Professor Komesar's remark about the housing code reflecting special interests. The code has placed the levels of standard housing so high that even sometimes a marvelous room might not meet all the requirements in terms of electrical outlets, for example. Much of the debate I think has to be about the level of the standard that is to be established.

ARANSON: Earlier, I suggested that if we tried to find a uniform law to cover all kinds of housing and an overall rule to cover all kinds of liabilities, we might fail. I think the same reasoning applies to our present topic in the following sense. When I was living in Miami, there was a substantial movement to resurrect South Miami Beach, which had become one of the worst slums imaginable. Given the area's tremendous attractiveness due to its natural attributes, someone suggested horizontal integration: Buy up the whole thing, move all those people out, and redevelop the whole area. But then a substantial problem arose: the

residents of South Miami Beach said they had rights in the property, and they absolutely denied that anyone had the right to move them out under any set of circumstances, even in "the public interest."

GOETZ: I think you have put your finger on an important problem; and the example along the same lines that I always used was, "What would Manhattan Island look like if you accomplished the economists dream of internalizing all of the externalities there?" Certainly, Harlem would not be filled with low income people and would not be a slum. Some of the richest people you can imagine would be living there. So, to some extent, low income people do benefit, at least temporarily, by the presence of a market defect. And if you try to implement any arrangement that cures it, why they would legitimately assert factually that you are depriving them of something of value that they had before. The answer would be, in the best of all possible worlds, that you could compensate them, but in fact we are unwilling to do so.

RABIN: Another problem: Once you recognize these informal rights of tenants to stay where they are, in the long run that means that the landlord who rents to tenants is taking on a burden for which he is not compensated; and as soon as landlords recognize that, they will seek compensation or not rent to such tenants. I would think that the landlord familiar with the South Miami Beach situation in a neighboring county would seek by informal means to let his buildings run down or deteriorate so that he gets rid of his tenants long before he wants to redevelop. And, in the long run, or taking the broadest possible picture, this might not be at all beneficial for tenants. So I think you have a very real cost when you recognize these informal rights. You may transfer some wealth to those immediate tenants, but the tenant class as a whole is likely to suffer. Unfortunately, that is the factor that the judges are not likely to recognize because the bad results of their actions don't appear immediately. Ten years later when some other landlord makes a decision to get rid of his tenants before they develop any vested rights, that doesn't reach the attention of the court.

MUTH: I would like to comment on the issues associated with the prisoners' dilemma and the related discussion. First of all, the prisoners' dilemma is really a game of noncommunication. There is nothing really to prevent owners of property from communicating with each other regarding mutually profitable outcomes. There may be instances, however, in which transactions costs prevent private individuals from engaging in the kinds of activities that might be socially desirable.

B. One Reform Leading to Another: The Process of Making the Warranty of Habitability Effective

KOMESAR: It is interesting to me how in this area of the landlord-tenant relationship a judicial decision that attempts to get rid of one "bad" doctrine for one party leads to other doctrines that are yet another level of oppression for the other party. For example, after *Javins* created the unwaivable warranty of habitability that made marginal rental property unprofitable, the decision in *Robinson v. Diamond Housing Corp.*⁷ took the next logical step and in effect forbade the landlord from taking his building out of the rental market.

ARANSON: This phenomenon is simply a common property of regulation. You start by regulating one thing, and to make it effective you end up regulating every aspect of the behavior of your target.

CUNNINGHAM: Let me raise this point in a different context. I think there is a lot in Professor Friedman's theory about the depersonalization of the landlord-tenant relationship to explain in part the whole trend of reform or change in landlord-tenant law in the last ten or fifteen years. But I do not think it is particularly pertinent to the specific issue of the development of retaliatory eviction rules. These were obviously just a logical extension of the notion that the tenant has a legal right to withhold rent when there is a breach of the warranty of habitability. Because in most cases the tenant is a periodic tenant, if he withholds the rent, the landlord doesn't have to specify that he is terminating because of the failure to pay the rent. The landlord simply says, "I give you thirty days notice; that's in accord with the terms of the lease; get out." Rent withholding would therefore have been totally ineffective to achieve the purposes the judges and the legislatures thought they were achieving if it could be evaded in such an easy way. So the rule prohibiting eviction for "retaliatory" reasons was just a further extension of the policy of the new implied warranty rule designed to prevent landlord circumvention of the new rule.

KOMESAR: The initial case of retaliatory eviction, I think, was *Edwards v. Habib*,⁸ which involved the reporting of housing code violations, not the use of any other defenses. The issue in the case was whether or not courts should reach decisions that would decrease the disincentive to report crimes. So for me, the question in these retaliatory cases is, Was it exclusively the housing code and the landlord-tenant relation that was in question, or was it the need somehow to increase the enforcement of criminal law?

