

2014

A Second Chance for Innovation--Foreign Inspiration for the Revised Uniform Residential Landlord and Tenant Act

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A SECOND CHANCE FOR INNOVATION—FOREIGN INSPIRATION
FOR THE REVISED UNIFORM RESIDENTIAL LANDLORD AND
TENANT ACT

*Melissa T. Lonegrass**

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I. INTRODUCTION

The Uniform Residential Landlord and Tenant Act (URLTA) was heralded as the crowning point in the American landlord-tenant “revolution”

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when it was promulgated in 1972.¹ Two aspects of URLTA were seen as especially innovative. First, the uniform law re-conceptualized the residential lease as a bilateral contract rather than a conveyance of property.² Second, URLTA adopted the emergent implied warranty of habitability, thereby imposing significant and continuing obligations on the landlord with respect to the condition of the premises leased.³ Other provisions included within the uniform law also reflected a transformation⁴ of landlord-tenant law and relations.⁵ Security deposits were strictly limited to the amount of one month's rent and mandated to be returned in a timely manner upon the lease's termination.⁶ Landlords were obligated to deliver physical, as opposed to mere legal, possession of the premises to tenants at the beginning of the term.⁷ Prohibitions on retaliatory conduct forbade landlords from increasing rent, decreasing services, or threatening eviction against tenants who availed themselves of their statutory rights.⁸ Together, these reforms affected a profound shift in the balance of power between residential landlords and tenants.⁹ By codifying these developments, URLTA captured and promoted the gamut of nascent tenant protections percolating out of state courts and legislatures around the country.

Still, many tenant advocates remain unsatisfied. Even before its completion, dissenters voiced concerns that the uniform law did not go far enough in securing tenant rights.¹⁰ Some even spoke against URLTA's

1. See Samuel Bassett Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1, 2 (1976) (remarking that "courts and legislatures have radically altered the distribution of rights between residential tenants and their landlords" and calling this shift a "revolution"); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 519 (1984) ("In the last two decades we have experienced a revolution in residential landlord-tenant law.").

2. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.102 & cmt. (1972) [hereinafter URLTA]; see also Steven G. Davison, *The Uniform Residential Landlord and Tenant Act and its Potential Effects Upon Maryland Landlord-Tenant Law*, 5 U. BALT. L. REV. 247, 249-51 (1975-1976).

3. URLTA, *supra* note 2, § 2.104 & cmt.; see also Davison, *supra* note 2, at 253-62.

4. See Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 504 (1982).

5. See generally Brian J. Strum, *Proposed Uniform Residential Landlord and Tenant Act: A Departure from Traditional Concepts*, 8 REAL PROP. PROB. & TR. J. 495 (1973) (discussing major departures from common law rules); Subcommittee on the Model Landlord-Tenant Act of Committee of Leases, *Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROB. & TR. J. 104 (1973) (describing components of the URLTA).

6. URLTA, *supra* note 2, § 2.101.

7. *Id.* § 2.103.

8. *Id.* § 5.101.

9. See Rabin, *supra* note 1, at 519 ("The residential tenant, long the stepchild of the law, has now become its ward and darling.").

10. See, e.g., Richard E. Blumberg & Brian Quinn Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1 (1976) (calling for reforms

adoption, despite the protections it would offer tenants, out of fear that its modest reforms would establish a ceiling beyond which further innovations would be unattainable.¹¹ In the years since URLTA was completed, scholars concerned with housing and poverty law continued to push for stronger tenant protections, including expanded habitability requirements,¹² increased security of tenure rules,¹³ protections for holdover tenants,¹⁴ and more robust regulation of standardized form contract provisions.¹⁵ Collectively, these calls for reform protest that the landlord-tenant revolution and its flagship legislation fell short of ensuring residential tenants safe, secure, and stable housing.

While URLTA may have been “revolutionary” by American standards, from a global point of view, the uniform law was far from pioneering. The characterization of the lease as a bilateral contract dates back to Roman law,¹⁶ and obligations approximating the implied warranty of habitability have existed in the civil law tradition for centuries.¹⁷ Even England, whose

beyond the URLTA, including remedies of receivership, retroactive rent abatement, specific performance of the warranty of habitability, a proposed landlord security deposit act, and a tenant-mortgagee negotiating strategy); Donald E. Clocksin, *Consumer Problems in the Landlord-Tenant Relationship*, 9 REAL PROP. PROB. & TR. J. 572 (1974) (noting that a number of issues remain unresolved by the URLTA, including the proper measure of damages under the warranty of habitability, the continued propriety of summary eviction procedures, code enforcement, and rent control); Myron Moskowitz, *The Model Landlord-Tenant Code—An Unacceptable Compromise*, 3 URB. LAW. 597, 597–99 (1971) (arguing that to effectively protect tenant rights, housing law ought to increase the supply of decent housing, organize tenants to use collective action, and permit rent withholding where landlords breach their obligation to maintain the premises in a habitable condition).

11. See, e.g., Moskowitz, *supra* note 10 at 599–600 (arguing that the uniform law would inhibit efforts to obtain more effective remedies for tenants, both through legislation and the courts).

12. See, e.g., Caroline Hudson, Recent Development, *Expanding the Scope of the Implied Warranty of Habitability: A Landlord’s Duty to Protect Tenants from Foreseeable Criminal Activity*, 33 VAND. L. REV. 1493, 1520 (1980); Barbara Jo Smith, Note, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty*, 72 WASH. U. L. REV. 475 (1994).

13. See, e.g., Florence Wagman Roisman, *A Tribute to Professor John O. Calmore: The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817 (2008).

14. See, e.g., Christopher Wm. Sullivan, Note, *Forgotten Lessons from the Common Law, The Uniform Residential Landlord and Tenant Act, and the Holdover Tenant*, 84 WASH. U. L. REV. 1287 (2006).

15. See, e.g., Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 879 (1974); Bernard Black, Note, *A Model Plain Language Law*, 33 STAN. L. REV. 255, 287–88 (1981).

16. See W.W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 498–99 (3d ed. 1963).

17. See *id.* at 500; see also E.J. Cohn, *Some Comparative Aspects of the Law of Landlord and Tenant*, 11 MOD. L. REV. 377, 380 (1948) (discussing the landlord’s obligations in the civil law tradition).

common law provided the foundations for the American law of lease, required landlords to maintain the premises long before the United States.¹⁸ Despite European jurisdictions' vast experience with the very institutions URLTA sought to adopt, the uniform law's drafters failed to look abroad for inspiration for the United States. Instead, the fashioning of tenant rights under the Act focused exclusively on domestic events.¹⁹ One wonders whether URLTA, and the landlord-tenant revolution as a whole, would have benefited from a European perspective.

On the surface, a comparative undertaking may appear incongruous with the aim of enacting a "uniform" residential landlord and tenant law for the United States. However, the stated objectives of URLTA were to "unify" state regimes, to "simply, clarify, modernize, and revise" residential landlord-tenant law, and to "encourage landlords and tenants to maintain and improve the quality of housing."²⁰ Thus, the drafters of URLTA sought to achieve more than the mere harmonization of law: they sought true innovation. The latter purpose is well served by comparative law, which is a natural companion to law reform.²¹ Successful transformation requires reformers to open their minds to the scope of the possible and challenge their preconceived notions. Comparative inquiry facilitates both of these objectives. Moreover, although comparative study may result in adoption of foreign solutions to domestic problems, it is successful even if it merely produces a

18. The Housing of the Working Classes Act of 1885 implied into leases for a low rent a term that the property should be "at the commencement of the holding in all respects reasonably fit for human habitation." Housing of the Working Classes Act 1885 § 12 (Eng.); see also THE LAW COMMISSION, CONSULTATION PAPER NO. 162, RENTING HOMES I: STATUS AND SECURITY, at 21–49 (Eng.), available at http://lawcommission.justice.gov.uk/docs/cp162_Renting_Homes_Consultation1_Status_and_Security.pdf (last visited Jan. 30, 2013) [hereinafter LAW COMMISSION, STATUS AND SECURITY] (providing detailed overview of the evolution of housing law in England).

19. To observe that the drafters of the URLTA did not appear to take foreign law into consideration is not to say that there was a complete absence of comparative scholarship on the law of residential lease during the landlord-tenant revolution. Rather, several comparative works were undertaken during that time. See, e.g., Michael Lipsky & Carl A. Neumann, *Landlord-Tenant Law in the United States and West Germany—A Comparison of Legal Approaches*, 44 TUL. L. REV. 36, 37 (1969); Gerald G. Greenfield & Michael Z. Margolies, *An Implied Warranty of Fitness in Nonresidential Leases*, 45 ALB. L. REV. 855, 865–866 (1981). Indeed, *Javins v. First National Realty Corp.*—the landmark decision that introduced the warranty of habitability in the District of Columbia—refers explicitly to the civil law tradition. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 n.13 (D.C. Cir. 1970) ("The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law.").

20. URLTA, *supra* note 2, § 1.102(b)(1)–(3).

21. See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 20 (3d ed. 2002); ZWIEGERT & KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 16 (Tony Weir trans., 3d ed. 1998); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 16 (2d ed. 1993).

deeper understanding of, and recommitment to, one's own law. A rare opportunity for American law to profit from foreign experience was thus squandered when URLTA was crafted without multi-jurisdictional study.

Nearly forty years after the promulgation of URLTA, the Uniform Law Commission (ULC) recently called for comprehensive revision to the uniform law.²² A second chance for American landlord-tenant law to benefit from comparative analysis has presented itself. This Article seeks to finally reap the benefits of comparative tenancy law and, to that end, looks abroad to Europe for inspiration that may improve the lives of residential tenants in this country.

European tenancy law has much to offer the American reformer. As a whole, tenancy law in Europe is considerably more "tenant-friendly" than that of the United States.²³ Implied habitability standards,²⁴ tenure guarantees,²⁵ and rent control schemes²⁶ are the norm. Consumer protections abound, particularly those aimed at policing unfair terms in standard form contracts.²⁷ When viewed through a wide comparative lens, American law

22. See Memorandum from Sheldon F. Kurtz, Chair of the Study Committee to the Uniform Law Comm'n Scope and Program Comm. (May 18, 2011) (on file with the Uniform Law Commission), available at http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta_studycomtreport_051811.pdf.

23. Andrew B. Carroll, *The International Trend Toward Requiring Good Cause for Tenant Eviction: Dangerous Portents for the United States?*, 38 SETON HALL L. REV. 427, 447 (2008).

24. See Cohn, *supra* note 17, at 380; see, e.g., Umberto Breccia & Elena Bargelli, *Italy*, in EUROPEAN UNIV. INST., TENANCY LAW AND PROCEDURE IN THE EU, <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawItaly.pdf> (last visited Oct. 26, 2013) (discussing implied obligations of landlord with respect to 'vices' and 'failures' in Italy).

25. See KATHLEEN SCANLON, *Towards a Sustainable Private Rented Sector: The Lessons From Other Countries* 31 (Kathleen Scanlon & Ben Kochan, eds., 2011), available at http://www.lse.ac.uk/geographyAndEnvironment/research/london/events/HEIF/HEIF4b_10-11%20-newlondonenv/prslaunch/Book.pdf; see, e.g., Sandra Passinhas, *Portugal*, in EUROPEAN UNIV. INST., TENANCY LAW AND PROCEDURE IN THE EU 24–32, <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawPortugal.pdf> (last visited Jan. 29, 2013) (describing Portuguese law generally mandating five-year terms, providing for automatic renewals, and listing specific reasons for which landlords may terminate the lease).

26. See Kathleen Scanlon, *Private Renting in Other Countries*, in TOWARDS A SUSTAINABLE PRIVATE RENTED SECTOR: THE LESSONS FROM OTHER COUNTRIES 19, 30 (Kath Scanlon & Ben Kochan, eds. 2011); see also e.g., Wolfgang Wurmnest, *Germany*, in EUROPEAN UNIV. INST., TENANCY LAW AND PROCEDURE IN THE EU 42, <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawGermany.pdf> (last visited Oct. 26, 2013) (discussing rules limiting rent and rent increases in Germany).

27. See Scanlon, *supra* note 26, at 31; see also, e.g., Natalie Boccadoro & Anthony Chamboredon, *France*, in EUROPEAN UNIV. INST., TENANCY LAW AND PROCEDURE IN THE EU 25–29, <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/Research>

significantly lags in guaranteeing many meaningful protections for residential tenants. At the same time, however, many variations exist between the tenancy laws of individual European nations. Therefore, a study of European systems does not merely illuminate ways in which American law could be made more sensitive to tenant needs, but it may also assist the reformers of URLTA in their attempts to strike a workable equilibrium between American landlords and tenants.

This Article proceeds in four parts. Part I addresses the threshold question of whether a comparative approach to landlord-tenant law can be advantageous, and concludes that while some aspects of tenancy law must be tailored to fit local needs, comparative analysis can be fruitful if cautiously conducted. Part I also introduces the tenancy regimes of France and England, providing context for comparison. Next, Parts II and III identify two areas of URLTA that are under consideration for revision—the implied warranty of habitability and security of tenure—and assess the proposed revisions in light of the French and English experiences. Finally, Part IV investigates foreign approaches to the policing of standard form contract terms in residential leases and considers whether the adoption of similar measures could improve landlord-tenant relations in the United States. The Article concludes with a call for future comparative study in this critical area of the law.

II. FOUNDATIONS FOR COMPARATIVE STUDY

The examination of foreign systems undoubtedly provides insight into domestic problems.²⁸ However, the comparative approach to law reform involves more than the mere description of foreign rules.²⁹ Therefore, before launching into a detailed examination of any one jurisdiction's tenancy regime, it is useful to address the methodological approach to be employed, as well as to provide context for comparative analysis.

A. The Comparative Method

The traditional approach to comparative analysis is functionalism.³⁰ According to functionalist theory, “the legal system of every society essen-

Themes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawFrance.pdf (last visited Oct. 26, 2013) (discussing regulation of form contracts in France).

28. See DE CRUZ, *supra* note 21, at 20; ZWEIGERT & KÖTZ, *supra* note 21, at 16; WATSON, *supra* note 21, at 16.

29. ZWEIGERT & KÖTZ, *supra* note 21, at 6.

30. See Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 679 (2002) (“Today, we understand that when we compare rules, we must take a functional approach”) (footnote omitted);

tially faces the same problems, and solves these problems by quite different means though very often with similar results.”³¹ Thus, functionalism involves the identification of common legal problems across jurisdictional lines and the investigation of the various, and perhaps disparate, solutions to those problems. The process inevitably leads to the discovery of new models for solving legal problems, and thereby lends itself naturally to law reform. As stated by Konrad Zweigert and Hein Kötz in their seminal discourse on the functionalist method, “[c]omparative law is an ‘*école de vérité*’ which extends and enriches the ‘supply of solutions’ and offers the scholar of critical capacity the opportunity of finding the ‘better solution’ for his time and place.”³²

Functionalism is not without its detractors, however.³³ There are those who, for instance, challenge functionalism’s underlying assumption that all societies face the same social problems.³⁴ This critique undermines the utility of the comparative method for creating blueprints for legal solutions.

ZWEIGERT & KÖTZ, *supra* note 21, at 34 (“The basic methodological principle of all comparative law is that of *functionality*.”). Functionalism is not, however, the only methodology of comparative law. *See generally* RICHARD HYLAND, *Comparative Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 184 (Dennis Patterson ed., 1996) (cataloging approaches to comparative law); Ralf Michaels, The Functionalist Method of Comparative Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 341 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (“At least three main current approaches other than functionalism remain: comparative legal history, the study of legal transplants, and the comparative study of legal cultures.”) (footnote omitted).

31. ZWEIGERT & KÖTZ, *supra* note 21, at 34.

32. *Id.* at 15; *see also* RUDOLPH B. SCHLESINGER, HANS W. BAADE, MIRJAN R. DAMASKA & PETER E. HERZOG, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 15, 22 (5th ed. 1988) (“[W]hen a problem is viewed in the deeper perspective made possible by the comparative method, a number of alternative solutions may come into sight.”); Arthur T. von Mehren, *The Comparative Study of Law*, 6/7 TUL. CIV. L.F. 43, 47 (1991–1992) (“Insight into how other legal systems have dealt with particular problems not only stimulates the jurist’s imagination but reveals the strengths and weaknesses of particular solutions. Comparative study thus assists legal reform as well as lawyers’ efforts to find creative solutions for problems that arise in legal practice.”); Arthur T. von Mehren, *An Academic Tradition for Comparative Law?*, 19 AM. J. COMP. L. 624, 628 (1971) (“[Comparative scholarship] is useful in that it gives a better understanding of inherent strengths and weaknesses of given institutional reforms. Such understanding has considerable theoretical interest and may also prove of direct practical value by providing perspective and direction for law reform efforts.”).

33. Michaels, *supra* note 30, at 340 (“The functional method has become both the mantra and the *bête noire* of comparative law. For its proponents, it is the most, perhaps the only, fruitful method; to its opponents, it represents everything bad about mainstream comparative law.”) (footnote omitted); *see also, e.g.*, Pierre Legrand, *Foreign Law: Understanding Understanding*, 6 J. COMP. L., no. 2, 2011, at 67, 95–96, 104–110 (2011) (discussing the “serious and numerous deficiencies” of functionalism).

34. *See, e.g.*, HYLAND, *supra* note 30, at 189; JAMES Q. WHITMAN, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 312, 313–14 (Pierre Legrand & Roderick Munday eds., 2003);

Critics argue that “a legal solution that effectively mitigates a problem in one society might not be appropriate for another society if the problem being solved in the former is different from the problem that needs to be solved in the latter.”³⁵ If this critique is taken seriously, then a logical conclusion is that the functionalist enterprise is more persuasively applied to some areas of law rather than others.³⁶ Only those social problems whose primary features are common among many jurisdictions are appropriate for comparative exploration.

The subject matter of this Article largely resists this criticism of functionalism. Indeed, residential tenancy is an area of law that fits squarely within the functionalist premise that different jurisdictions often face similar societal problems. Housing is a basic requirement for everyone; and everywhere, a significant portion of the population meets this need by renting. Tenants constitute roughly the same proportion of the population—one-third—in both Europe³⁷ and the United States.³⁸ Additionally, housing short-

35. See Christopher A. Whytock, *Legal Origins, Functionalism, and the Future of Comparative Law*, 2009 BYU L. REV. 1879, 1886.

36. Andrew W. Jurs, *Balancing Legal Process with Scientific Expertise: Expert Witness Methodology in Five Nations and Suggestions for Reform of Post-Daubert U.S. Reliability Determinations*, 95 MARQ. L. REV. 1329, 1362 (2012).

37. See Christoph U. Schmid, *General Report*, in European Univ. Inst., *Tenancy Law and Procedure in the EU 1*, <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawGeneralReport.pdf> (last visited Oct. 26, 2013). In 2009, 24 percent of principal dwellings in France were private rentals and 16 percent were public rentals. HERVÉ BOULHOL, OECD ECONOMICS DEPARTMENT WORKING PAPERS, NO. 861: MAKING THE FRENCH HOUSING MARKET WORK BETTER (May 11, 2011), <http://www.oecd-ilibrary.org/docserver/download/5kgcd9w73qvf.pdf?expires=1382848495&id=id&accname=guest&checksum=971C67655C465E1DE618CFEF1068B792>. In 2011, approximately 35.5 percent of the English housing stock was rented. See *Table 104 Dwelling Stock: by Tenure, England (historical series)*, GOV.UK (click on “Table 104: by tenure, England (historical series)”) (last updated Feb. 27, 2014), <https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants>; see also Scanlon, *supra* note 26, at 19 (stating that 17% of English housing stock consisted of private rentals in 2011).

38. In 2010, the percentage of renter-occupied housing in the United States was approximately 31.6 percent. See UNITED STATES CENSUS BUREAU, *American Housing Survey (AHS) FAQ*, (June 7, 2013 1:04 PM), <http://www.census.gov/housing/ahs/about/faq.html#Q9>; see also UNITED STATES CENSUS BUREAU, *Housing Characteristics: 2010*, at 9 fig.6 (October 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-07.pdf> (showing percentage of renters by region: Midwest (30.8%), South (33.3%), Northeast (37.8%), West (39.5%)). In more populated areas, the majority of households reside in rented housing. See UNITED STATES CENSUS BUREAU, *Housing Characteristics: 2010*, *supra*, at 11. In six of the ten most populous cities in 2010, the majority of households were renters. This includes: 69 percent of households in New York City, 61.8 percent in Los Angeles, 55.1 percent in Chicago, and 54.6 percent in Houston rented their homes. Renters also accounted for the majority of households in San Diego (51.7 percent) and Dallas (55.9 percent), the eighth and ninth most populous cities in 2010, respectively. Of the remaining ten largest cities, homeownership was more common in Philadelphia, Phoenix, San Antonio, and San Jose. *Id.*

ages plague residential tenants both here in the United States³⁹ and abroad.⁴⁰ As lawmakers work to ensure a sufficient supply of safe, affordable housing for a sizeable and growing number of their citizens, the cross-pollination of ideas may both strengthen and hasten solutions to meet tenants' needs.

Nevertheless, the comparative method must be utilized with caution.⁴¹ Functionalism begins to break down when the law under consideration is heavily tied to a nation's unique culture, history, or socio-economic environment.⁴² In order for legal solutions to be transplanted successfully from one jurisdiction to another, they must not be so dependent upon the context of their home country that they founder, or worse, produce unintended consequences, when adopted elsewhere.⁴³ Tenancy law is heavily imbued with housing policy, a matter generally considered to be of local, rather than international, concern.⁴⁴ Additionally, balancing landlord and tenant rights has a distinctly political character that defies large-scale harmonization.⁴⁵ Moreover, in many jurisdictions, residential tenancy is governed by a blend of contract, property, tort, administrative, consumer protection, and constitutional law, and the precise blend of those elements varies from place to place.⁴⁶ The diversity of subject matters touched upon by residential leases not only makes comparative study practically difficult, but it also suggests that legal transplants may not be successful when removed from their unique support systems.

The constitutional dimensions of tenancy law particularly discourage a functional approach, as they suggest that legal regulation of landlord-tenant

39. *Nation's Renters Face Severe Affordable Rental Shortage*, NAT'L. LOW INCOME HOUSING COALITION (Feb. 15, 2012), <http://nlihc.org/press/releases/2-15-12>; Schmid, *supra* note 37, at 23.

40. See Schmid, *supra* note 37, at 23 ("Virtually everywhere, there have in recent years been periods of massive shortage in larger cities . . .").

41. ZWEIGERT & KÖTZ, *supra* note 21, at 17.

42. HYLAND, *supra* note 30, at 189.

43. See ZWEIGERT & KÖTZ, *supra* note 21, at 17 ("Whenever it is proposed to adopt a foreign solution which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it. It may well prove impossible to adopt, at any rate without modification, a solution tried and tested abroad because of differences in court procedures, the powers of the various authorities, the working of the economy, or the general social context into which it will have to fit.")

44. See BOULHOL, *supra* note 37, at 14 ("Housing markets depend to a considerable extent on the historical and institutional context of each country."); see also Schmid, *supra* note 37, at 1 (attributing absence of a "European perspective" on tenancy law to the notional domination of the regulation of housing markets).

45. See Schmid, *supra* note 37, at 1.

46. See Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 417 (2010) [hereinafter Lonegrass, *Convergence in Contort*].

relations may not easily be excised from their political context.⁴⁷ In particular, whereas a fundamental right to housing is recognized by the domestic law of many European countries,⁴⁸ as well as a number of international agreements,⁴⁹ the same is not true in the United States.⁵⁰ This, and other internationally recognized human rights, occasionally impact European court decisions addressing the rights of landlords and tenants to property, private and family life, and information.⁵¹

On the other hand, some private law matters lend themselves to the functional approach more easily than problems of public law.⁵² Where public law tends to be deeply intertwined with an individual nation's social and historical context, private law is less so.⁵³ And while landlord-tenant law is impacted to some degree by the public sphere, leases—particularly private leases—are treated primarily within a contractual framework. Though residential leases in all of the jurisdictions studied here have evolved from purely consensual transactions to ones containing numerous mandatory duties, the regulatory nature of landlord-tenant law derives primarily from principles of consumer protection rather than public law *per se*. And while different jurisdictions may vary in the degree of tenant protections imposed, the challenge of squaring traditional notions of freedom of contract and ownership of property with consumer protection is common across borders.

Moreover, the overall impact of constitutional and human rights law on private tenancies is slight.⁵⁴ As a rule, the right to housing merely obligates the state to undertake best efforts in the provision of housing and does not give individual citizens the right to a dwelling provided by the state, much

47. See Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2576 (2004) (book review).

48. These jurisdictions include Belgium, Finland, France, Greece, the Netherlands, Portugal, Scotland, Spain, and Sweden. Carroll, *supra* note 23, at 429 & n.11.

49. See International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), pt. III, at art. 11(1) (Jan. 3, 1976), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (“The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate . . . housing . . . [and] will take appropriate steps to ensure the realization of this right”); Universal Declaration of Human Rights, G.A. Res. 217A (III), at art. 25(1), U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html> (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . housing . . .”).

50. Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 279–80 (2002).

51. See Schmid, *supra* note 37, at 12.

52. Jurs, *supra* note 36, at 1361; see also Teitel, *supra* note 47, at 2575 (“[C]omparativism’s origins in private law rendered its subject matter easy to isolate from ambient politics.” (footnotes omitted)).

53. Jurs, *supra* note 36, at 1361.

54. See Schmid, *supra* note 37, at 12–13.

less a private landlord.⁵⁵ Additionally, the application of constitutional law to private tenancy has been concentrated in a few jurisdictions, and even then, some courts are more active than others.⁵⁶ Thus, while the constitutional dimensions of European tenancy law may be expanding, they are still rather limited in scope.⁵⁷

Finally, the potential benefits of investigating foreign systems for solutions to problems in tenancy law far outweigh its hazards. Comparativists have been warned to “be wary of the pitfalls and dangers of comparisons,” without allowing those risks to “inhibit them from embarking on comparative analyses utilizing the materials, methods, and tools of comparison to the best possible advantage.”⁵⁸ Thus, while the limits of the comparative method must be kept in mind, they should not defeat the hope that the exploration of foreign experience with residential leases may improve the reformation of law at home.

B. Context for Comparison

The enterprise of comparative law requires that legal rules be studied in context.⁵⁹ Thus, the comparativist must familiarize herself with not only the procedural and institutional frameworks for law, but also the socio-economic and historical backdrop against which it is applied.⁶⁰ To that end, this section provides a brief introduction to the landlord and tenant law and policy in the two European jurisdictions examined in this paper—France and England.

A word about the jurisdictions selected for study is in order. An exhaustive examination of the tenancy laws of all European jurisdictions is far beyond the purview of a single paper. However, some of the benefits of comparative analysis can be achieved by more modest means. The juxtaposition of French and English law with that of the United States promises to

55. *Id.*; see also Jane Ball, *Renting Homes: Status and Security in the UK and France—A Comparison in the Light of the Law Commission’s Proposals*, [2003] CONV. & PROP. L. 38, 55. As in the United States, in much of Europe, private tenancy is distinguished from social tenancy—the provision of low-cost housing, generally by the state. See Schmid, *supra* note 37, at 7, 19–20. Constitutional issues primarily affect public sector housing, which, though a substantial component of housing law, lies outside the scope of this paper.

56. Schmid, *supra* note 37, at 7, 19–20.

57. See *id.*; see also generally Jacques Ziller, *The Constitutional Dimensions of Tenancy Law in the European Union: Background Paper*, in EUROPEAN UNIV. INST., TENANCY LAW AND PROCEDURE IN THE EU, available at <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawZiller.pdf> (last visited Oct. 26, 2013).

58. DE CRUZ, *supra* note 21, at 219.

59. Reimann, *supra* note 30, at 679.

60. *Id.* at 679–80; DE CRUZ, *supra* note 21, at 223.

be particularly rewarding for several reasons. First, the selection of jurisdictions chosen here permits the demonstration of legal diversity among European jurisdictions. While both systems' private tenancy law may be considered tenant-friendly in comparison to that of the United States, English law is by far the more conservative of the two regimes, occasionally approximating or even producing results more favorable to landlords than American rules.⁶¹ French law, on the other hand, is much more sensitive to tenant concerns, as will be shown below. Second, France and England have both dramatically reformed their tenancy laws in the years since the American landlord-tenant "revolution" began. Third, in both jurisdictions, landlord-tenant law is dynamic—continually evolving. This has been particularly true in England, where extensive tenancy law reform efforts have been ongoing for several decades.

1. *France*

In France, landlord-tenant relations are governed by general provisions of the *Code civil* (Civil Code) concerning the *louage des choses* (lease of things)⁶² as well as by special legislation relating specifically to residential tenancy.⁶³ The Civil Code provisions covering the landlord-tenant relation

61. See generally, Christine Whitehead, et al., *The Private Rented Sector in the New Century—A Comparative Approach* (2012), <http://www.cchpr.landecon.cam.ac.uk/Downloads/Realdania%20summary%20final%20for%20web.pdf>.

62. CODE CIVIL [C. CIV.] arts. 1708–78 (Fr.). These articles cover all leases of all types, whether residential, commercial, agricultural, or involving personal property. See CODE CIVIL [C. CIV.] arts. 1713 (Fr.) (“One may rent all kinds of property, movables and immovables.”). Following a brief preliminary chapter containing rules applicable to all leases (CODE CIVIL [C. CIV.] arts. 1708–13 (Fr.)), the Code enumerates provisions governing both leases of houses and leases of rural property (CODE CIVIL [C. CIV.] arts. 1714–51), provisions governing leases of houses only (CIVIL CODE [C. CIV.] arts. 1752–62 (Fr.)), and provisions governing agricultural leases only (CIVIL CODE [C. CIV.] arts. 1763–78 (Fr.)). In addition to the Code provisions, special legislation governs residential, commercial, and agricultural leases. The special legislation treating residential leases is discussed in detail in the following pages. For the major special legislation applicable to commercial leases, see generally CODE DE COMMERCE, [C. COM] art. L145-1–L145-60; Décret 53-960 du 30 septembre 1953 réglant les rapports entre bailleurs et locataires en ce qui concerne le renouvellement des baux a loyer d'immeubles ou de locaux a usage commercial, industriel ou artisanal [Decree 53-960 of September 30, 1953 addressing relations between lessors and lessees relative to the renewal of leases of buildings or premises for commercial, industrial, or artisanal use] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 1, 1953, p. 8618 (Fr.). For special legislation applicable to agricultural leases, see generally CODE RURAL, art. L411-1 (Fr.).

63. Loi 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du décembre 1986 [Law 89-462 of July 6, 1989 tending to improve lease relations and modifying Law 86-1290 of Dec. 23, 1986], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 1989, p. 8541 [hereinafter Mermaz Act].

are few.⁶⁴ Grounded in the “twin liberal policies of property and contract” born of the French Revolution (that the landlord’s right over his property ought to be absolute, and that contracts are best left unrestricted by legislation) the Civil Code articles on lease purposely provide little regulation.⁶⁵ With the exception of a provision prohibiting perpetual leases,⁶⁶ lease terms are not mandated, but may be made for any fixed or periodic length.⁶⁷ The obligations of the parties are broadly defined. Those of the lessor include the obligation to deliver and maintain the premises in a good condition,⁶⁸ to warrant against vices and defects of the thing leased,⁶⁹ and to secure to the lessee a peaceful enjoyment for the duration of the lease.⁷⁰ The lessee, in turn, is required to use the thing according to the purposes intended by the lease and to act as *un bon père de famille* (to refrain from committing an abuse of enjoyment),⁷¹ to pay the agreed upon rent,⁷² and to perform certain minor repairs.⁷³

Although these provisions of the Civil Code have been left relatively unchanged since 1804, any perceived stability in the law of lease is misleading because today, the Code only plays a secondary role to special legislation.⁷⁴ The special regime now governing lease contracts supersedes and

64. Boccadoro & Chamboredon, *supra* note 27, at 7; *see also* Anne de Moor, *Landlord and tenant in French law: a recent statute*, 3 OXFORD JOURNAL OF LEGAL STUDIES [O.J.L.S.] 425, 425 (1983) (explaining the suppletive character of the provisions of the *Code civil* on lease). This is consistent with the fact that in Europe, general contract law is typically premised on freedom of contract and commutative justice rather than regulation and distributive justice. The latter is usually accomplished in special legislation. *See* Schmid, *supra* note 37, at 14.

65. de Moor, *supra* note 64, at 425.

66. That a lease cannot have a term longer than ninety-nine years is a traditional rule in French law but one that no text expresses outright, although certain texts such as article 1709 of the *Code civil* allude to the rule. PHILIPPE MALAURIE & LAURENT AYNES, *LES CONTRATS SPECIAUX* 358, 362 (Defrénois 2d ed. 2005); CODE CIVIL [C. CIV.] art. 1709 (Fr.) (stating that contracts of leases permit the enjoyment of a thing “during a certain time”); FREDERIC LECLERC, *DROIT DES CONTRATS SPECIAUX* 200 (Librairie Générale de Droit et de Jurisprudence 2007).

67. CODE CIVIL [C. CIV.] art. 1709 (Fr.); *see* MALAURIE & AYNES, *supra* note 66, at 357–62; *see also* LECLERC, *supra* note 66, at 200.

68. CODE CIVIL [C. CIV.] arts. 1719(1)–(2), 1720 (Fr.).

69. *Id.* at art. 1721.

70. *Id.* at art. 1719(3).

71. *Id.* at arts. 1728(1), 1729, 1732; *see also* MALAURIE & AYNES, *supra* note 66, at 382 (noting that *abus de jouissance* (abuse of enjoyment) has been defined broadly by the jurisprudence and does not include merely physical damage to the property).

72. CODE CIVIL [C. CIV.] art. 1728(2).

73. *Id.* at arts. 1728(1), 1754; *see also infra* note 141 and accompanying text for additional discussion of repairs incumbent on the lessee, or *réparations locatives*.

74. MALAURIE & AYNES, *supra* note 66, at 329 (“[L]es dispositions du Code civil ne jouent qu’un rôle secondaire Le Code est supplétif, alors que ces statuts sont impératifs. [The dispositions of the Civil Code only play a secondary role The Code is supplemen-

displaces the corresponding articles of the *Code civil*.⁷⁵ Additionally, because the statutory regime is *d'ordre public* (of public order), the parties are generally not free to derogate from its provisions by contract.⁷⁶ As a result, the Civil Code applies only residually and in rare circumstances.⁷⁷

The first comprehensive regulation of private tenancy was introduced in 1982⁷⁸ and marked a substantial departure from the liberal regime established under the articles of the *Code civil*.⁷⁹ Although a prior act passed in 1948 had imposed security of tenure and rent control in residential tenancies, its purpose was limited to correcting, in the short term, the housing shortage that burdened France following the Second World War.⁸⁰ Enacted by a socialist government, the 1982 Quillot Act extended and expanded upon prior protections.⁸¹ Most important among its provisions were those adopting minimum lease terms, restricting grounds for termination of the lease, and protecting collective bargaining regarding rent control.⁸² The legislation was wildly unfavorable with conservatives, who viewed its strict regulation as an exacerbating factor in the ongoing economic and housing crises.⁸³

tary while special legislation is imperative.]”). Special legislation has been enacted to address leases of many types, including not only leases of habitation but also rural leases, commercial leases, and professional leases. *Id.* at 329–34.

75. JEAN-LUC AUBERT & PHILIPPE BIHR, *LA LOCATION D’HABITATION: LOI DU 6 JUILLET 1989*, at 3 (1990).

76. *Id.*

77. *Id.*

78. Loi 82-526 du 22 juin 1982 relative aux droits et obligations des locataires et des bailleurs [Law 82-526 of June 22, 1982 relative to the rights and obligations of lessees and lessors], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE]*, Jun. 23, 1982, p. 1967 [hereinafter Quillot Act].

79. AUBERT & BIHR, *supra* note 75, at 3.

80. *See id.* at 2; de Moor, *supra* note 64, at 426.

81. Boccadoro & Chamboredon, *supra* note 27, at 2; AUBERT & BIHR, *supra* note 75, at 2.

82. Boccadoro & Chamboredon, *supra* note 27, at 2; AUBERT & BIHR, *supra* note 75, at 2.

83. AUBERT & BIHR, *supra* note 75, at 2–3 (“[E]n 1986, la France connaît une grave crise du bâtiment et du logement: le rythme des constructions de logements s’est abaissée dans des proportions inquiétantes; dans les grandes agglomérations les logements à louer sont rares et de plus en plus chers. Cette situation, détestable pour ceux qui ne sont pas propriétaires d’un logement, est en fait le résultat d’une évolution amorcée depuis plus de dix ans, et dont la loi de 1982 n’a fait qu’amplifier certains des effets.” [“In 1986, France was suffering from a significant housing crisis: the rhythm of construction of housing decreased in worrying proportions and dwellings for rent in large complexes became more and more rare and expensive. This situation, detestable for non-homeowners, was the result of an evolution ten years in the making, and the Quillot Act only amplified its effects.”]); *see also* de Moor, *supra* note 64, at 430 (describing rent control provisions of the 1982 act as “[t]he most contentious part” of the legislation); Boccadoro & Chamboredon, *supra* note 27, at 2 (noting that “[t]he right wing accused the government of willing to abolish private property”).