⁷ 463 F.2d 853 (D.C. Cir. 1972).

⁸ 397 F.2d 687 (D.C. Cir. 1968).

I find the situation more problematic where the tenant seeks simply the enforcement of an implied warranty of habitability. In this context the theory is that the tenant is now faced with a situation in which he is not getting what he is paying for. But if that is the case, then the theory would be that you wouldn't need a retaliatory eviction defense because once the landlord made repairs the tenant would be getting what he paid for, and in terms of rental value, the tenant could replicate the premises at some other location. But that's not the reality. The basis of these rules is not simply the fulfillment of somebody's expectations of getting what he paid for. Under the circumstances I have described, except for some special capital associated with the unit itself, there is little reason to need retaliatory eviction. Instead, I think that the basis of these rules is wealth redistribution, making it necessary to back up implied warranties of habitability with retaliatory eviction.

WEICHER: In addition to retaliatory eviction rules, there are more pervasive "just cause" eviction statutes as in New Jersey, which Professor Rabin mentions in his paper. I would think we ought to be seeing that kind of effect in New Jersey and in the District of Columbia which have similar "eviction for cause" statutes, that is, the tenants who the landlord can reasonably expect not to be tenants very long will be preferred: for example, the elderly and the very young, upwardly mobile, immediate graduate of a law school. They should benefit to the detriment of the forty-five year old married couple in the bottom quarter of the income distribution with a couple of kids about whom you can have no reasonable expectation as to when they would be likely to move out. .

BLOCK: Thomas Sowell and Walter Williams make a very similar point to the one John Weicher has made, namely, that when you force employers to hire a certain number of blacks or minorities, what usually happens is that the employer believes that under no circumstances can he ever fire such a person, because he would be inundated with all sorts of lawsuits. So what he will do is only hire a "Cadillac" person: the Harvard graduate, etc. In other words, the law doesn't help the people one would expect that the lawmakers had in mind when they were passing such legislation, namely, the average black person or even the person who needs help. It only helps the people at the top. What results is simply a greater difference between the upper and lower black incomes. This is the same phenomena that we are talking about here with regard to tenants.

C. Law versus Practice: Waivers of the Warranty of Habitability

WILLIAMS: We have had two completely different explanations for the anomalous fact that warranties of habitability are routinely waived in leases of middle class housing even though in almost every case the land-

lord maintains the premises anyway. One theory is Professor Rabin's, that this phenomenon is an example of market failure; essentially, the costs to the tenant of focusing on this clause or the cost to the landlord of articulating this warranty are in some way excessive. The other theory is that of Professor Goetz, which I find more persuasive, that the essential reason that the clause is waived is that its costs to the landlord exceed any benefits to the tenants. That is, the landlord is exposed to risks of litigation by people with phony claims, which nonetheless the courts have to sift out at great expense and with considerable risk of error.

ARANSON: A lot of repairs that landlords make, even though they don't have to, they would have had to make anyway. For example, the landlord is eventually going to have to replace the furnace, and if he doesn't, the present tenants will probably move out. So there is a very logical ongoing relationship of the kind that Professor Goetz described. The landlord's incentives are such that he would ordinarily make these repairs anyway.

CUNNINGHAM: I suspect that most tenants don't know what their legal rights are in this respect. My guess is that the landlord may not, although perhaps his lawyer does. I am sure the lease doesn't say anything about it one way or another.

WILLIAMS: Although my data are very rough, I disagree. The leases of my students routinely contain an express waiver.

GORSKY: When I was in practice, I acted for many landlords and every lease that I had anything to do with had a waiver clause. It was boilerplate. And since there are good economic reasons for middle class accommodations to be kept up by the landlords, why is the clause put in? In my experience, it was because disputes often arose between tenants and landlords as to whether a particular item calling for repair was the result of tenant negligence or the usual clause found in leases, "usual wear and tear excepted," and this clause provided landlords with a certain leverage to tell the tenant he was responsible for making the repairs in this instance. I don't know that the economic implications and economic reasoning are particularly significant in middle class housing.

D. On the Effects of Rent Control

RABIN: I would like to comment on the analysis presented by Professor Hirsch in his paper. He addressed mainly the effect of rent control on the quality of existing housing. I think it is also important to talk about the effect of rent control on the construction of new housing. There is a considerable debate in the literature over whether a rent control ordinance that exempts new housing from rent control nevertheless has a

chilling effect on the construction of new housing. For example, builders may be afraid that after they put up their units, they will find that they are under rent control even though they thought that they would escape it.