A subsequent shift of the political majority in the French Parliament (itself caused by the economic and housing crises of the 1980s) brought about the abrogation of the Quillot Act by way of new legislation, enacted in 1986, known as the Méhaignerie Act.⁸⁴ In stark contrast to prior law, the Méhaignerie Act placed much greater emphasis on the prerogative of property owners in order to encourage a return of vacant properties to the rental market.⁸⁵ Its primary reform was to abolish rent control.⁸⁶ And, although this change appeased the right wing in the short term, rents increased dramatically as a result.⁸⁷

The most recent piece of comprehensive legislation, passed in 1989 and known as the “Mermaz Act,”⁸⁸ is viewed as a compromise between the rights of landlords and tenants.⁸⁹ However, due to the Mermaz Act’s maintenance of minimum contract terms,⁹⁰ limited grounds for lease termination,⁹¹ and habitability requirements,⁹² the law remains decidedly favorable to tenants.⁹³

84. Loi 86-1290 du décembre 1986 tendant à favoriser l’investissement locatif, l’accession à la propriété de logements sociaux et le développement de l’offre foncière [Law 86-1290 of December 23, 1986 tending to favor housing investment, ownership of social housing and the development of property availability], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 24, 1986, p. 15531 [hereinafter Méhaignerie Act].

85. AUBERT & BIHR, *supra* note 75, at 2–3.

86. Boccadoro & Chamboredon, *supra* note 27, at 2.

87. *Id.*

88. *See generally*, Mermaz Act, *supra* note 63. More recent specialized legislation relating to residential leases exists. *See, e.g.*, Loi 2007-290 du 5 mars 2007 instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale (1) [Law 2007-290 of March 5, 2007 creating an opposable right to habitation and including diverse measures favoring social cohesion (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 6, 2007, p. 4190.

89. Mermaz Act, *supra* note 63, at art. 1 (“Les droits et obligations réciproques des bailleurs et des locataires doivent être équilibrés dans leurs relations individuelles comme dans leurs relations collectives.”) [“The reciprocal rights and obligations of lessors and lessees must be equal both on an individual and on a collective level.”]. The text presented to the French *Assemblée Nationale* at the time the law was proposed states that it is necessary to “organize by law the equilibrium of rights and obligations between lessors and lessees.” *See* JACQUES LAFOND & FRANCIS LAFOND, LES BAUX D’HABITATION APRES LA LOI DU 6 JUILLET 1989 [THE RESIDENTIAL TENANCIES AFTER THE LAW OF JULY 6, 1989] (Litec 1990) (quoting *Assemblée Nationale*, doc. n. 345, p. 10); GERARD AZÉMA, NOUVEAU STATUT DES BAUX D’HABITATION [NEW STATUS OF THE TENANCY] (Masson, 1st ed. 1990).

90. Mermaz Act, *supra* note 63, art. 10.

91. *Id.* at art. 15.

92. *Id.* at art. 6.

93. AUBERT & BIHR, *supra* note 75, at 2 (noting that the Mermaz Act draws clear inspiration from the Quillot Act and marks a return to a heavily protectionist regime in favor of the tenant).

Reactions to the reforms implemented in France in the 1980s have been mixed. The prevailing view is that although the regulations currently in place responded to legitimate concerns, they are too severe in some respects.⁹⁴ Central to this criticism are the strict rules governing security of tenure and eviction, which make repossession by the landlord extremely difficult, even for legitimate purposes, such as for the non-payment of rent.⁹⁵ The unpredictability of rent recovery causes landlords to rigorously screen tenants and raise rents, reducing the supply of available housing, particularly in large urban centers.⁹⁶ On the other hand, little complaint is made about the rules requiring landlords to maintain the premises in good condition. Indeed, housing conditions in France are recently reported as having “never been better.”⁹⁷

2. *England*

Whereas French tenancy law is decidedly pro-tenant, landlord-tenant law in England favors the interests of landlords, at least in the private sector.⁹⁸ This was not always the case. Rent control and security of tenure, first introduced early in the nineteenth century, were reaffirmed following the Second World War.⁹⁹ With some minor deviations,¹⁰⁰ these protections persisted into the 1980s, at which point the Conservative government succeeded in passing legislation that was aimed at deregulating private sector tenancies.¹⁰¹ These efforts were largely directed at reviving the private rental sector, which had fallen into serious decline.¹⁰² In particular, policy-makers hoped that a more landlord-friendly regime would encourage investment,

94. See ORGANIZATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, OECD ECONOMIC SURVEYS: FRANCE 105 (2011) [hereinafter OECD SURVEY: FRANCE].

95. See *id.* at 105–06; see also *infra* notes 367–75 and accompanying text.

96. See OECD SURVEY: FRANCE, *supra* note 94; BOULHOL, *supra* note 37, at 8.

97. BOULHOL, *supra* note 37, at 8.

98. DAVID HUGHES AND STUART LOWE, THE PRIVATE RENTED SECTOR IN A NEW CENTURY 1 (Stuart Lowe & David Hughes eds., 2002).

99. *Id.* at 2–3; LAW COMMISSION, STATUS AND SECURITY, *supra* note 18, at 21–34.

100. See HUGHES & LOWE, *supra* note 98, at 3–4 (describing the partial deregulation of the 1957 Rent Act, which was largely reversed in 1965).

101. See RICHARD COLBEY & NIAMH O'BRIEN, RESIDENTIAL TENANCIES 1–2 (5th ed. 2009); LAW COMMISSION, STATUS AND SECURITY, *supra* note 18, at 34.

102. See VALERIE KARN & HAROLD WOLMAN, COMPARING HOUSING SYSTEMS: HOUSING PERFORMANCE AND HOUSING POLICY IN THE UNITED STATES AND BRITAIN 143–47 (1992); Dave Cowan & Emma Laurie, *England and Wales*, in EUROPEAN UNIV. INST., TENANCY LAW AND PROCEDURE IN THE EU, <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawUK.pdf> (last visited Oct. 26, 2013); HUGHES & LOWE, *supra* note 98, at 1–5.

particularly at the corporate level, thereby increasing the dwindling housing supply.¹⁰³

The key piece of legislation effecting deregulation was the Housing Act of 1988,¹⁰⁴ which abolished rent control for private tenancies and provided instead that rent is to be controlled by the market.¹⁰⁵ Under the Act, rent is effectively set by the agreement of the parties to the lease.¹⁰⁶ With respect to tenure, the legislation increased the number of grounds upon which landlords can evict secured tenants and regain possession of the premises.¹⁰⁷ Most significantly, the 1988 Act instituted the “assured shorthold tenancy”—a lease that can be terminated by the landlord for any reason upon two months’ notice.¹⁰⁸

Efforts at deregulation have proven largely successful: the most recent data available shows that the private rental sector is at its highest level since the 1990s and continues to grow.¹⁰⁹ Other problems remain, however. Altogether, thirty-five percent of the private rental stock is currently classified as “non-decent,” meaning that it fails to meet statutory minimum requirements for housing conditions, that it is in a state of disrepair, or that it lacks reasonably modern facilities.¹¹⁰ Additionally, relations between landlords and tenants are often strained, characterized by tenant harassment and unlawful evictions.¹¹¹

Importantly, England’s tenancy law continues to evolve in response to these perceived deficiencies. Over the course of the last twenty-five years, the Law Commission of England and Wales (“Law Commission”)¹¹² has undertaken numerous projects involving the study of English tenancy law.¹¹³

103. HUGHES & LOWE, *supra* note 98, at 5.

104. Housing Act, 1988 (Eng.). Because the Housing Act of 1988 is not retroactive, a small number of tenancies created prior to 1989 are still governed largely by the law in effect at the time of creation. See COLBEY & O’BRIEN, *supra* note 101, at 1–6 for a brief description of the law governing leases granted before the effective date of the new legislation.

105. See LAW COMMISSION, STATUS AND SECURITY, *supra* note 18, at 35–36.

106. See *id.* at 34.

107. See *id.*

108. Housing Act, 1996, c. 2, § 21(4) (Eng.); see also LAW COMMISSION, STATUS AND SECURITY, *supra* note 18, at 35. For further discussion of the assured shorthold tenancy, see *infra* notes 348–52 and accompanying text.

109. DEPARTMENT FOR COMMUNITIES & LOCAL GOVERNMENT, ENGLISH HOUSING SURVEY HEADLINE REPORT 2011-2012, at 8, available at <https://gov.uk/government/publications/english-housing-survey-2011-to-2012-headline-report.pdf> (last visited Oct. 26, 2013).

110. *Id.* at 40.

111. HUGHES & LOWE, *supra* note 98, at 13.

112. The Law Commission is an independent body charged with reviewing and recommending reforms to the law. The stated purpose of the Law Commission is to ensure that the law is fair, modern, simple, and as cost-effective as possible. See LAW COMMISSION, <http://lawcommission.justice.gov.uk/index.htm> (last visited Oct. 26, 2013).

113. See, e.g., The LAW COMMISSION, LANDLORD AND TENANT: RESPONSIBILITY FOR STATE AND CONDITION OF PROPERTY, 1996, LAW COM No 238 (U.K.), available at

Projects have focused on the landlord's obligation for the condition of the premises, security of tenure and lease termination, and dispute resolution, and have uniformly called for increased tenant protections. As a whole, the work of the Law Commission reflects dissatisfaction with the state of housing law in England, and in particular, with the condition of rented dwellings, particularly in the private sector.

III. THE IMPLIED WARRANTY OF HABITABILITY

The cornerstone of the American landlord-tenant revolution was the recognition of an implied warranty of habitability—a continuing obligation on the part of the landlord to ensure that the premises were in decent and safe repair.¹¹⁴ In recognition of the fact that tenants generally do not have the access, skills, or financial resources to make repairs to the property they lease, courts and legislators alike gradually began to impose affirmative obligations on the landlord to make repairs and keep the premises a condition fit for human habitation.¹¹⁵ URLTA championed the implied warranty and promoted its adoption by codifying it and ensuring tenants access to a number of remedies in the event of its breach.¹¹⁶

The warranty of habitability has been highly controversial since its inception.¹¹⁷ A fervent debate regarding its potential effects on housing cost

<http://lawcommission.justice.gov.uk/publications/landlord-and-tenant-responsibility-for-state-and-condition-of-property.htm> (last visited Oct. 26, 2013) [hereinafter LAW COMMISSION, STATE AND CONDITION OF PROPERTY]; THE LAW COMMISSION, TERMINATION OF TENANCIES FOR TENANT DEFAULT, 2006, LAW COM No 303 (U.K.), available at <http://lawcommission.justice.gov.uk/areas/termination-of-tenancies-for-tenant-default.htm> (last visited Oct. 26, 2013); THE LAW COMMISSION, RENTING HOMES: THE FINAL REPORT, 2006, LAW COM No 297 (U.K.) available at http://lawcommission.justice.gov.uk/docs/lc297_Renting_Homes_Final_Report_Vol1.pdf; (last visited Oct. 26, 2013); THE LAW COMMISSION, HOUSING: ENCOURAGING RESPONSIBLE LETTING, 2008, LAW COM No 312 (U.K.), available at <http://lawcommission.justice.gov.uk/areas/housing-encouraging-responsible-letting.htm> (last visited Oct. 26, 2013); THE LAW COMMISSION, HOUSING: PROPORTIONATE DISPUTE RESOLUTION, 2008, LAW COM No 309 (U.K.), available at <http://lawcommission.justice.gov.uk/areas/housing-proportionate-dispute-resolution.htm> (last visited Oct. 26, 2013) [hereinafter LAW COMMISSION, PROPORTIONATE DISPUTE RESOLUTION].

114. See WILLIAM B. STOEBCUK & DALE A. WHITMAN, THE LAW OF PROPERTY 299 (3d ed. 2000) (calling the adoption of the implied warranty “the most dramatic and sudden change in [landlord-tenant law] in modern times”); David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 393 (2011) (stating that the warranty of habitability was “[t]he most prominent result of the revolution”).

115. See Barbara Jo Smith, Note, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty*, 72 WASH U. L.Q. 475, 495 (1994).

116. See Strum, *supra* note 5, at 499.

117. See Rabin, *supra* note 1, at 558–61 (summarizing academic debate regarding the implied warranty).

and supply took place at the time of its initial development¹¹⁸ and has yet to be resolved.¹¹⁹ Recent literature has addressed a more basic issue—the warranty’s *efficacy* in improving housing conditions.¹²⁰ While limited empirical evidence suggests that the implied warranty of habitability “positively affects the condition of rented dwellings,”¹²¹ commentators generally find the warranty lacking in results.¹²² One of the doctrine’s chief critics recently declared that the warranty of habitability “has failed at achieving any of its major goals.”¹²³

The failures of the warranty of habitability may well be attributed to far-reaching forces affecting poverty at the macro-level.¹²⁴ Such forces, being deeply rooted in history, social context, and public policy, are difficult to evaluate comparatively. However, the failure of the warranty is tied as much to internal deficiencies as to overarching societal and structural influences. These include not only the warranty’s scope, but also the remedies available in the event of the landlord’s breach, and the rules governing its modification by the parties. Comparative law offers guidance for each of these matters.

A. Scope

URLTA’s warranty obligation is both comprehensively formulated and defined with specificity. The provision begins by requiring the landlord to comply with building and housing codes,¹²⁵ to make repairs and do whatever is necessary to put and keep the premises in a “fit and habitable condition,”¹²⁶ and to keep common areas in a “clean and safe condition.”¹²⁷ The uniform law then goes on to list installations¹²⁸ and appliances¹²⁹ that the

118. *See id.*

119. *See id.* at 560–79 (summarizing empirical data and concluding that it “provides no basis upon which to make a judgment” about the effects of the warranty); Michael A. Brower, Comment, *The “Backlash” of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 884–89 (2011) (concluding that a statistically significant relationship exists between the implied warranty and rent rates, but conceding that the data “did not prove the existence of a causal relationship between the implied warranty and increased rent rates” (footnote omitted)).

120. *See, e.g.*, Brower, *supra* note 119; Super, *supra* note 114.

121. Brower, *supra* note 119, at 887–89.

122. *See, e.g.*, Super, *supra* note 114.

123. *Id.* at 458.

124. Professor Super, for example, finds blame in the lack of a coherent, broadly accepted set of goals for the warranty, moral judgments inflicted upon the poor, and the nonexistence of a practical infrastructure for the enforcement of tenant rights. *Id.* at 458–61.

125. URLTA, *supra* note 2, § 2.104(a)(1).

126. *Id.* § 2.104(a)(2).

127. *Id.* § 2.104(a)(3).

128. *Id.* § 2.104(a)(4).

landlord must maintain and the utilities¹³⁰ that must be supplied to the tenant.

Although the scope of a landlord's obligation with respect to the condition of the premises is already quite broad, the ULC Drafting Committee is considering amendments that expand the landlord's obligation to safeguard the tenant's health and safety.¹³¹ The draft Revised URLTA (RURLTA) imposes general obligations on the landlord to "make all repairs" and to "do or refrain from doing whatever is necessary to assure that the premises are maintained in a habitable condition"¹³² before going on to provide an exclusive list of conditions deemed to constitute breach of this obligation.¹³³ Several items in this list impose obligations on the landlord that are not included explicitly in the existing law. These include the obligations to ensure that the roof and exterior walls are waterproof,¹³⁴ to have reasonable measures in place to control the presence of infestations and environmental hazards, including mold,¹³⁵ to ensure that locks and security devices on exterior doors and windows are maintained in good working order,¹³⁶ and to provide safety equipment such as smoke detectors and fire extinguishers as required by law.¹³⁷

Upon first reading, these revisions seem conservative, especially in light of the fact that many states have already adopted these requirements.¹³⁸ However, they in fact reflect a subtle but important refocusing of the warranty away from the specific appurtenances of the dwelling and toward the general safety and wellbeing of the tenants who reside there. A review of the landlord's maintenance and repair obligations in England and France may help place the proposed amendments into perspective.

129. *Id.* § 2.104(a)(5).

130. *Id.* § 2.104(a)(5)–(6).

131. See Memorandum from Alice Noble-Allgire to Members of the URLTA Drafting Comm. (Feb. 12, 2012) available at http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta_memo_warrantyofhabitability_021212.pdf (last visited Oct. 26, 2013); see also Joan Zeldon et. al., DRAFT REVISED UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 303(a)(1)–(13) (Oct. 25, 2013) [hereinafter RURLTA], available at www.uniformlaws.org/shared/docs/Residential%20Landlord%20and%20Tenant/2013nov_RURLTA_MtgDraft_Clean.pdf (last visited January 7, 2014).

132. RURLTA, *supra* note 131, § 303(a).

133. *Id.* § 303(a)(1)–(13).

134. *Id.* § 303(a)(2).

135. *Id.* § 303(a)(7).

136. *Id.* § 303(a)(12).

137. *Id.* § 303(a)(13).

138. See Noble-Allgire, *supra* note 131, at 8–9.

1. *France*

French law has historically imposed stringent obligations on lessors with respect to the condition of leased property.¹³⁹ The *Code civil* imposes three primary obligations relating to the condition of the premises on the lessor. First, the landlord is required to deliver to the lessee decent premises fit for use as a dwelling.¹⁴⁰ Next, the lessor must make all repairs necessary to maintain the premises, other than *réparations locatives* (repairs incumbent upon the lessee).¹⁴¹ Finally, the lessor owes a warranty against hidden vices or defects in the premises that prevent its use.¹⁴² Under this scheme, the obligations of the landlord are tied primarily to the attributes of the structure and its appurtenances.¹⁴³ The lessor's obligations of maintenance and protection against vices have been held to extend to collapsed floors, faulty guardrails and windows, and poor construction.¹⁴⁴

139. Lessors in France have always been subject to an obligation of warranty vis-à-vis their lessees. AUBERT & BIHR, *supra* note 75, at 115. Article 6(b) of the Mermaz Act of 1998 has affirmed this obligation. *Id.*

140. CODE CIVIL [C. CIV.] arts. 1719(1), 1720 (Fr.).

141. *Id.* at arts. 1719(2), 1720 (Fr.). *Réparations locatives* are defined by the *Code civil*. See *id.* at art. 1754 (Fr.). Jurisprudence is abundant concerning the definition of “*réparations locatives*.” See MALAURIE & AYNES, *supra* note 66, at 375 n. 21. Generally, a *réparation locative* is any repair that does not concern the structure or any essential element of the dwelling. *Id.* at 375. Any other repair is the responsibility of the lessor, who is also responsible for all repairs regardless of their size that are caused by a vice or defect of the leased premises. *Id.* at 375 n. 21.

In the context of residential leases, special legislation has intervened to define with more clarity the concept of *réparation locative* and the obligations incumbent on the lessee. Article 7(d) of the Mermaz Act specifically imposes on the lessee the responsibility to “undertake the ongoing upkeep of the leased premises, the upkeep of equipment mentioned in the contract, and small repairs, as well as the ensemble of ‘réparations locatives,’ or lessee repairs.” Mermaz Act, *supra* note 63, art. 7(d). The term “*réparations locatives*” is defined by Article 1 of Decree number 87-112 of August 26, 1987 of the Conseil d’Etat as “ongoing upkeep work and small repairs . . . consistent with the normal usage of the premises and equipment for private use” and includes things such as replacing broken keys and light bulbs. Décret 87-712 du 26 août 1987 pris en application de l'article 7 de la loi n° 86-1290 du 23 décembre 1986 tendant à favoriser l'investissement locatif, l'accession à la propriété de logements sociaux et le développement de l'offre foncière et relatif aux réparations locatives [Decree 87-712 of August 26, 1987 pursuant to Article 7 of Law 86-1290 of December 23, 1986 aimed to favor housing investment, ownership of social housing, and the development of property availability], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 30, 1987, p. 9976 (Fr.).

142. CODE CIVIL [C. CIV.] art. 1721 (Fr.). Although the text of the article does not explicitly so state, it is well established that the lessor is not responsible for apparent defects but only for those that are hidden. See MALAURIE & AYNES, *supra* note 66, at 378; J. Schmidt-Szalewski, *France*, in 3 INTERNATIONAL ENCYCLOPAEDIA OF LAWS 221 (1999).

143. AUBERT & BIHR, *supra* note 75, at 120.

144. *Id.* at 121.

The Mermaz Act largely repeats the substance of the *Code civil* with respect to the obligations of the lessor; however, there are several important changes found in the special legislation. First, despite the protective nature of the obligations set forth by the *Code civil*, the obligations there are generally subject to the will of the contracting parties.¹⁴⁵ To protect lessees from overreaching by lessors, the 1989 Mermaz Act and more recent special legislation have made the lessor's obligations respecting the condition of the premises matters of public order that may not be waived or modified by the parties.¹⁴⁶ Additionally, while the *Code civil* imposes an obligation on the lessor to protect the lessee only from *hidden vices* in the leased thing,¹⁴⁷ the 1989 Mermaz Act extends the lessor's warranty to all vices, whether hidden or apparent.¹⁴⁸

Moreover, special legislation clarifies that one of the lessor's primary obligations respecting the condition of the premises is to supply *un logement décent* (a decent lodging) and describes the obligation by reference to specific physical conditions.¹⁴⁹ For example, the legislation requires that the dwelling contain a minimum square footage and basic heating, electrical, and plumbing systems.¹⁵⁰ The dwelling must not present any manifest risk to the tenant's health, safety, or physical security.¹⁵¹ This broad standard has been interpreted as requiring the landlord to ensure the dwelling is free from

145. *Id.* at 115.

146. Mermaz Act, *supra* note 63, at art. 6; Décret n°2002-120 du 30 janvier 2002 relatif aux caractéristiques du logement décent pris pour l'application de l'article 187 de la loi n° 2000-1208 du 13 décembre 2000 relative à la solidarité et au renouvellement urbains [Decree 2002-120 of January 30, 2002 relative to characteristics of decent housing pursuant to Article 187 of Law 2000-1208 of December 13, 2000 relative to solidarity and urban renewal] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 31, 2002 [hereinafter Decent Housing Decree]; *see also* Part II(C), *infra*.

147. *See* MALAURIE & AYNES, *supra* note 66, at 378; Schmidt-Szalewski, *supra* note 142, at 221.

148. AUBERT & BIHR, *supra* note 75, at 121; Mermaz Act, *supra* note 63, at art. 6.

149. Mermaz Act, *supra* note 63, at art. 6; Decent Housing Decree, *supra* note 146, at art. 1. The obligation to provide the lessee with *un logement décent* appeared in the Code civil for the first time in 2000 and is now applicable to all residential leases. CODE CIVIL [C. CIV.] art. 1719(1) (Fr); Loi n 2000-1208 du 13 décembre 2000 relative à la solidarité et au renouvellement urbains [Law 2000-1208 of December 13, 2000 concerning solidarity and urban renewal], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 14 2000, p. 19777 (Fr.).

150. Decent Housing Decree, *supra* note 146, at arts. 3–4.

151. Mermaz Act, *supra* note 63, at art. 6.

dangerous floors and ceilings,¹⁵² exposed electrical wires,¹⁵³ and environmental hazards such as mold¹⁵⁴ and chipping lead paint.¹⁵⁵

Also noteworthy is a modern jurisprudential trend that has expanded the lessor's obligation to secure the lessee's "peaceful enjoyment" of the premises by imposing additional requirements on the lessor to safeguard the tenant's health and physical security.¹⁵⁶ In one representative case, a lessor was found liable for a burglary occurring on the property after he neglected to give proper instructions to contractors to close the shutters after working.¹⁵⁷ These cases highlight the point that in French law, the lessor's primary obligation is one of ensuring the lessee's enjoyment of the leased premises.¹⁵⁸ It is from this principal obligation of enjoyment that the lessee's other obligations—including the obligation to maintain conditions of decency—flow.¹⁵⁹

152. See Ministère de l'emploi, du travail et la cohésion sociale, *Guide d'évaluation: Qu'est-ce qu'un logement décent?*, DIRECTION GÉNÉRALE DE L'URBANISME, DE L'HABITAT, ET DE LA CONSTRUCTION, http://www2.logement.gouv.fr/publi/locaces/doc_pdf/logtdecent.pdf.

153. See *id.*

154. See Cour de cassation [Cass.] 3^e civ., Feb. 5, 2013, 12-11.827, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027055740&fastReqId=304481899&fastPos=42> (last visited Feb. 27, 2013) (Fr.) (discussing a lessor's failure to provide a decent lodging in the presence of "abundant" mold, condensation on windows, and humidity); Cour d'appel [CA] Lyon 8^e ch, Oct. 25, 2011, 10/00279, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025306023&fastReqId=1699777926&fastPos=11> (last visited Feb 27, 2013) (Fr.) (discussing a lessor's failure to provide a decent lodging in the presence of excessive mold and humidity).

155. See Ministère de l'emploi, du travail et de la cohésion sociale, *supra* note 152.

156. See ALAIN BÉNABENT, *Droit Civil* 249 (Librairie générale de Droit et de Jurisprudence, EJA 2006) (citing Cour de cassation [Cass.] 3^e civ., Feb. 28, 1990, *Bull.* III, no. 63 (Fr.) (holding a lessor liable for a burglary when scaffolding was erected against the complex where lessor did not take precautions to prevent burglary, notify his lessees, or provide them with security); Cour de cassation [Cass.] 3^e civ., Feb. 22, 1983, *Bull.* III, n. 50 and 51 (Fr.) (holding a lessor liable for a burglary where he undertook to provide security for the complex)).

157. See Cour de cassation [Cass.] 3^e civ., Jul. 8, 1992, 90-18367, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007161782&fastReqId=474252380&fastPos=4> (last visited Feb. 25, 2013) (Fr.); see also Beatrice Vial-Pedroletti, *Bail d'habitation*, *LOYERS ET COPROPRIÉTÉ* Oct. 1992 at 5; BÉNABENT, *supra* note 156, at 250.

158. See BÉNABENT, *supra* note 156, at 246–7 (Librairie générale de Droit et de Jurisprudence, EJA 2006); see CODE CIVIL [C. CIV.] arts. 1709, 1719(3) (Fr.); Mermaz Act, *supra* note 63, at art. 6.

159. BÉNABENT, *supra* note 156, at 246–47.

2. *England*

As a general rule, no continuing warranty of habitability exists in England.¹⁶⁰ Moreover, the implied covenant of quiet enjoyment does not impose any obligation to maintain the premises in a good condition or to make repairs.¹⁶¹ In most cases,¹⁶² a statutory repairing obligation requires landlords only to maintain the structure and exterior of the property and to ensure that certain major installations, such as plumbing and electrical systems, are in proper working order.¹⁶³ Moreover, the statutory repairing obligation applies only to “disrepair”—correcting damage and deterioration—and not to all cases where structural defects lead to non-habitability.¹⁶⁴ In one well-known case in which construction defects caused dampness and condensation so severe that the plaintiff’s living conditions were described by the court as “appalling,”¹⁶⁵ the court found that there was no “disrepair” to the structure

160. See *Hart v. Windsor*, (1843) 152 Eng. Rep. 1114 (exch.) 1122, 12 M&W 68, 87-88 (Eng.) (overruling earlier cases); *Robbins v. Jones* (1863) 143 Eng. Rep. 768 (Ct. Com. Pl.) 776, 15 C.B.N.S. 22, 240 (Eng.) (“fraud apart, there is no law against letting a tumbledown house”); ARDEN & DYMOND, *MANUAL OF HOUSING LAW* 190 (9th ed. 2012).

This rule admits several narrow exceptions. An implied condition that leased premises shall be “in all respects reasonably fit for human habitation” applies to leases with a very low rent—less than 52£ per annum (in London, 80£ per annum). Landlord and Tenant Act, 1985, c. 70, §8 (Eng.). The standard of fitness under the 1985 act requires that the property must not be defective in respect to: repair, stability, freedom from damp, internal arrangement, natural lighting, ventilation, water supply, drainage and sanitary conveniences, facilities for preparation of food and for the disposal of waste water, and by reason that is not reasonably suitable for occupation. ARDEN & DYMOND, *supra* at 192–93. The failure of the legislature to increase the statutory rent limits triggering the warranty over the course of years has allowed the warranty to fall into desuetude. See THE LAW COMMISSION, *STATE AND CONDITION OF PROPERTY*, *supra* note 113, ¶ 6.3. Additionally, in leases of *furnished* dwellings, the common law requires that the premises be “fit for human habitation” at the *start* of the tenancy, though not thereafter. See *Smith v. Marrable*, (1843) 152 Eng. Rep. 693 (Exch.) 694, 11 M&W 5, 7-9 (Eng.); ARDEN & DYMOND, *supra* at 190; see also JAN LUBA ET AL., *REPAIRS: TENANTS’ RIGHTS* 13–18 (2010).

161. See ARDEN & DYMOND, *supra* note 160, at 191–92.

162. Landlord and Tenant Act, 1985, c. 70 § 11–14 (Eng.). The repairing obligation does not apply to leases longer than seven years. *Id.*

163. *Id.* at c. 70, § 11(1)(a), (b) & (c).

164. See *Quick v. Taff Ely Borough Council*, [1986] Q.B. 809 at 820–21 (Wales).

165. *Id.* at 815. The court remarked that:

[t]he evidence shows that there was severe condensation on the walls, windows and metal surfaces in all the rooms of the house. Water had frequently to be wiped off the walls; paper peeled off the walls and ceilings; woodwork rotted, particularly inside and behind the fitted cupboards in the kitchen. Fungus or mould appeared in places and particularly in the two back bedrooms there was a persistent and offensive smell of damp. . . . The moisture of the condensation was then absorbed by the atmosphere, and transferred to bedding, clothes, and other fabrics which became mildewed and rotten. There was evidence that car-

and thus no obligation to repair.¹⁶⁶ Moreover, litigation surrounding the scope of the “structure and exterior” of the dwelling has produced a jurisprudential catalog of those parts of a building which are, and are not, covered by the obligation.¹⁶⁷

Though the statutory repairing obligation is a narrow one, it is extended—albeit indirectly—by the landlord’s obligations in tort.¹⁶⁸ The Defective Premises Act of 1972 overturned the common law rule that the landlord owes no duty of care to the tenant, his family, or his lawful visitors.¹⁶⁹ The statute imposes a duty on the landlord “to take such care as is reasonable in all the circumstances” to ensure that “all persons who might reasonably be expected to be affected by defects in the state of the premises . . . are reasonably safe from personal injury or from damage to their property caused by a relevant defect.”¹⁷⁰ The Act imposes this duty on the landlord whenever the tenancy either expressly or impliedly gives the landlord the right to enter the premises to carry out maintenance or repairs.¹⁷¹ Moreover, the landlord’s duty applies to any defect of which he knew or “ought in all the circumstances to have known.”¹⁷² The landlord is therefore liable for any defect that he ought to have discovered, regardless of whether the tenant notified him of its existence.¹⁷³ Thus, the Defective Premises Act converts a mere *right* to enter to make repairs into a *duty* to enter to inspect the premises’ safety.¹⁷⁴

The expansion of the landlord’s repair obligations by way of his duties in tort is slight, however. The tort obligation applies only to damage caused by “relevant defects”—defects resulting from the landlord’s failure to carry out his contractual obligations of maintenance and repair.¹⁷⁵ Thus, English

pets and curtains had been ruined. . . . I would concluded that, by modern standards, the house was . . . virtually unfit for human habitation.

Id.

166. See *id.* at 820–21; see also *Stent v. Monmouth District Council* [1987] 19 H.L.R. 269, (C.A.) at 285–286 (Eng.) (holding that defective door that failed to keep rain out of dwelling did not fall within ambit of landlord’s obligation to “repair”).

167. See WOODFALL: LANDLORD AND TENANT § 13.009.2 (2013) (collecting cases); Jan Luba, *Landlord’s Repairing Obligations in the Residential Sector: Part 1—Liability Issues*, L & T REVIEW 2005, 9(3), 62, 63 [hereinafter Luba, *Repairing Obligations Part 1*] (same).

168. LAW COMMISSION, STATE AND CONDITION OF PROPERTY, *supra* note 113, § 5.26.

169. *Id.* § 5.21.

170. Defective Premises Act, 1972, c.35, § 4(1) (Eng.).

171. *Id.* § 4(4).

172. *Id.* § 2.

173. LAW COMMISSION, STATE AND CONDITION OF PROPERTY, *supra* note 113, ¶ 5.26.

174. See *id.*; WOODFALL, *supra* note 167, § 13.008.

175. Defective Premises Act, 1972, c. 35 § 4(3) (Eng.) (defining “relevant defect” as “a defect in the state of the premises existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he

courts have made clear that by tracking the obligation in contract, the obligation in tort is limited to *repairs* and does not extend to *structural defects* in the premises.¹⁷⁶

Not surprisingly, the traditional regimes governing the landlord's liability for the premises have been heavily criticized.¹⁷⁷ In 1996, citing data indicating that over twenty percent of privately rented housing was unfit for habitation,¹⁷⁸ the Law Commission recommended the enactment of legislation adopting an implied covenant of habitability in every residential lease with a term of less than seven years.¹⁷⁹ After much deliberation, the Government did not adopt the Law Commission's recommendations, but instead chose to address the poor quality of housing with a public law solution.

Local authorities in England have long had the authority to ensure that buildings used for housing are "fit for human habitation," and to require repair or demolition of structures that fail to meet this standard.¹⁸⁰ In 2004, the fitness standard was discarded in favor of a new Housing Health and Safety Rating System, which requires landlords to take measures to ensure the safety of their tenants from specific "hazards," defined generally as any risk to health or safety to an occupier of a dwelling.¹⁸¹ The recasting of the standard to one requiring freedom from "hazards" stemmed from dissatisfaction with the limitations of the "fitness" construct, which did not encompass important elements such as dangerous design features of the dwelling,

had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises").

176. See, e.g., *Dunn v. Bradford MDC* [2003] 15 H.L.R. 154, 179 ("[T]o construe section 4(4) of the 1972 Act would require . . . reading the phrase 'any description of maintenance or repair' as if it extended to works of improvement which went beyond maintenance or repair. I do not think that, in the absence of clear words, Parliament should be held to have intended to impose so substantial a burden on landlords."); see also Luba, *Repairing Obligations Part I*, *supra* note 167, at 66 (calling *Dunn* "[t]he latest attempt to 'stretch' the scope of s.4 of the 1972 Act").

177. See, e.g., LAW COMMISSION, STATE AND CONDITION OF PROPERTY, *supra* note 113, ¶¶ 1.7–1.13, 6.21 ("[T]he present law regulating repair and unfitness cannot be regarded as satisfactory."); Jan Luba, *Landlord's Obligations for the Condition of Rented Residential Premises—A Law Full of Holes*, L & T REVIEW 2002, 6(3), 49, 50 (describing the law as "a legal landscape full of holes"); *Habinteg Housing Association v. James* (1995) 27 H.L.R. 299, 306 ("We are told that the Law Commission has been considering such a problem. It is to be hoped that they will recommend a solution. What is more, it is to be hoped that if they do, Parliament will carry it out. Judges and lawyers are sometimes reproached when the law does not produce the right result. There are occasions when the reproach should be directed elsewhere.").

178. LAW COMMISSION, STATE AND CONDITION OF PROPERTY, *supra* note 113, ¶ 8.4 (Table 1).

179. *Id.* ¶ 8.35.

180. *Id.* ¶ 4.31.

181. Housing Act, 2004, c. 34, § 2(1) (Eng.).

fire safety, or energy efficiency.¹⁸² The stated purpose of the new legislation is to ensure that “[a]ny residential premises should provide a safe and healthy environment for any potential occupier or visitor.”¹⁸³ Under the new regime, hazards are grouped into four categories: physiological requirements (such as cold, lead, dampness, and mold); protection against infection (for example, water supply safety); protection against accidents (including fire, structural collapse, and falls); and psychological requirements (such as overcrowding, entry by intruders, light, and noise).¹⁸⁴ Failure to comply with the new standards triggers regulatory action ranging from required repairs to demolition.¹⁸⁵

Although the Housing Health and Safety Rating System is viewed as an important step toward improving the quality of the housing stock in England, skeptics remain concerned that a public law solution does not go far enough to incentivize landlords to maintain their properties in a decent state.¹⁸⁶

3. *Comparative Lessons*

The foregoing account makes plain that French law affords residential tenants much greater recourse against landlords whose properties do not meet minimum standards of comfort and safety than the law of England does. The narrative is not entirely one of dissimilarity, however. In both jurisdictions, tenant protections have expanded significantly over the course of the last decade or so. In England, persistent dissatisfaction with the poor condition of many rented dwellings led Parliament to implement significant regulatory controls on residential landlords. In France, legislative and jurisprudential developments have led to amplified and more concrete housing standards. The evolution of the law in both jurisdictions reflects a common goal—to improve housing conditions for residential tenants—though different means have been employed to do so.