On the other hand, rent control might actually have a stimulating effect on new housing, and this phenomenon is something that I haven't seen discussed. Rent control encourages tenants to waste space. They find that housing is cheap, so they can afford a lot of it and stay in an apartment that is larger than they would rent if there were no rent control. By encouraging all tenants in a rent control area to waste space, demand for additional construction is created that wouldn't otherwise be there. You therefore end up with a kind of cross-effect between these two phenomena.

ARANSON: But the stimulating effect would not be felt in the rent control area. The builders might go to other areas outside of that jurisdiction, which would then lead to too many resources being devoted to construction in those locations. There would be an external diseconomy.

RABIN: If new construction is exempt from rent control, some builder might see a pent-up demand—an artificially created scarcity—that he now seeks to capitalize on by building in that very jurisdiction. Thereafter, along comes a scholar, economist or otherwise, and concludes that rent control hasn't actually discouraged the construction of new housing, because there is just as much as there used to be. My answer to that is that this "equal" amount of new construction has not been as effective in alleviating a housing scarcity because it is prompted by an artificial scarcity and an artificially created demand based on the waste of existing resources.

OLSEN: Even if there is a stimulus to new construction—and I don't think that that is empirically very likely—those people who occupy units in the uncontrolled sector in that city would still be worse off: the price they would have to pay is higher because the risk premium that investors will demand will be higher. I think that is the key issue. From an empirical point of view, the one bit of evidence that I have seen, which is very compelling, is a series of building permits issued in Washington, D. C., right before and after rent control—something like three to four thousand down to one or two hundred.

NOURSE: Even the mere threat of rent control is going to affect whether an investor is going to be interested in a particular area. The investor has a choice; he doesn't have to be in housing at all. He can be in shopping centers, office buildings, condominiums, and in other kinds of

real estate investment. If you look at the data on life insurance companies in 1970, forty percent of their lending was going into apartments—in 1980, less than one percent. Now, there are many other factors involved there, of course, but one of them is the threat of rent control.

MUTH: Regarding rent control and the use of space, it may well be the case that you have certain families or households whose normal usage of space would decline but they stay in a controlled apartment. At the same time, it can work the other way. You can have young families who, as they get children, would normally move into bigger quarters but don't because rent control gives them a good deal. Indeed, if anything, I think the latter is likely to predominate. I would expect to find, if anything, that rent control would diminish the total amount of new housing built—not necessarily the number of units perhaps, but the number of units times the average size.

BLOCK: My expectation would be the opposite of Professor Muth's, namely the predominance of what I would call the "little old lady phenomenon"—the widow holding the big apartment all by herself—instead of the young family cramming itself into a small apartment. The young people with growing families would be the new folks who wouldn't get into the choice rent control apartments.

MANDELKER: I think that we may have a definitional problem here. The second generation rent controls are pass-through controls. They are not really controls. That is, under modern rent control laws costs, taxes, utility costs, increases in maintenance costs, etc., get passed through to the tenant in some formula or other. There has of course been a lot of debate over the formulas, which tend to be circular: you look to the market to get a base, but you can't look to the market because the market is controlled, so, of course, you have to make one up. So, the real issue here, assuming that there is a need for this kind of regulation, is whether this regulation meets some criteria.

BENDER: I think this second generation rent control pass-through of costs is a wolf in sheep's clothing. It is still rent control, because in the short run market prices are not determined solely by costs. You can have demand shifts as well. If you are just passing through the costs, you can still have ceilings below the market rate. Second, it seems extremely optimistic to expect governments on any level to be very good at determining what market prices of things are. So my feeling is that although second generation rent controls *above* the market price may not be rent controls, there is a very good probability that the second generation controls will, at least part of the time or in some areas of the city, be

below what the market price is and effectively be rent controls similar to the first generation.

BLOCK: I entirely disagree with the idea that rent control above the market price is not really rent control. In any other market, if prices go up or prices go down, the entrepreneur can either benefit or lose. However, in this one case, if rents go down, the landlords lose, but if they go up he won't gain. So, in other words, it is now more risky to engage in this area than in any other area. So, as economists we would anticipate the supply curve moving to the left—some diminution in supply of rental housing. So it really is *rent* control, even if it is not “binding” at present.