Another more subtle similarity between the developments in French and English law is the fact that both systems are moving away from standards focused on mere repairs and reparations of structural defects and to-

182. JAMES DRISCOLL, *HOUSING: THE NEW LAW: A PRACTICAL GUIDE TO THE HOUSING ACT 2004* 28 (2007).

183. OFFICE OF THE DEPUTY PRIME MINISTER, *HOUSING HEALTH AND SAFETY RATING SYSTEM: OPERATING GUIDANCE 8* (2006), available at <http://www.nchh.org/Portals/0/Contents/HH%20Standards.UKHHSoperatingguidance.pdf> (last visited Oct. 13, 2013).

184. *See id.* at 49.

185. Housing Act, 2004, c. 34, §§ 5–7 (Eng.).

186. *See* THE LAW COMMISSION, *RENTING HOMES: THE FINAL REPORT* §§ 1.61, 8.1–8.17 (2008) (proposing legislation that would require landlords to include in the rental agreement an express covenant that the premises are free from “category 1” (severe) hazards).

ward standards focused more broadly on health, safety, and comfort. In France, this shift was accomplished through legislation imposing specific standards of decency and creative jurisprudential interpretation of the lessor's obligation to maintain the lessee in peaceful enjoyment. English law has chosen to address risks to health and safety through prevention efforts conducted by the government. These disparate developments are functionally equivalent in their recognition that poor housing conditions present serious burdens to a tenant's health and safety.

The restructured and expanded habitability standards of RURLTA fit squarely within both of these trends. Habitability involves compliance with housing codes and the provision of basic installations, as well as the prevention of any condition within the lessor's control that may negatively impact the tenant's health and safety. The additions made by the ULC Drafting Committee reflect a continued commitment to broad delineation of the landlord's obligations. Perhaps most significantly, the drafters have restructured the provisions outlining the landlord's duty to maintain the premises. Now, the landlord's "duty to maintain" is defined by referencing a list of conditions deemed to establish the "minimum" state of repair and decency.¹⁸⁷ This drafting style is ideal for defining an evolving standard, such as habitability. The listed conditions make the law clear and easy for landlords, tenants, lawyers, and courts to understand and apply. Codifying specific examples of inhabitability is particularly helpful for residential tenants and nonprofessional landlords who would have great difficulty distilling the standards from case law. Moreover, language making it explicit that the listed requirements establish the "minimum" state of repair leaves room for the warranty to grow beyond the conditions enumerated in the statute.

B. Remedies

Beyond its scope, a second feature of the implied warranty of habitability that has been a source of both academic and jurisprudential disagreement in the United States is the range of remedies available to the tenant in the event of the landlord's breach. The primary remedies presently recognized by URLTA are termination of the lease,¹⁸⁸ damages and/or injunctive relief, and attorney's fees.¹⁸⁹ URLTA also permits the tenant to engage in self-help by repairing minor defects,¹⁹⁰ and, in certain circumstances, to receive rent abatement or procure substitute housing.¹⁹¹

187. See RURLTA, *supra* note 131, § 303(a)(1)–(13).

188. URLTA, *supra* note 2, § 4.101(a).

189. *Id.* § 4.101(b).

190. *Id.* § 4.103.

191. *Id.* § 4.104.

Several difficulties have emerged in the application of these remedies in individual cases. The first concerns the proper measure of damages owed to the tenant in the event of the landlord's breach. URLTA does not specify precisely how damages are to be calculated. Without statutory guidance, courts have developed several different approaches to determining the extent of damages recoverable.

One approach has been to award damages equating to the difference between the contract rent and the fair rental value of the leased premises in their actual, defective condition.¹⁹² This "fair market value" calculation is said to put the tenant in the position in which he would have been if the contract had not been breached.¹⁹³ However, this method has been criticized on the ground that, in a case where the landlord charges a low rent for sub-standard housing, the warranty essentially provides the tenant with no recourse.¹⁹⁴

A second approach, sometimes described as the "benefit of the bargain" approach, calculates damages based upon the difference between the fair market value of the premises if they had been as warranted and the fair market value of the premises in their actual, defective condition.¹⁹⁵ This calculation is said to provide the tenant with his lost "benefit of the bargain," regardless of the rent that the landlord chooses to charge.¹⁹⁶ While avoiding the difficulties of the fair market value approach, the benefit of the bargain approach has been criticized on the ground that it can produce a seemingly bizarre result—if the fair market value of the premises is greater than the rent, the landlord may end up paying the tenant to occupy the premises.¹⁹⁷

A third approach provides a percentage reduction in the rent corresponding to the percentage of use lost "as a result of the landlord's breach of the implied warranty."¹⁹⁸ This approach has been adopted by a handful of courts in an apparent effort to avoid the problems associated with the other two measures of damage, as well as the difficulty of requiring a low-income tenant to provide expert testimony regarding the rental value of leased premises.¹⁹⁹

192. 5 N. GREGORY SMITH, THOMPSON ON REAL PROPERTY § 41.06(a)(6)(ii) (David A. Thomas ed., 2d ed. 2007).

193. *See id.*; ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:25, at 141–44 (1980).

194. Abbott, *supra* note 1, at 22.

195. *See* SMITH, *supra*, note 192, § 41.06(a)(6)(ii); *see, e.g.*, Hilder v. St. Peter, 144 Vt. 150, 161, 478 A.2d 202, 209 (1984) (noting that, "[i]n determining the fair rental value of the dwelling as warranted," the court can consider the value of "the agreed upon rent").

196. *See* SMITH, *supra*, note 192, § 41.06(a)(6)(ii); SCHOSHINSKI, *supra* note 193, at 141–42.

197. *See* Abbott, *supra* note 1, at 22.

198. *See* SMITH, *supra*, note 192, § 41.06(a)(6)(ii).

199. *See id.*; SCHOSHINSKI, *supra* note 193, at 141–42.

The ULC Drafting Committee considered all three approaches, and appears to adopt the third. RURLTA now states that the tenant may recover “damages based upon the diminution in value of the dwelling unit.”²⁰⁰ The phrase “diminution in value” is further defined by explicit reference to impairment of “the tenant’s use and enjoyment of the dwelling.”²⁰¹ Also notably, RURLTA makes clear that a court’s determination of “diminution in value” “need not include expert testimony.”²⁰²

A second damages issue considered by the ULC Drafting Committee is the question of whether a tenant should be permitted to recover consequential damages in addition to abatement of the rent, including perhaps emotional damages and damages for injury to person or property.²⁰³ Courts in several states have declined to award consequential damages for breach of the implied warranty altogether.²⁰⁴ Other courts, while permitting consequential damages for such items as out-of-pocket costs to repair defects,²⁰⁵ are mixed in their approaches to awarding damages for emotional distress, personal injury, and property damage.²⁰⁶ Those courts that have refused to award traditional “tort” damages for breach of the implied warranty have provided several grounds for doing so, including: (1) the rationale that tort law is better equipped to address issues of causation, fault, and comparative fault surrounding such claims, and (2) that contract law traditionally does not handle non-economic damages.²⁰⁷

RURLTA is disappointing in its failure to directly address this thorny area of the law. The revision permits the recovery of “actual damages” in addition to reduction in the rent.²⁰⁸ Although the term “actual damages” is defined so as to include direct damages, as well as consequential and incidental losses,²⁰⁹ neither the text nor the commentary of RURLTA’s damages provision makes clear what types of consequential losses are covered, or whether consequential damages appropriately include nonpecuniary damag-

200. RURLTA, *supra* note 131, § 501(b)(1) & cmt.

201. *Id.* § 102(10) (“‘Diminution in value of the dwelling unit’ means a reduction from the rent provided in a lease in an amount that reflects the extent to which a noncompliant condition of the premises impairs the tenant’s use and enjoyment of the dwelling unit.”).

202. *Id.* § 501(b)(1).

203. *See* Noble-Allgire, *supra* note 131, at 29, 33–37.

204. *See, e.g.*, *Wendt v. Barnum*, 2007 Mass. App. Div. 93, at *2 (2007); *Chiu v. City of Portland*, 788 A.2d 183, 188, n. 6 (Me. 2002); *303 Beverly Grp., L.L.C. v. Alster*, 735 N.Y.S.2d 909(N.Y. App. Term 2001); *Johnson v. Scandia Assocs., Inc.*, 717 N.E.2d 24, 32 (Ind. 1999); *cf. Hilder v. St. Peter*, 478 A.2d 202, 209 (1984).

205. *See, e.g.*, *Poncz v. Loftin*, 607 N.E.2d 765, 766 (Mass. App. Ct. 1993).

206. *See* Lonegrass, *Convergence in Contort*, *supra* note 46, at 425–31 (summarizing relevant case law).

207. *See id.* at 425–31.

208. RURLTA, *supra* note 131, § 501(b)(1)–(2).

209. *Id.* § 102(2) (“‘Actual damages’ means compensation for direct, consequential, or incidental injuries or losses.”).

es of any type. Instead, the comment introduces additional and unnecessary confusion, stating that “[r]emedies available to the tenant pursuant to [this section] are not exclusive Thus, to the extent permitted by state law, tort remedies also may be available.”²¹⁰ While this language preserves existing tort remedies, it does little to clarify whether nonpecuniary damages can be recovered in contract. Moreover, the failure of RURLTA to explicitly endorse traditional tort damages, particularly personal injury damages, seems at odds with the basic policies underlying the expansion of the warranty’s scope to better ensure tenant health and safety.

A third remedies problem under consideration by the ULC is the availability of injunctive relief in the event of the landlord’s breach. URLTA currently provides that “injunctive relief” is an appropriate remedy, without specifying more.²¹¹ In practice, courts have been reluctant to order a landlord to specifically perform an implied warranty of habitability.²¹² The courts that have recognized specific performance as an appropriate remedy have held that it is available in “unique situations” only.²¹³ As a general rule of the common law, specific performance is an exceptional remedy available only when damages would prove inadequate to compensate the tenant.²¹⁴

URLTA’s traditional approach to specific performance has faced criticism on the ground that damages alone do not threaten significant enough economic sanctions to induce landlords to make repairs themselves.²¹⁵ When faced with the decision of whether to repair, many landlords compare the cost of repairs against the potential sanction for failing to do so, and choose the less expensive option.²¹⁶ When disrepair is substantial, the costs of repairs may outweigh hypothetical damages, particularly if they do not encompass nonpecuniary harm. Despite these criticisms, RURLTA appears to have retained the traditional jurisprudential approach to specific performance. Although the text of the revised provision detailing available remedies states that an aggrieved tenant may “seek injunctive relief or specific performance,” the statutory comment remains silent regarding the circumstances under which injunctive relief may be appropriate.²¹⁷

However, like its predecessor, RURLTA allows tenants to engage in an alternative to specific performance—a limited form of self-help known as

210. *Id.* § 501 cmt.

211. URLTA, *supra* note 2, § 4.101(b).

212. *See* SMITH, *supra*, note 192, § 41.06(a)(6)(v) (noting that no appellate court has awarded specific performance in this situation).

213. *Pugh v. Holmes*, 405 A.2d 897, 908 (Pa. 1979).

214. *See* 25 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 67:8 (4th ed. 2012).

215. *See, e.g.*, Blumberg & Robbins, *supra* note 10, at 11–12, 27–30.

216. *See id.* at 11–12.

217. RURLTA, *supra* note 131, § 501(b)(2)(C) & cmt.; *see also id.* § 108 (“Unless displaced by this [act], the principles of law and equity supplement this [act].”).

“repair and deduct.” Under current law, this right is extremely limited; tenants may cause repairs to be made at the landlord’s expense only when the cost of those repairs is less than \$100 or an amount equal to one-half the periodic rent, whichever is greater.²¹⁸ Additionally, prior to availing himself of this remedy, the tenant must notify the landlord in writing of his intention to correct the offending condition.²¹⁹ Only if the landlord fails to make the repairs within 14 days after receiving notice can the tenant proceed with the repairs on his own.²²⁰ RURLTA makes slight alterations to the repair-and-deduct scheme, providing that tenants may make repairs of minor defects when the cost of repair does not exceed \$500 or one month’s rent.²²¹

1. *France*

French law provides the lessee with several contractual remedies for the non-execution of the lessor’s obligations. First, the lessee is entitled to a reduction in rent in the event of the lessor’s breach.²²² This reduction is proportional to the lessee’s loss of enjoyment, and is particularly justified if the lessee suffers some type of accident.²²³ Although the lessee is usually not entitled to withhold rent unilaterally,²²⁴ a judge may order a reduction or suppression of the rent to apply prospectively, in addition to awarding damages for loss of enjoyment suffered in the past.²²⁵

The lessee is also entitled to consequential damages that result from any vice or defect in the premises.²²⁶ According to doctrine, the warranty against vices and defects imposes on the lessor *all* of the consequences of the defect, including damages for emotional distress and personal injury.²²⁷ Indeed, although the lessor is responsible in tort for damages suffered by third parties to the lease as a result of defects in the premises,²²⁸ his liability

218. URLTA, *supra* note 2, § 4.103.

219. *Id.*

220. *Id.*

221. RURLTA, *supra* note 131, § 503(a).

222. CODE CIVIL [C. CIV.] art. 1721 (Fr.); LAFOND & LAFOND, *supra* note 89, at 188–189; AUBERT & BIHR, *supra* note 75, at 122.

223. CODE CIVIL [C. CIV.] art. 1721 (Fr.); LAFOND & LAFOND, *supra* note 89, at 188–189; AUBERT & BIHR, *supra* note 75, at 122.

224. BÉNABENT, *supra* note 156, at 253. Nonetheless, an *exception d’inexécution* may apply permitting a lessee to withhold rent in narrow circumstances where the leased thing becomes totally unusable for its intended purpose. *Id.*

225. *Id.* at 254; AUBERT & BIHR, *supra* note 75, at 122.

226. CODE CIVIL [C. CIV.] art. 1721(2) (Fr.); AUBERT & BIHR, *supra* note 75, at 122.

227. *See* BÉNABENT, *supra* note 156, at 250.

228. *See* Cour de cassation, Assemblée plénière [Cass. Ass. Plén.] [highest court of ordinary jurisdiction], Oct. 6, 2006, Bull. Civ., No. 05-13255 (Fr.); Oliver Moréteau, France, *in* TORT AND INSURANCE LAW YEARBOOK: EUROPEAN TORT LAW 2005 197, 205–208 (Helmut Koziol & Barbara C. Steininger eds. 2006).

to his tenant is encompassed *entirely* by the contract. According to the French doctrine of *non-cumul*, when a wrong that might be classified as delictual, or tortious, is connected to the defendant's failure to perform a contract that bound the parties, the plaintiff's remedy lies only in contract, and not in tort.²²⁹ This does not generally affect the remedies of the aggrieved lessee, however, due to the fact that the prescriptive period for actions involving personal injury does not vary depending on the nature of the claim, nor do the available damages.²³⁰ Moreover, the lessor is liable for damages caused by both hidden and apparent defects, whether or not he knew or had reason to know of the need for repair. His liability is, in effect, strict in nature, regardless of the nature of the claim.

Although French courts freely award damages for breach of lease, the preferred remedy for breach of contract in France is, at least in theory, specific performance. The *Code civil* explicitly provides that a party to a contract who has not received what he was promised is entitled to require the other party to perform.²³¹ However, this general rule must be understood in light of the distinction in French law between *obligations de donner* (obligations to give) and *obligations de faire* (obligations to do).²³² With respect to the latter, the Code expresses a preference for damages,²³³ the underlying principle being that the law ought to not encroach on freedom of will by concerning particular behavior.²³⁴ The Civil Code does, however, authorize "surrogate performance;" the creditor may have the obligation performed himself, at the debtor's expense.²³⁵ Consistent with these general principles of contract law, the Code permits the lessee to undertake necessary repairs himself at the expense of the lessor.²³⁶ Unlike American law, the French statutory regime does not place explicit limitations on the dollar value of the repairs that the lessee is entitled to make. Instead, except in exceptional circumstances, the lessee must obtain judicial leave prior to making the repairs.²³⁷

229. See Denis Tallon, *Contract Law*, in INTRODUCTION TO FRENCH LAW 205, 231 (George A. Bermann & Etienne Picard eds. 2d prtg 2012); Genevieve Viney, *Tort Liability*, in INTRODUCTION TO FRENCH LAW 237, 244 (George A. Bermann & Etienne Picard eds. 2d prtg. 2012).

230. See *id.*

231. CODE CIVIL [C. CIV.] art. 1184 (Fr.).

232. See ZWEIGERT & KÖTZ, *supra* note 21, at 475.

233. CODE CIVIL [C. CIV.] art. 1142 (Fr.).

234. See ZWEIGERT & KÖTZ, *supra* note 21, at 475.

235. CODE CIVIL [C. CIV.] art. 1144 (Fr.); ZWEIGERT & KÖTZ, *supra* note 21, at 475.

236. LECLERC, *supra* note 66, at 225.

237. CODE CIVIL [C. CIV.] art. 1144, cmt. 1 (Fr.) ("L'exécution de l'obligation aux dépens du débiteur suppose l'autorisation de justice." ["The [creditor's] execution of the debtor's obligation presupposes judicial authorization."]); LECLERC, *supra* note 66, at 225–26. Addi-

2. *England*

No statutory guidance exists in England regarding the proper calculation of damages, though the jurisprudence addressing the issue is plentiful. The traditional measure of damages is “the difference in value to the tenant between the premises in their defective condition and the premises in the condition in which they would have been if the landlord had never been in breach.”²³⁸ This formulation would appear to present the same problems faced by American courts—that is, whether a “benefit of the bargain,” “fair market value,” or “percentage in reduction” method is most appropriate to determine the loss in value to the tenant. However, English courts “have been anxious to avoid the expense of expert witnesses or to encourage too fine-toothed an approach to quantification”²³⁹ and have thus long taken a flexible approach to the quantification of damages.

As explained by the Court of Appeal, the proper approach to damages places the court’s primary focus on the value of the premises to the tenant as a *home*.²⁴⁰ As articulated by the court in one case, any suggestion that the tenant’s damages should be tied to the value of the flat as a “marketable asset” is “to ask the court to take a wholly unreal view of the facts.”²⁴¹ The court went on:

The reality of the [tenant’s] loss is the temporary loss of the home where she would have lived with her husband permanently if the [landlords] had performed their covenant....If she had bought the lease as a speculation intending to assign it, to the knowledge of the [landlords], the alleged diminution in rental (or capital) value might be the true measure of her damage. But she did not; she bought it for a home, not a saleable asset, and it would be deplorable if the court were bound to leave the real world for the complicated underworld of expert evidence on comparable properties and values, on the fictitious assumption that what the flat would have fetched had anything to do with its value to her or her husband.²⁴²

Thus, the primary concern for English courts is not to quantify a precise reduction in rent per se, but to compensate the plaintiff for “the personal discomfort and inconvenience he has experienced as a result of the want of

tionally, the lessor must have been put in default and have not undertaken to make the necessary repairs himself. *Id.*

238. WOODFALL, *supra* note 167, § 13.089.2 (citing *Hewitt v. Rowlands* [1924] 93 L.J.K.B. 1080 (Eng.)).

239. *Regus (UK) Ltd. v. Epcot Solutions Ltd.*, [2008] EWCA (Civ) 361, [31], [2009] 1 All E.R. (Comm.) 586 (Eng.).

240. *See Calabar Props., Ltd. v. Stitche* [1984] 1 W.L.R. 287 at 293–94 (Eng.).

241. *Id.* at 293.

242. *Id.*

repair.”²⁴³ Occasionally this has been accomplished through a proportional reduction in rent, based not on the tenant’s loss of bargain or market value, but based upon the tenant’s loss of comfort.²⁴⁴ In other cases, global awards for discomfort and inconvenience are made in lieu of rent reduction.²⁴⁵ In these cases, damages need not be tied directly to the rent and, when appropriate, are permitted to exceed the rent.²⁴⁶ In still other cases, separate awards are made—one for diminution in value calculated as a percentage of rent and another for discomfort, inconvenience, and injury to health.²⁴⁷

The Court of Appeal recently synthesized these apparently disparate rulings, holding that courts “are not bound to assess damages separately under heads of both diminution in value and discomfort because . . . those heads are alternative ways of expressing the same concept.”²⁴⁸ However, the court suggested that judges ought to “cross-check” the prospective award against the rent, in order to “avoid over- or under-assessments through failure to give proper consideration to the period of the landlord’s breach of obligation or the nature of the property.”²⁴⁹ Subsequent decisions have relied upon the latter suggestion to hold that damage assessments ought to be reasonably tied to rental values in most cases.²⁵⁰ Where awards exceeding rent are made, courts ought to provide clear reasons for doing so.²⁵¹

It is abundantly clear in the English jurisprudence that consequential damages of all types are permitted, including not only economic damages

243. WOODFALL, *supra* note 167, § 13.089.2.

244. *See, e.g.,* McCoy & Co. v. Clark, [1984] 13 H.L.R. 87 at 94–95 (Eng.); *see also* WOODFALL, *supra* note 167, § 13.089.2 (referring to the court’s reduction of the rent as “notional”).

245. *See, e.g.,* Calabar, [1984] 1 W.L.R. at 298 (Eng.).

246. *See, e.g.,* Chiodi v. De Marney, [1989] 21 H.L.R. 6 at 14 (Eng.) (permitting award of £30 per week although rent was merely £8 per week).

247. *See, e.g.,* Sturrolson & Co. v. Mauroux [1998] 20 H.L.R. 332 at 333 (Eng.); Brent London Borough Council v. Carmel [1996] 28 H.L.R. 203 at 207 (Eng.).

248. Wallace v. Manchester City Council [1998] 30 H.L.R. 1111 at 1121 (Eng.). Indeed, according to the court, the fact that the plaintiff in that case was a recipient of public housing and thus had paid her rent using housing benefits did not require a reduction in her award. *Id.* at 1121–22. Rather, “the source of the money with which to pay the rent is irrelevant to the extent of the discomfort and inconvenience suffered by the tenant and what would be proper monetary compensation for it.” *Id.* at 1122.

249. *Id.*

250. *See, e.g.,* Earle v. Charalambous [2006] EWCA (Civ) 1090, [32], [2007] H.L.R. 8, [108] (Eng.) (“If the lessor’s breach of covenant has the effect of depriving the lessee of [his] enjoyment . . . [of the premises], a notional judgment of the resulting reduction in rental value is likely to be the most appropriate starting point for assessment of damages.”).

251. *See, e.g.,* English Churches Housing Group v. Shine, [2004] EWCA (Civ) 434, [104], [2004] H.L.R. 727, [755] (Eng.) (“[I]f an award of damages for stress and inconvenience arising from a landlord’s breach of the implied covenant to repair is to exceed the level of the rental payable, clear reasons need to be given by the court for taking that course, and the facts of the case—notably the conduct of the landlord—must warrant such an award.”).

such as out-of-pocket expenses and the cost of substitute accommodations, but also personal injury and property damages.²⁵² Courts have taken care to draw a distinction between damages for “distress” and those for “injury to health,” awarding separate measures of damages for each where appropriate.²⁵³ Indeed, one well-known case considered whether a tenant’s damages for pain and suffering ought to be discounted for the time he spent in the hospital, which was “more comfortable” than his severely dampened flat with a damaged roof.²⁵⁴ The court held that they ought not.²⁵⁵

Unlike courts in the United States, English courts have shown no trepidation in awarding damages for consequential loss. This may be due in part to the fact that English courts have not had to consider whether awards of consequential damages for breach of contract would transform the landlord’s negligence-based tort liability into strict liability in contract. This is because all damages awards for breach of the landlord’s repairing obligation require that the landlord had notice of the need for repairs and failed to make the repairs within a reasonable time.²⁵⁶ Thus, regardless of whether the lessor’s liability lies in contract or in tort, he is responsible for consequential loss only in those circumstances where he was negligent in some respect. Also blurring the line between contract and tort are the limitations periods applicable in English law. A six-year time period generally applies to all actions, whether predicated in tort or in contract.²⁵⁷ Where damages for personal injury are at stake, the limit is three years in all cases.²⁵⁸

Also noteworthy is the English approach to specific performance. The Landlord and Tenant Act of 1985 explicitly provides that the court may order specific performance of the landlord’s repairing obligation “notwithstanding any equitable rule restricting the scope of the remedy.”²⁵⁹ Thus, whereas specific performance is seen as an exceptional remedy under traditional common law, statutory law specifically authorizes its use.²⁶⁰ Even

252. See WOODFALL, *supra* note 167, §§ 13.089.1–13.089.2; ARDEN & DYMOND, *supra* note 160, at 196–97.

253. See, e.g., *Chiodi v. De Marney*, [1989] 21 H.L.R. 6 at 13–14 (Eng.).

254. *McCoy & Co. v. Clark*, [1984] 13 H.L.R. 87 at 96 (Eng.).

255. *Id.* (“The [trial court] judge took into account that the defendant had a comfortable time in [the] hospital. I daresay he did; I daresay his hospital bed was more comfortable than that at his flat, No 2 Everington Street, but I do not think that that is a matter which can be taken into account.”).

256. ARDEN & DYMOND, *supra* note 160, at 186–87; WOODFALL, *supra* note 167, §§ 13.016, 13.067.

257. ARDEN & DYMOND, *supra* note 160, at 209.

258. *Id.* In cases of latent defects, the limitation period accrues from the date when the damage cause into existence, or three years from the date when the complainant discovers or could have discovered the damage, subject to an overriding limitation of fifteen years. See *id.*

259. Landlord and Tenant Act, (1985) § 17 (Eng.).

260. See LAW COMMISSION, STATE AND CONDITION OF PROPERTY, *supra* note 113, ¶ 9.24.

under earlier common law, tenants were readily awarded specific performance in the event of the landlord's breach of a covenant to repair.²⁶¹

As a matter of policy, specific performance is regarded as the best means of improving the quality of rented dwellings.²⁶² This policy has largely proved successful—in practice, aggrieved tenants frequently seek specific performance, and when it is ordered, it is generally effective.²⁶³ Additionally, according to the Law Commission, courts have managed to overcome the difficulty of defining, with sufficient precision, the work to be done and in ensuring compliance with their orders.²⁶⁴ In fact, orders requiring landlords to specifically reform repairing obligations in residential leases have been so successful that the Law Commission has recommended that the remedy be expanded to permit specific performance in other types of leases, as well as against tenants in certain cases.²⁶⁵

Finally, although the English law “on the books” does not explicitly provide for a repair-and-deduct remedy of the type contained within URLTA, anecdotal evidence indicates that this alternative to specific performance has evolved organically within specific locales.²⁶⁶ The so-called “Liverpool order,” for example, involves a two-step process. First, having established that the landlord is in breach of the repairing covenant, the court makes an order detailing the repairs to be made and setting a period of time

261. See, e.g., *Jeune v. Queens Cross Properties Ltd.*, [1974] Ch. 97 at 101 (Eng.) (“I cannot myself see any reason in principle why, in an appropriate case, an order should not be made against a landlord to do some specific work pursuant to his covenant to repair. Obviously, it is a jurisdiction which should be carefully exercised. But in a case such as the present where there has been a plain breach of a covenant to repair and there is no doubt at all what is required to be done to remedy the breach, I cannot see why an order for specific performance should not be made.”); see also Mark Pawlowski, *Specific Performance of repairing obligations*, LANDLORD & TENANT REV. 1997, 1(2), 32, 33 (quoting *Jeune*, Ch. 97 at 101) (noting that the traditional common law requirement that damages be an inadequate remedy is met in these cases; as stated by the judge in *Juene*, an order requiring the defendant to carry out the work was “a much more convenient order than an award of damages leaving it to the individual plaintiffs to do the work.”).

262. LAW COMMISSION, STATE AND CONDITION OF PROPERTY, *supra* note 113, ¶ 9.27.

263. See *id.* ¶¶ 9.22–9.24 (“[W]e were advised by housing law practitioners that, in cases brought for breach of landlords’ repairing covenants where the repairs had not been carried out, specific performance was the remedy that was invariably sought.”); see also Jan Luba, *Landlords’ Repairing Obligations in the Residential Sector: Part 2—Remedies*, LANDLORD & TENANT REV. 9(4), 96, 97 (2005) [hereinafter Luba, *Repairing Obligations Part 2*] (“The primary remedy usually sought by a tenant of a home in disrepair will be that the landlord carries out the landlord’s obligations to the do the necessary work of repair . . .”).

264. See LAW COMMISSION, STATE AND CONDITION OF PROPERTY, *supra* note 113, ¶ 9.27.

265. See *id.* ¶¶ 9.21–9.42.

266. See *id.* ¶ 9.22 (“In Liverpool, ‘it is virtually if not entirely unknown for a plaintiff in a case of this character to recover as damages the costs of carrying out the necessary remedial work on the basis that he will have it executed himself.’”).

within which the repairs must be made by the landlord.²⁶⁷ The second stage arises if the defendant fails to carry out his undertaking; in those cases, further damages are awarded to the tenant for the cost of carrying out the repairs.²⁶⁸ According to one local judge, there is in most cases no need for the “second stage” of the proceedings; rather, the mere threat of its occurrence compels most defendants to perform.²⁶⁹

3. *Comparative Lessons*

Several lessons may be derived from the foregoing description of tenant remedies in England and in France. First, in both jurisdictions the emphasis is on making the tenant whole. Damages regimes are employed in a flexible manner, moving beyond traditional notions of economic loss to ensure that the tenant is compensated for intangible injuries. The English jurisprudence in particular emphasizes that the focus of relief should not be limited to the benefit of the bargain lost. Rather, courts have embraced the reality that residential tenants do not conceive of their lease as a commercial transaction so much as an investment, with its primary value being its utility and comfort as a home.

While RURLTA’s adoption of the “percentage in reduction” approach to damages is consistent with this approach, its incomplete authorization of consequential damages is not. In England and France, the artificial dividing lines between contract and tort have given way to permit full compensation for a tenant’s losses of every type. URLTA’s revision offers an opportunity for American reformers to adopt that approach where, as here, breach of contract impacts physical safety and emotional comfort. Moreover, explicit approval of damages for emotional distress and pain and suffering may further incentivize landlord behavior than the threat of less costly consequential loss.

Finally, complaints that URLTA does not go far enough to ensure the landlord’s performance of his obligations find further support in some European systems. In England and France, while damages are an important remedy for injured tenants, they are secondary to the immediate aim of improving the housing stock. If the chief criticism of URLTA’s warranty of habitability is that it fails to produce landlord compliance, then injunctive relief ought to be made central to the plaintiff’s relief. This could be accomplished by explicitly relaxing the traditional barriers to awards for specific performance within the statutory framework. Either alternatively or in addition,

267. *See id.* ¶ 9.22 & n.93.

268. *Id.*

269. *See* LAW COMMISSION, STATE AND CONDITION OF PROPERTY, *supra* note 113, ¶ 9.22, n.93.

the tenant's repair-and-deduct remedy should be expanded to permit an aggrieved tenant to seek court authorization to make repairs the costs of which would exceed the statutory maximum for self-help.

C. Waiver and Modification

A final aspect of the American implied warranty of habitability that serves as a severe impediment to its success is its waivability.²⁷⁰ Residential tenants often lack the bargaining power to dictate the terms of the lease, and the risk that landlords will waive the implied warranty is substantial.²⁷¹ While this is most apparent for the poorest tenants, who are at the same time the least sophisticated and the most likely to live in substandard housing,²⁷² middle and upper-class tenants are also susceptible of exploitation, particularly during periods of housing shortage.²⁷³ Moreover, even if the law prohibits the enforcement of contractual waivers, the possibility remains that landlords will include terms renouncing their obligation to maintain the premises in the hopes that tenants, unaware of the law, will believe that the lease dictates their rights.²⁷⁴

URLTA presently purports to combat both of these problems through provisions prohibiting rental agreements in which the tenant waives any rights or remedies supplied by the uniform law, including the landlord's maintenance obligations, and imposing a penalty of up to three months' rent and attorney's fees on the landlord who deliberately includes such a waiver in the lease.²⁷⁵ This proscription on waivers is not without exception, however. In leases of single-family residences, the parties are permitted to modify the landlord's obligations respecting the provisions of waste removal, running water, hot water, and heat, as well as specified repairs and maintenance tasks, provided the modification is made in good faith.²⁷⁶ Similar modifications are permitted in leases of multi-family dwellings.²⁷⁷ These are more limited; for example, the landlord in multi-family dwellings may not be relieved of the responsibility to comply with building and housing codes.²⁷⁸

270. See Super, *supra* note 114, at 423–24.

271. *Id.*

272. See *id.*

273. See Smith, *supra* note 115, at 491.

274. See Super, *supra* note 114, at 423–24.

275. URLTA, *supra* note 2, § 1.403.

276. *Id.* § 2.104(c).

277. *Id.* § 2.104(d).

278. *Id.*

Most of the states that have enacted statutes based upon URLTA have adopted these exceptions,²⁷⁹ and as a result, the statutory obligations of the landlord to maintain the premises and to supply basic services are deprived of much of their force. Although the exceptions to the prohibition on waiver of the implied warranty appear at first blush to be narrow in scope, their potential application is quite broad. The uniform law lacks clear delineation between the lessor's repair and habitability obligations. Thus, in a typical lease of a single-unit dwelling, the landlord may relieve himself of the obligation to maintain the premises in a fit and habitable condition simply by stating with specificity in the lease the portions of the property that the lessee must repair.

RURLTA makes significant changes to the rules governing modification of the implied warranty. First, it sets forth a uniform waiver standard for single-family and multi-unit dwellings.²⁸⁰ The revised law permits the landlord and tenant to agree that the tenant "will perform one or more of the duties imposed on the landlord by [the Act]," provided that the agreement is supported by consideration that is not based on reduction of the rent.²⁸¹ Additionally, RURLTA makes clear that the tenant's failure to perform under this agreement neither relieves the landlord of the obligation to perform those duties, nor constitutes waiver of the tenant's rights.²⁸² The revised provision does not, however, offer complete clarity with respect to what repairing or maintenance obligations the tenant may assume.

1. *France*

In France, the landlord's implied repairing and maintenance obligations are considered to be matters of public policy rather than of freedom of contract, and therefore cannot be waived.²⁸³ Although the implied obligations set forth in the French Civil Code are suppletive and freely amendable by the parties,²⁸⁴ the statutory obligations set forth in the 1989 Act and subsequent decrees are matters *d'ordre public* that may not be modified.²⁸⁵

279. North Carolina, Ohio, and West Virginia did not adopt the exceptions. See N.C. GEN. STAT. § 42-42 (2013); OHIO REV. CODE ANN. § 5321.04 (LexisNexis 2004 & Supp. 2013); W. VA. CODE § 37-6-30 (LexisNexis 2005).

280. RURLTA, *supra* note 131, § 304

281. *Id.* § 304(a)(1).

282. *Id.* § 304(a)(2).

283. Mermaz Act, *supra* note 63, at art. 2; see AUBERT & BIHR, *supra* note 75, at 123.

284. See de Moor, *supra* note 64, at 425; BÉNABENT, *supra* note 156, at 249. Article 1721, which outlines the lessor's warranty against vices and defects, is not considered a matter of public policy, and therefore, the parties are free to insert clauses in the lease relative to the warranty so long as they do not purport to exonerate the lessor for his own *faute lourde* (gross negligence). See CODE CIVIL [C. CIV.] art. 1721 (Fr.). Nonetheless, if the lessee is a

French law admits one exception to this general prohibition.²⁸⁶ Although landlords are required to deliver premises fully conforming to the minimum standards of repair and decency, the parties may agree at the outset of the lease that the tenant will be responsible for certain repairs.²⁸⁷ This type of agreement is similar to that permitted by URLTA, but with several important exceptions. First, the French law is clear that the agreement may concern only maintenance and repairs; the lessee may not assume the obligation to make repairs needed for the dwelling to meet minimum standards of comfort and habitability as defined by law.²⁸⁸ Additionally, the agreement must provide for a reduction in the rent in favor of the tenant to compensate for the costs of repair.²⁸⁹ Because the obligation to repair ultimately rests on the lessor, the lessee is entitled to recuperate the costs of repair by a reduction in the rent over a fixed period.²⁹⁰ And finally, the agreement may only be made in an express clause in the original contract of lease and must state with specificity the work to be performed, the anticipated cost of the repairs, and the associated modification of the rent.²⁹¹

2. *England*

In England, although the repairing obligations of the landlord are far more limited than in France or even the United States, those that do exist are generally insusceptible of modification. The Landlord and Tenant Act of 1985 explicitly forbids any exclusion or limitation of the landlord's repairing obligations, unless a court authorizes the agreement.²⁹² Court authoriza-

consumer or a non-professional, clauses reallocating the warranty are not permitted. *See id.* at art. 1721 cmt.

285. Mermaz Act, *supra* note 63, at art. 2; AUBERT & BIHR, *supra* note 75, at 77, 105.

286. Mermaz Act, *supra* note 63, at art. 6.

287. *Id.*; AUBERT & BIHR, *supra* note 75, at 120.