FISCHEL: Let me make partly an advocate's defense of rent control, although I still think it empirically dubious. It relates to community participation and to the potential community benefits of improved housing. I resist the term “positive externality,” but that's what I am talking about—that nice housing benefits other neighborhoods. In big city neighborhoods that are largely rental housing with absentee landlords, the landlords may have very little incentive to use the public sector to upgrade neighboring housing. Someone else may have to take their place. The someone else is obviously the tenants. But in a non-rent-control world, the tenants have absolutely no interest in participating in upgrading the value of the rented property. What rent control does is reallocate property rights from landlords to tenants, and there may be some desirable consequences from it. The tenants may become more active in the community. They may start behaving like suburban home owners. (Of course, that may have some very bad consequences as well, because they may tend to resist other developments as a result.) If you think that community participation by tenants is a good thing, giving tenants some property rights in their own units may, in fact, have some beneficial effects.

MCCLOSKEY: There is a long history of landlord-tenant law in agriculture in which exactly that issue comes up—the issue of the possible benefits of providing the tenant with security, that is, some property interest in the land. So I am not so sure that it is such a far-fetched argument.

ARANSON: I want to enunciate briefly a hypothesis about the effects of rent control. There are many claims about the efficacy of price controls on medical care, which resemble rent controls in housing: Many scholars observe the same sorts of things as Professor Hirsch has educated us about, concerning how much greater the price would have been had controls not gone into effect.

Frankly, I do not believe these results. I have in my mind an alter-

native political model of price controls. If you are a producer or supplier of housing, in periods of demand increasing for exogenous reasons—for example, in migration for housing, or third-party payers for hospitals—you see a real outward shift of the demand schedule. You are then going to start scurrying up the demand curve until you start hitting the elastic portion. When you begin to find some buyer resistance, you will slow down your price increases. This is a realistic model of what suppliers actually do.

At some point, users might become angry and provide a ready constituency for a legislative entrepreneur. But, at the same time, you are more and more likely to have arrived at the elastic portion of the demand curve, so your price increases will already have ended.

Now, if this scenario occurs, then rent control, like hospital price control, given the normal lags in legislatures, is going to come in precisely when the producer stops increasing price. Unfortunately, the econometric models used to study medical care pricing project the amount of the increase expected in the absence of the price-control law, usually as a linear extrapolation of what occurred beforehand. And so, what these models do not take into account is that the market is already adjusted by the time the law is put in place. Hence, any speculation about how much more the price would have been after the imposition of rent controls, except insofar as general price level increases are concerned, is probably just that: unwarranted speculation. And, unless for some strange reason the rent control law is enacted before the price has increased fully, which I have never seen occur, these controls do not bite, at least over the normal course of price rises. The exceptions, of course, would be the normal CPI increases that we would otherwise expect or other exogenous shocks that we would not anticipate.

E. The Relationship of Rent Control to Other Tenant Protections, Particularly Condominium Conversion Restrictions

MCCLOSKEY: I would like to connect rent control with other parts of this so-called revolution. In the long run the distributional effects of the implied warranty of habitability, receivership, and so forth depend on whether or not rent control exists. If there is no rent control, the price of housing simply adjusts. Let me go through it. If there is no rent control, and through tenant protection devices you force all the rental units to be of high quality, then there will be a smaller amount of investment in housing, and a corresponding fall in the supply of housing. The beneficiaries of this will be the present landlords. That is, those who are in the housing business will find the value of their properties to be higher. In fact, if the demand for housing is very inelastic, as there is some reason to think it is, the cut in supply may approximate what a cartel of house owners would have wanted to achieve. If there *is* rent control, on the

other hand, as is obvious, the present landlords are hurt, the present tenants are helped, and future tenants are hurt. So I think these laws interact, in effect with each other; and the key is control of rents.

RABIN: In my paper I treated condominium conversion legislation as being similar to rent control in that both were tenant-protection devices. I am not sure if they really are as alike as I treated them.

CUNNINGHAM: Aren't they really more like antieviction laws?

HIRSCH: It seems to me that in those cities in which you have rent control laws with vacancy decontrol provisions, you have an automatic need for "just cause" eviction laws and anticondominium conversion laws. In the case of Santa Monica, they went even further and enacted an antidemolition law as well. The sequence that is unleashed once you impose rent control clearly distorts resource allocation in any number of directions. And that's what you see at the moment in the Los Angeles area.

NOURSE: Rent control and condominium conversion are part and parcel of the same problem. And the reason why Los Angeles was having trouble with the condominium conversions was precisely because they put in the rent control law.

KOMESAR: The same thing can be seen in the sequence of cases ending with *Robinson v. Diamond Housing*,⁹ in which the retaliatory eviction defense is expanded by Skelly Wright in reaction to the market's reaction to previous decisions—that is, housing is being taken off the market. It seems that there will be a sequence of laws in reaction to either foreseen or often unforeseen market reactions to the first imposition.