288. AUBERT & BIHR, *supra* note 75, at 120. If the dwelling does not meet these minimum standards, the lessee retains the right to demand the repair of the leased premises or the extinction of the contract. *Id.* at 79.

289. Mermaz Act, *supra* note 63, at art. 6; AUBERT & BIHR, *supra* note 75, at 120.

290. AUBERT & BIHR, *supra* note 75, at 77–78. If the lessee were to leave the premises before being reimbursed, he is entitled to recuperate the remaining balance from the lessor. *Id.* However, there is no obligation to reimburse the lessee for the full amount of the repairs if the work undertaken by the lessee goes beyond the lessor's simple obligation to return the dwelling to a habitable condition. *Id.* The parties may also provide that the lessor will undertake additional work on the property to ameliorate its condition beyond the minimum standards of comfort and decency, such as by installing higher quality flooring. *Id.* at 80. In such circumstances, rather than negotiating a reduction in the rent, the parties may freely negotiate an increase in the rent. *Id.* at 80–81.

291. *Id.* at 79. The parties must negotiate not only the amount to be repaid the lessee by way of a reduction on in rent, but also the period over which the reduction will be made. *Id.*

292. Landlord and Tenant Act, 1985, c. 70, §§ 11(4), 12(1) (Eng.).

tion may be granted only if the court determines that the modification of the landlord's statutory obligations is "reasonable . . . having regard to all the circumstances of the case, including the other terms and conditions of the lease."²⁹³ These court authorizations, while permitted, occur infrequently, if at all.²⁹⁴ Although English law has been criticized for its failure to impose a general warranty of habitability on residential landlords, the mandatory nature of existing repairing obligations is generally regarded as a favorable aspect of the law.²⁹⁵

3. *Comparative Lessons*

All systems studied here have emphasized the importance of mandatory obligations, but at the same time have crafted narrow exceptions to the rule against waiver. The question, in light of this observation, is whether one of the foreign approaches studied here might provide a better "safety valve" for landlords and tenants who wish to freely negotiate for the tenant to make certain repairs. American law currently fails to draw clear distinctions between repairs and habitability. To rectify this weakness, the French approach of permitting the lessee to undertake basic maintenance, while prohibiting modifications of the landlord's habitability obligations, could easily be incorporated into RURLTA. On the other hand, the English rule permitting court authorization for modifications appears less attractive for a number of reasons. Not only does a court-applied "reasonableness" standard offer little guidance to contracting parties, a case-by-case approach reduces the potential for much-needed certainty in the law. Perhaps most importantly, residential tenants often lack the legal representation that would be required to assure their protection.

IV. SECURITY OF TENURE

The implied warranty of habitability works to safeguard tenants' access to safe and suitable housing. But the warranty alone cannot ensure housing that is also stable. Thus, a second fundamental component in the landlord-

293. *Id.* § 12(2).

294. This author's research did not uncover any appellate reviews of county authorization orders.

295. In a 1996 report, the Law Commission recommended that an implied warranty of fitness for human be implied into all residential leases made for a term of less than seven years. *See* LAW COMMISSION, STATE AND CONDITION OF PROPERTY, *supra* note 113, at 93–121. Draft legislation accompanying the report declared void any agreement "to exclude or limit the obligations of the lessor under the implied covenant." *Id.* at 190. Unlike present law, the proposed legislation did not permit court authorization of agreements to modify the landlord's obligations. *See id.*

tenant revolution was the introduction of rules designed to increase tenants' continuity and security of tenure.²⁹⁶

Common law tenure rules were particularly unforgiving. Although a lease could be made for a fixed or periodic term, the most common form of tenancy was the tenancy at will, which could be terminated by the landlord without any advance notice to the tenant.²⁹⁷ While the position of the tenant at will was especially vulnerable, even fixed and periodic tenants were left without any guarantee that their landlords would renew the tenancy at the end of the term or period.²⁹⁸ Indeed, once the lease could be lawfully terminated, the landlord could evict the tenant "for any reason or no reason" at all.²⁹⁹

In the 1960s and 1970s, courts and legislatures introduced a variety of measures aimed at ameliorating the harshest effects of the common law rules.³⁰⁰ For example, a few jurisdictions created schemes for minimum lease terms, automatic renewals, and "just cause" evictions.³⁰¹ These robust protections were, and still are, controversial.³⁰² More widespread and less provocative developments were prohibitions on "retaliatory eviction"—lease termination and dispossession resulting from a tenant's invocation of housing code or implied habitability protections.³⁰³

URLTA, which was enacted during the early development of these safeguards, was intended to "[e]nsure tenants the right to occupy a dwelling as long as they fulfill their responsibilities."³⁰⁴ However, once finalized, URLTA accomplished only slight reforms regarding tenure. One was the elimination of tenancy at will. Essential to tenure regimes are default minimum lease terms and proscriptions on lease terminations without cause. When a tenancy is terminable "at will" by a landlord, the tenant is quite obviously deprived of any guarantee of security in the lease. In recognition of the stress placed upon tenants renting under such an arrangement, URLTA eliminated the tenancy at will and established a default rule that, unless the rental agreement fixes a definite term, the tenancy is generally month-to-

296. See Roisman, *supra* note 13, at 830–31.

297. See SMITH, *supra* note 192, § 39.05(d).

298. Roisman, *supra* note 13, at 831.

299. Glendon, *supra* note 4, at 539–40.

300. Roisman, *supra* note 13, at 832–33.

301. Rabin, *supra* note 1, at 534–35.

302. Compare Roisman, *supra* note 13, at 820–29 (defending security of tenure regimes), with Carroll, *supra* note 23, at 472–75 (criticizing American good cause eviction schemes).

303. See SMITH, *supra* note 192, § 41.08(a).

304. *Residential Landlord and Tenant Act Summary*, THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Art. 1, <http://uniformlaws.org/ActSummary.aspx?title=Residential+Landlord+and+Tenant+Act> (last visited October 12, 2013).

month.³⁰⁵ Such a lease can be terminated by providing written notice to the tenant within sixty days.³⁰⁶

Although URLTA's rejection of tenancy at will provides tenants with some modicum of security, the protections afforded by month-to-month leases are minimal. Moreover, at the end of any lease—whether fixed or periodic—the tenant is not guaranteed any right to renew the lease for an additional term, but instead, is required to vacate the premises or face eviction and potential damages.

URLTA did not adopt generalized security of tenure provisions (such as minimum lease terms or automatic renewals) but it did codify prohibitions on so-called “retaliatory eviction” that had been developed by courts and legislatures to complement the implied warranty of habitability and other newly recognized tenant rights. Both scholars and courts recognized early on that “[m]any of the new rights acquired by tenants as landlord-tenant law was transformed in the 1960's and 1970's could have been virtually nullified if landlords could terminate or refuse to renew the leases of tenants who exercised them.”³⁰⁷ Retaliatory eviction schemes were thus designed to prevent threats of eviction or other abusive conduct from discouraging tenants from seeking redress of their grievances.

Under URLTA's retaliatory conduct provision, the tenant is protected from retaliatory conduct resulting from complaints about the condition of the premises, from the tenant's association with a tenant's union, and from the tenant's association with other similar organizations.³⁰⁸ In any of these circumstances, the landlord is prohibited from increasing rent, decreasing services, or bringing or threatening to bring an action for possession against the tenant.³⁰⁹ If the landlord acts improperly, the tenant is entitled to damages and attorneys' fees, and has a defense to any retaliatory action against him for possession.³¹⁰ To ameliorate the difficulty in proving the causal rela-

305. URLTA *supra* note 2, § 1.401(d).

306. *Id.* § 4.301(b). If the tenant remains in possession without the landlord's consent after the expiration of a fixed or notice term, the landlord is entitled to bring an action for possession and, if the tenant's holdover is willful and not in good faith, may also recover damages and attorneys' fees. *Id.* § 4.301(c). It is noteworthy that the sixty day period enumerated in the uniform law is designated as optional; individual states are free to insert their own number of days. *See id.* § 4.301(b).

307. Glendon, *supra* note 4, at 540; *see also* *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968) (“There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction under the circumstances of this case would not only punish appellant for making a complaint which she had a constitutional right to make . . . but would also stand as a warning to others that they dare not be so bold . . .”).

308. URLTA, *supra* note 2, § 5.101(a).

309. *Id.*

310. *Id.* § 5.101(b).

tionship between the tenant's action and the landlord's allegedly retaliatory conduct, the uniform law establishes a presumption of wrongdoing if the alleged retaliation occurs within one year of a complaint made by the tenant.³¹¹ The uniform law also sets forth a number of "safe harbors" for the landlord, specifically providing that the landlord may bring an action for possession if the complained-of code violation was caused by the tenant, the tenant is in default in rent, or compliance with the applicable code provision would effectively deprive the tenant of his use of the dwelling.³¹²

At the time of URLTA's adoption, tenant advocates argued passionately in favor of just cause eviction rules and more robust prohibitions on retaliatory eviction.³¹³ Ultimately, those calls went unheeded, likely due to the extreme controversy surrounding tenure protections. In the years that have followed URLTA's adoption, the debate concerning security of tenure has continued. Those in favor of increasing tenant protections emphasize the emotional, physical, and economic harm suffered by tenants who are ousted from their homes, either at the end of a fixed lease term or, worse, by the sudden termination of a periodic tenancy.³¹⁴ Opponents cite a dwindling supply, deteriorating conditions, and economic inefficiencies as negative consequences weighing against the adoption of rules increasing the security of tenants' tenure.³¹⁵ At present, tenure protections in the private rental market are limited to a few isolated jurisdictions.³¹⁶

Sentiments about retaliatory eviction also vary considerably from locale to locale. At the state level, retaliatory eviction schemes are characterized by a fair degree of nonuniformity. While some states have expanded on URLTA provisions by adding to the list of prohibited landlord conduct that qualifies as "retaliatory," others have implemented rules providing tenants with less protection than is afforded by the uniform law.³¹⁷ In particular, a number of states have altered the presumption of retaliation, either by devi-

311. *Id.*

312. *Id.* § 5.101(c).

313. *See, e.g.,* Blumberg & Robbins, *supra* note 10, at 4.

314. *See* Roisman, *supra* note 13, at 820–29.

315. *See* Carroll, *supra* note 23, at 447–61 (cataloguing deleterious effects of good cause eviction schemes). *But see generally* Arlo Chase, *Rethinking the Homeownership Society: Rental Stability Alternative*, 18 J. L. & POL'Y 61 (2009) (proposing longer lease terms, rights to lease renewal, temporary regulation of rent increases, and federal rental subsidies to cover rent increases for rent-burdened low and moderate income households as a means of correcting the housing crisis).

316. *See* Roisman, *supra* note 13, at 834–35; Carroll, *supra* note 23, at 464–75.

317. *See* Memorandum from Shelly Kurtz and Alice Noble-Allgire of the Uniform Law Commission to Professor Noble-Allgire (Oct. 2, 2012), *available at* http://www.uniformlaws.org/shared/docs/Residential%20Landlord%20and%20Tenant/2012oct2_URLTA_Memo_Retaliatory%20Eviction.pdf.

ating from the one-year time period, omitting the presumption altogether, or, in one extreme case, reversing the presumption to favor landlords.³¹⁸

In keeping with popular sentiment surrounding tenure protections, RURLTA does not expand significantly upon tenant rights, and in some important instances, reduces protections afforded to tenants. As under current law, the default tenancy is a month-to-month periodic lease.³¹⁹ However, whereas URLTA requires sixty days' notice to terminate such a tenancy, the revised act shortens the notice period to one month.³²⁰ While the shorter notice period may provide additional flexibility to tenants desiring increased mobility, it will undoubtedly harm others by hastening unexpected terminations. Furthermore, although RURLTA retains the presumption of retaliation, it weakens it by shortening the period within which retaliation is presumed from one year to six months.³²¹ In adopting this change, RURLTA endorses state variations that have relaxed protections for tenants.

Although RURLTA backs away from security of tenure in several important respects, the revision introduces some new protections for tenant victims of domestic violence and abuse. American commentators concerned about domestic violence have complained that existing tenure rules fail tenant victims in two important respects. First, victims seeking to escape from a dangerous living situation may be unable to quickly terminate their rental agreements in order to do so.³²² Consequently, these victims may face steep early termination fees or continued liability for unaccrued rent.³²³ Tenant advocates fear that these burdens will prevent victims of domestic violence from escaping psychologically and physically dangerous conditions.³²⁴ A second problem faces tenants who do not desire to terminate their lease arrangements, but who face involuntary termination by the landlord due to the occurrence of a domestic dispute on the property.³²⁵ Here, advocates argue that victims of domestic violence will be discouraged from seeking police

318. *See id.* at 5–8.

319. RURLTA, *supra* note 131, § 201(c).

320. *Id.* § 801(b)(2).

321. *Id.* § 904.

322. Rebecca Licavoli Adams, *California Eviction Protections for Victims of Domestic Violence: Additional Protections or Additional Problems*, 9 HASTINGS RACE & POVERTY L.J. 1, 16 (2012).

323. *Id.* at 16.

324. *See* Anne C. Johnson, *From House to Home: Creating a Right to Early Lease Termination for Domestic Violence Victims*, 90 MINN. L. REV. 1859, 1862–64, 1867 (2006).

325. *See* Adams, *supra* note 322, at 1–2; Kristen M. Ross, *Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 HASTINGS WOMEN'S L.J. 249, 250 (2007); Meris L. Bergquist, *After the Violence: Using Fair Housing Laws to Keep Women and Children Safe at Home*, 34-Spring VT. B.J. 46, 46 (2008).

protection from their abusers if they risk lease termination based solely upon a reported incident of domestic violence.³²⁶

In response to these criticisms and the actions of several states that have created statutory regimes designed to ameliorate these problems, the ULC Drafting Committee incorporated protections for victims of domestic violence into RURLTA.³²⁷ The uniform law now permits victims of domestic violence, sexual assault, or stalking to terminate a lease by giving two weeks' written notice and providing verification of the alleged abuse.³²⁸ Moreover, new rules limiting the landlord's conduct with respect to these victims should prevent a tenant's eviction on the basis of an incident of domestic violence alone.³²⁹

A. France

French lessees enjoy far more security of tenure than the vast majority of American tenants. Legislation promulgated in 1948 provides residential tenants with *le droit au maintien dans les lieux* (the right to remain in the premises).³³⁰ The Mermaz Act reinforces this principle by mandating minimum lease terms, providing for automatic lease renewals, and strictly regulating lease termination. French tenancies must have a fixed term of at least three years when the landlord is an individual, and at least six years when the landlord is *une personne morale* (a legal entity such as a company).³³¹ The minimum term is viewed as crucial to the lessee's ability to put down roots in the community, settle children into school, and achieve professional success.³³²

Additional stability is provided by automatic renewals, which may be avoided on narrow grounds only.³³³ First, the landlord can refuse to renew

326. Adams, *supra* note 322, at 14–15.

327. See Kurtz & Noble-Allgire, *supra* note 317, at 7.

328. RURLTA, *supra* note 131, § 508.

329. See *id.* § 514 (prohibiting eviction when the tenant's violation of the lease or the law results from the incident of domestic violence, abuse, or stalking).

330. Article 4 du loi 48-1360 du 1 septembre 1948 portant modification et codification de la législation relative aux rapports des bailleurs et locataires ou occupant de locaux d'habitation ou à usage professionnel et instituant des allocations de logement [Article 4 of Law 48-1360 of September 1, 1948 for the modification and codification of legislation concerning the relationship between lessors and lessees], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 2, 1948, p. 8659 (Fr.).

331. Mermaz Act, *supra* note 63, at art. 10. A lease for a term of less than three years is permitted in limited circumstances, such as when the lessor can show the need to reoccupy the home for professional or personal reasons. In no event, however, can the lease be any shorter than one year. *Id.* at art. 11.

332. See Ball, *supra* note 55, at 51.

333. See Mermaz Act, *supra* note 63, at art. 10. The landlord is entitled to increase the rent at renewal, provided that he gives notice to the tenant at least six months prior to the

the lease for *un motif légitime et sérieux* (for a serious and legitimate reason), such as the lessee's failure to perform his obligations.³³⁴ In applying this standard, French courts have refused to permit eviction for minor breaches of contract; instead, the ground is reserved for egregious conduct, such as the failure to pay rent or to procure insurance as required by law.³³⁵ Second, the landlord is permitted to terminate the lease at renewal if he requires the property for his own occupation, or that of his relatives.³³⁶ Finally, the lessor may refuse to renew if he wishes to sell the property.³³⁷ In all of these cases, the lessor must provide timely written notice of termination to the lessee.³³⁸

The lessor is even more restricted in his power to terminate a lease *prior* to the termination of the lease term. In theory, a lessor can protect himself from extreme abuses by including in the lease a so-called *clause résolutoire* (resolatory provision) permitting the lessor to evict a tenant who has failed to pay rent or procure insurance as required by French law.³³⁹ In the absence of such a clause, the lessee who has breached the lease contract, even as radically as by not paying rent, is generally entitled to remain in the premises at least until the original term of the lease has expired. In extreme cases, a

termination of the original lease. *Id.* Additionally, any proposed increase in the rent is subject to the terms of Article 17 of the Act, which stipulates that the rent cannot be increased unless it is proven to be manifestly lower than rent prices for comparable apartments in the area. *Id.* at art. 17. If the parties cannot come to an agreement on the price of rent and the lessee wishes to remain in the dwelling, the parties must contact the *Commission de Conciliation* to address the problem. Failure to contact the Commission results in the lease's automatic renewal according to its previous terms. *Id.*; see also LAFOND & LAFOND, *supra* note 89, at 293–305.

334. Mermaz Act, *supra* note 63, at art. 15.

335. See *id.*; Ball, *supra* note 55, at 51. French courts have considered as a serious and legitimate reason sufficient to oppose automatic renewal the following: the failure of a lessee to pay the entirety of his rent (although not a lessee who paid his debt within the period fixed by a court); failure of the lessee to procure rental insurance; prohibited subleasing; the exercise of a commercial activity from the leased residence; the lessee's failure to use the premises peacefully, including aggressive behavior by the lessee toward neighbors and excessive noise; and demolition of the apartment complex. See CODE DES BAUX L. 6 juill. 1989, cmts. 65–76 (Fr.); see also LOYERS ET COPROPRIÉTÉ Dec. 2002 at 278 (noting that exercising even a limited commercial activity out of the leased residence in violation of applicable law and the lease was serious and legitimate motive for termination of the lease).