WEICHER: There is a provision in the condo-conversion laws in the District of Columbia, and, I believe, in Maryland, which gives the tenants the right of first refusal on the apartments, and also gives them a right to buy at a lower price than someone who is not a resident. These rights give them something that is valuable on the open market.

RABIN: Just carrying that thought through, I suppose every time that you give something to a tenant at the expense of the landlord, some new landlord is going to try to devise a way to avoid making that gift. In this context, I think it is important to recognize that builders in the future will be reluctant to start their buildings off as rentals with the thought that they would convert five or six years down the line into condominiums. There are good tax advantages for following that approach. You

⁹ 463 F.2d 853 (D.C. Cir. 1972).

can take the accelerated depreciation on rental properties and then sell the entire building to a professional converter as a capital gain to be taxed at capital gains rates, so that is a fairly common mode of operation. This strategy will be discouraged in any jurisdiction that has severe condo-conversion laws, the result being that unless a developer can be sure of selling his building as a condominium immediately, he will be reluctant to build at all. The end result, I would argue, would be that there will be fewer rental units, which would act to the long-range detriment of tenants as a class.

KMIEC: What kind of empirical evidence exists to sort out the variety of factors that act as incentives for condominium conversion? Specifically, is there evidence in the current market that with declining rates of inflation, there is a tremendous drop-off in conversions from when inflation rates were very high?

RABIN: The best study is the HUD study on condo conversions. It pointed out what I guess is fairly obvious if you think about it, that you have condo conversion when the rents are low compared to the prices that you can get from selling the unit as a condo. They also tried to examine whether most conversions took place because the rental market was weak or because the sale market for condos was strong. Their empirical investigation led them to the conclusion that most conversions occurred when there was a strong market for condominiums even though there was also a strong demand for rental units. And I think that the reason that condo conversions have fallen off is the same reason that single family homes have fallen off: the economic conditions of high interest rates and the abatement in inflation. With inflation having abated, a prospective buyer loses the incentive to protect himself against inflation by acquiring a home. And condos were simply one way of becoming an owner and benefiting from inflation. That may mean that we are entering into a period in which rents will go up more rapidly than they used to as renters decide that there is now no particular advantage of owning a home, they therefore stay in rental units, and thus fuel the demand for rental units.

MUTH: What we are talking about here is an almost meaningless empirical morass. Even during the late seventies when condominium conversions were so much in the press, they were such a small fraction of the housing stock that it is unlikely that one would ever observe any effects on anything. With regard to some of these reforms—for example, those which give residents an opportunity to continue renting—experience has been that up to perhaps a third of the units in buildings that have been converted have continued to be rented, some by original tenants, some by new owners to other tenants, and so forth. It has also been the

case that in most conversions, units were sold to existing residents at lower prices than to new residents in the absence of legislation mandating this. So this sort of legislation by no means clearly required landlords to do something they wouldn't already be doing anyway.

Regarding rental property and the way inflation works out through the tax system, the effect of inflation is, if anything, apart from bracket creep, to make rental property more desirable. But with bracket creep it works just the reverse and gives you the incentive to become homeowners when you otherwise might not be. So while inflation itself may be over, people are now at these higher tax levels, and it may well be that there is an incentive to continue to become homeowners even though inflation has certainly decelerated.

This also relates to the issue of falling rents, which was certainly happening apart from rent control. There is something going on here which I think is quite analogous to what happened in owner-occupied housing—that is, real prices of apartment buildings were increasing. Part of the return that is necessary for a landlord or homeowner to recoup his cost can be seen in the increase in the value of the asset during the time that he holds it. Indeed, there is reason to think that, because interest payments are tax deductible and interest is relatively more important as a cost-component for housing than for other things, during inflationary periods the relative prices of housing, whether rented or owned, are going to decline. I would argue, then, that this is by far the most important reason why real rents fall. It is also true, as I said earlier, that the relative advantage of home ownership was increasing, again because of the structure of the tax laws and because of bracket creep. This is presumably why you have the richer tenants becoming owners to a greater degree than they were before: the value of the tax advantage became progressively greater.

But this doesn't mean that the rental industry was necessarily in bad shape. And it doesn't mean that tenants as a whole were getting better off or worse off. What it says in effect is that you have a fall in the price of housing relative to other things.

As I read the evidence, people spend about the same fraction of their incomes for housing at all income levels, and therefore the fall in the relative price of housing doesn't have important distributional effects in one direction or the other. Instead, I think there was something very important going on here that swamps all of these other factors we are talking about.