336. Mermaz Act, *supra* note 63, at art. 15.

337. *Id.* In this case, however, the lessor is required to offer the lessee a right of first refusal on the property. *Id.*

338. *Id.* Traditionally, French courts have required the notice of termination to comply strictly with the statutory requirements, finding notices served even one day late to be invalid. See LOYERS ET COPROPRIÉTÉ Oct. 2007 n. 190 (citing Cour d'appel [CA] [regional court of appeals] Reims, 2e ch., 27 Jan. 27, 2005) (holding invalid notice received on the 26th of June where the lease expired on the 25th of December).

339. Mermaz Act, *supra* note 63, at art. 4(g); see also AUBERT & BIHR, *supra* note 75, at 149, 197.

court may award dissolution of the lease in the absence of a *clause résolutoire*.³⁴⁰ However, dissolution is considered a drastic measure and is tempered by courts' reticence to impose such a harsh sanction for less than grave failure to comply.³⁴¹

The lessee, in contrast to the lessor, is afforded far more flexibility by law. The lessee can terminate the lease at any time by giving three months' notice.³⁴² If exigent circumstances exist, such as when the lessee obtains his first job, is transferred, or loses a job, the lessee may terminate following notice of only one month.³⁴³ These rules reflect a desire to provide lessees with secure tenure that is not concurrently paralyzing. There is clear concern with fostering mobility in circumstances where it is needed.

B. England

England's security of tenure rules contrast sharply with French law. Current law recognizes two types of private tenancy—the assured tenancy and the assured shorthold tenancy. Assured tenancies are relatively secure in that they can be terminated by the landlord only upon proof of one of several statutorily enumerated grounds for possession. Some grounds are mandatory, meaning that the court must grant possession if the basis for eviction is proved.³⁴⁴ Examples include the landlord's desire to use the property as his primary residence, or a finding that the tenant is two months in arrears in paying rent. Other grounds, discretionary in nature, justify possession only when a court determines that an order for possession is "reasonable."³⁴⁵ Dis-

340. CODE CIVIL [C. CIV.] art. 1184(c) (Fr.) (according to the *Code civil*, the lessor may seek judicial dissolution of the lease due to the lessee's failure to fulfill his obligations); see AUBERT & BIHR, *supra* note 75, at 149.

341. See AUBERT & BIHR, *supra* note 75, at 197.

342. Mermaz Act, *supra* note 63, at arts. 12, 15.

343. *Id.* at art. 15.

344. Housing Act, 1988, Sch. 2 (Eng.); see also ARDEN & DYMOND, *supra* note 160, at 107–10. Mandatory grounds are: (1) the landlord's desire to occupy the home as a dwelling; (2) the foreclosure of a mortgage by a mortgagee; (3) termination of a fixed-term holiday letting; (4) termination of a fixed-term student letting; (5) tenant is a minister; (6) landlord intends to demolish or reconstruct the premises or carry out substantial works on them; (7) property subject to periodic tenancy devolves by testament of tenant; (8) two months' rent arrears, both at the date of the notice seeking possession and at the date of hearing. Housing Act, 1988, Sch. 2 (Eng.).

345. Housing Act, 1988, Sch. 2 (Eng.); see also ARDEN & DYMOND, *supra* note 160, at 105–07. There are 10 discretionary grounds. These are: (1) suitable alternative accommodation; (2) rent arrears at the date of the notice seeking possession and at the issue of the proceedings; (3) persistent delay in paying the rent, even if no arrears now; (4) any other breach of the tenancy agreement; (5) waste or neglect by the tenant or other resident causing deterioration of dwelling; (6) the tenant or a person residing in or visiting the premises is guilty of conduct causing a nuisance or has been convicted for immoral/illegal use of the premises or for an arrestable offence committed in the locality; (7) (for registered social landlords only)

cretionary grounds include breach of the tenancy, failure to pay rent, nuisance, and illegal activity, among others. Where an order is made on a mandatory ground, legislation requires that the tenant be given no more than a two-week delay to vacate the premises, though more time might be awarded in extreme circumstances.³⁴⁶ In contrast, when a discretionary ground is invoked, the court has very broad powers to postpone or suspend the order, on conditions, and can ultimately set the order aside altogether.³⁴⁷

Although the limitations on termination appear significant, they rarely apply in private tenancies. This is because English law recognizes the “assured shorthold tenancy,” which may be terminated by either party for any reason upon giving two months’ notice.³⁴⁸ The assured shorthold was introduced as part of a package of reforms aimed at drastically deregulating English tenancy law in order to increase the size of the private rental sector.³⁴⁹ Even with this purpose, however, the law requires that an assured shorthold cannot be terminated less than six months after its inception.³⁵⁰ Although the assured shorthold is not mandatory for private leases, given its clear advantages to the landlord, it has become the most common form of lease in the private sector.³⁵¹ Its universality has been further promoted by 1996 legislation making the shorthold the default lease form—with certain exceptions. All private leases are of this type unless the landlord serves a notice that the lease will be an assured tenancy.³⁵²

The average private, residential tenant in England is therefore in a rather tenuous position, one that has been the subject of intense criticism by law reformers. The primary concern is that the shorthold’s lack of security makes tenants vulnerable to retaliatory eviction; the threat of which tends to

the tenant is guilty of domestic violence, and victim is driven from the premises and is unlikely to return; (8) ill-treatment of furniture by tenant or another resident causing deterioration; (9) tenant is ex-employee of landlord living in accommodation needed for another employee; (10) false statement by the tenant to obtain the tenancy. Housing Act, 1988, Sch. 2.

346. See ARDEN & DYMOND, *supra* note 160, at 97–98, 109–10.

347. See *id.* at 98.

348. Housing Act, 1988, c. 2, § 21(1)(b) (Eng.); see also ARDEN & DYMOND, *supra* note 160, at 113–14. If the tenancy is fixed, then notice may be given two months prior to the end of the fixed term. If notice is not provided, then at the end of the fixed term the lease becomes periodic. See Housing Act, 1988, c. 2 § 21(1)(b) (Eng.). Periodic assured shorthold tenancies may be terminated by giving notice at least two months prior to the date of desired termination, which must be the last day of a period. See *id.*

349. See DRISCOLL, *supra* note 182, at 1–2 (noting that in 1980, less than 10% of households rented from private landlords, due in part to stringent regulation existing prior to the Housing Act of 1988).

350. Housing Act, 1988, c. 2, § 21(5) (Eng.); see also ARDEN & DYMOND, *supra* note 160, at 113; HUGHES & LOWE, *supra* note 98, at 7.

351. See Cowan & Laurie, *supra* note 102, at 3–9.

352. Housing Act, 1988, c. 2, § 21(5) (Eng.); ARDEN & DYMOND, *supra* note 160, at 50–52.

chill tenant complaints regarding the condition of the premises.³⁵³ Indeed, private tenant rights groups routinely issue advice to tenants warning that demands for repairs may be met with eviction, and thus must be made cautiously.³⁵⁴

Statutory regimes aimed at preventing improper eviction do little to ameliorate the situation.³⁵⁵ Although both civil and criminal sanctions exist for improper evictions, they are generally directed at unlawful landlord behavior, rather than lawful behavior that is merely retaliatory in nature.³⁵⁶ Moreover, these rules are rarely enforced. Criminal convictions have been described as “negligible and declining” as both police and prosecutors lack incentives and resources to prosecute landlords.³⁵⁷ Civil actions are also relatively scarce. Here, it is private litigants who lack the incentive to file suit. Damages are calculated as the difference between the value of the property to the landlord with and without the tenant’s occupation.³⁵⁸ The measure was designed to deny the landlord the “windfall” of the increased capital value of the premises resulting from the tenant’s ouster.³⁵⁹ However, as a practical matter, calculating the relative values of the property with and without the tenant’s occupation is quite difficult.³⁶⁰ Additionally, since most tenancies are assured shortholds with very limited security of tenure, the difference between the two values is quite low.³⁶¹ Consequently, the tort action does little in practice to deter retaliatory conduct by landlords against tenants.³⁶²

353. See DEBBIE CREW, CITIZENS ACTION BUREAU, *THE TENANT’S DILEMMA WARNING: YOUR HOME IS AT RISK IF YOU DARE COMPLAIN* (2007), available at http://www.citizensadvice.org.uk/tenants_dilema_-_document.pdf; Jan Luba, *Repairs, Where Have All the Claims Gone?* LANDLORD & TENANT REV. 2010 14(1) 3–6.

354. See, e.g., *Getting repairs done: Your rights if you are renting your home*, A SHELTER GUIDE (Shelter, London, Eng.), Updated July 2013, available at http://england.shelter.org.uk/_data/assets/pdf_file/0019/23392/ShelterGuide_GettingRepairsDone.pdf (“You may be evicted if you complain about disrepair. Think carefully, and do not take action until you are sure that you will be able to find somewhere else to live.”).

355. See generally Jill Morgan, *Unlawful Eviction and Harassment*, in *THE PRIVATE RENTED SECTOR IN A NEW CENTURY: REVIVAL OR FALSE DAWN?* 109–22 (Stuart Lowe & David Hughes, eds., 2002).

356. See THE LAW COMMISSION, SUPPLEMENTARY PAPER 1: THE LAW ON HOUSING CONDITIONS AND UNLAWFUL EVICTION ¶¶ 1.68–1.86, available at http://lawcommission.justice.gov.uk/docs/Housing_Encouraging_Responsible_Letting_Supplementary_1.pdf (last visited Feb. 10, 2013) [hereinafter LAW COMMISSION, UNLAWFUL EVICTION].

357. THE LAW COMMISSION, CONSULTATION PAPER NO. 181, ENCOURAGING RESPONSIBLE LETTING ¶ 3.35 (2008), available at http://lawcommission.justice.gov.uk/docs/cp181_Housing_Encouraging_Responsible_Letting_Consultation.pdf (last visited Oct. 27, 2013) [hereinafter LAW COMMISSION, RESPONSIBLE LETTING].

358. LAW COMMISSION, UNLAWFUL EVICTION, *supra* note 356, ¶¶ 1.82–1.83.

359. *Id.* ¶ 1.83.

360. *Id.* ¶ 1.84.

361. *Id.* ¶ 1.85.

362. *Id.*

Although commentators and tenant advocates have recently voiced their dissatisfaction with the systems currently in place to deter abusive conduct by landlords, the implementation of a retaliatory scheme in England seems unlikely. In its most recent report to Parliament proposing reforms to tenancy law, the Law Commission considered, but did not recommend, the adoption of a retaliatory eviction program.³⁶³ The report cited data indicating that tenants in England who refrain from taking legal action against landlords for failing to make repairs do not do so because of a perceived fear of eviction, suggesting that other forces operate to prevent tenants from taking advantage of their legal rights.³⁶⁴ Thus, the Law Commission concluded that prohibitions on retaliatory eviction “may be of symbolic importance but be of little practical effect.”³⁶⁵ Instead, the Law Commission suggested that a robust regulatory scheme aimed at incentivizing landlord compliance with housing standards might better serve tenants’ primary need for decent housing.³⁶⁶

C. Comparative Lessons

Given the controversy surrounding tenure protections in the United States, RURLTA’s silence on the subjects of automatic renewal and good cause eviction schemes is unsurprising. Nonetheless, the study of tenure protections in France, and their relative absence in England, does provide a backdrop against which to evaluate these institutions and their potential success here in the United States. Indeed, as presented here, foreign law militates in favor of providing residential tenants with modestly increased security of tenure through the implementation of minimum lease terms, while at the same time ensuring landlords sufficient protection against noncompliant tenants.

Under RURLTA, periodic tenants are subject to eviction without cause with advance notice of only one month. While this short notice period may be attractive to tenants who desire increased flexibility, it offers tenants little to no protection against unexpected ouster. And, by constricting rather than expanding tenant security, this revision moves American law away from international trends. Even in England, where security of tenure is regarded as slight in the private rental sector due to the assured shorthold tenancy, tenants are afforded at least six months of uninterrupted possession.

363. See THE LAW COMMISSION, HOUSING: ENCOURAGING RESPONSIBLE LETTING FINAL REPORT ¶¶ 6.98–6.99 (2008), available at http://lawcommission.justice.gov.uk/docs/lc312_Housing_Encouraging_Responsible_Letting.pdf (last visited Oct. 27, 2013).

364. See *id.* ¶ 2.8.

365. *Id.* ¶ 6.99.

366. See generally *id.* ¶¶ 6.1–6.111.

Moreover, while some American commentators have staunchly criticized France's more significant tenure protections,³⁶⁷ the most controversial aspect of the French regime is not the substantive law per se, but is instead the procedural framework in place for eviction. Even when the substantive law governing renewal would permit the landlord to terminate the lease, eviction procedures prevent the landlord from quickly ousting the tenant.³⁶⁸ If the tenant fails to vacate the premises at the termination of the lease, the landlord is required to request an eviction order from the court and serve notice on the tenant to quit the premises.³⁶⁹ Once served, the tenant is afforded an initial period of two months to leave, but is permitted to petition the court for additional time to find another dwelling.³⁷⁰ This type of accommodation is quite common, and the usual grace period allowed is six months.³⁷¹ During this time, the tenant is permitted to petition for an additional grace period ranging between one month and one year if "serious unfair consequences" will result from the eviction, such as, for example, the inability of the family to procure housing, employment, or schooling for children.³⁷² As a result of these delays and opportunities for appeal, evictions

367. See, e.g., Carroll, *supra* note 23, at 446 ("[M]odern French tenancy law is perhaps the most overt European example of an emphasis on the rights of the tenant at the expense of landlords.").

368. See AUBERT & BIHR, *supra* note 75, at 180.

369. See *id.* at 192–93.

370. *Logement vide relevant du secteur privé : impayés de loyers et expulsion [Empty slot in the private sector: unpaid rent and eviction]*, SERVIC-PUBLIC.FR : LE SITE OFFICIEL DE L'ADMINISTRATION FRANÇAISE [SERVICE-PUBLIC : THE OFFICIAL WEBSITE OF THE FRENCH ADMINISTRATION], <http://vosdroits.service-public.fr/F1213.xhtml> (last visited Oct. 28, 2013).

371. Boccadoro & Chamboredon, *supra* note 27, at 18.

372. CODE DE LA CONSTRUCTION ET DE L'HABITATION [C. civ.] [BUILDING AND HOUSING CODE] art. L.613-1 (Fr.); CODE DES PROCEDURES CIVILES D'EXECUTION [C.P.C.E.] [CODE OF CIVIL ENFORCEMENT PROCEEDINGS] arts. L.412-3–4, L.412-6–8; *Résiliation du bail et expulsion du locataire [Terminate the lease and evict the tenant]*, SERVIC-PUBLIC.FR : LE SITE OFFICIEL DE L'ADMINISTRATION FRANÇAISE [SERVICE-PUBLIC : THE OFFICIAL WEBSITE OF THE FRENCH ADMINISTRATION], <http://vosdroits.service-public.fr/F1213.xhtml> (last visited Oct. 28, 2013). In setting the grace period, the judge is instructed to consider the good or bad will manifested by the lessee in the execution of his obligations; the respective situations of the lessor and the lessee, notably concerning age, health, familial circumstances or finances; atmospheric circumstances, as well as the diligence manifested by the lessee in securing another dwelling. CODE DES PROCEDURES CIVILES D'EXECUTION [C.P.C.E.] [CODE OF CIVIL ENFORCEMENT PROCEEDINGS] art. L.412-4 (Fr.).

This period was recently reduced from three months to three years. See Loi 2009-323 du 25 mars 2009 de mobilisation pour le logement de la lutte contre l'exclusion (1) [Law 2009-323 of March 25, 2009 for mobilization for lodging and the fight against exclusion (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 27, 2009, p.5408 (modifying Article L613-2 of the CODE DE LA CONSTRUCTION ET DE L'HABITATION and reducing the grace period from between three months and three years to one month and one year); see also Boccadoro & Chamboredon, *supra* note 27, at 18.

can extend for years.³⁷³ Once the eviction order is entered, eviction may be delayed further by *la trêve hivernale* (the “winter truce”)—a prohibition on evictions during the winter months.³⁷⁴ Finally, it is quite possible that an otherwise lawful eviction will never occur if local officials decide to exercise their legal option of rendering compensation to the landlord instead of ordering the tenant to leave.³⁷⁵ These many procedural obstructions to a final eviction tend to obscure the efficacy of the substantive law.

Furthermore, the contrast between French and English tenure rules brings into sharp focus both the purpose and functionality of retaliatory eviction schemes. French law does not appear to recognize a doctrine of retaliatory eviction. Special legislation governing residential leases does not treat the subject, and the issue has not been raised either in reported cases or in the scholarly doctrine. However, absence of discourse about retaliatory eviction should not lead to the conclusion that French law permits landlords to engage in retaliatory conduct against tenants who attempt to avail themselves of their statutory rights. To the contrary, all indications point to the probability that retaliatory eviction schemes are unnecessary in France due to the exceptionally strong protections against eviction that tenants already enjoy.³⁷⁶ Similarly, in England calls for prohibition on retaliatory eviction were not made until tenure security was relaxed through the assured short-hold. Foreign experience thus appears to suggest that if American law retains its permissive approach toward lease termination, retaliatory eviction must be carefully guarded against. On the other hand, reformers in the United States should keep a watchful eye on developments in England, where increased regulatory controls are hoped to obviate the need for a private law remedy for improper termination.

373. See Robert C. Ellickson, *Legal Sources of Residential Lock-Ins: Why French Households Move Half as Often as U.S. Households*, 2012 U. ILL. L. REV. 373, 387 & n.67 (2012).

374. CODE DES PROCEDURES CIVILES D’EXECUTION [C.P.C.E.] art. L412-6 (Fr.). No tenant may be evicted between November 1 and March 15, even if a valid order to evict them from the premises has been rendered. *Id.*

375. AUBERT & BIHR, *supra* note 75, at 193.

376. In addition, the French *Code civil* specifically provides that the extinction of a contract may be refused if the party requesting extinction acts in bad faith. CODE CIVIL [C. CIV.] art. 1134 (Fr.). This provision, generally applicable to all contracts, has been held to apply in the context of residential leases. Specifically, the Cour de cassation has recently condemned a Cour d’appel’s finding that a lessor’s notice for termination of a lease was not subject to the standard of good faith contained in Article 1134. Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ. Jun. 29, 2010, Bull. civ. III, No. 08-12303; See also Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ. Sept. 18, 2012, Bull. civ. III, No. 11-23051 (Fr.) (applying the good faith standard contained in article 1134 to the exercise of a resolatory clause in a residential lease); Cour de cassation [Cass.] [supreme court for judicial matters] 3d civ. Oct. 27, 2010, Bull. civ. III, No. 09-16351 (Fr.) (finding the good faith standard in Article 1134 may only be invoked by the lessor).

Finally, comparison with foreign law highlights RURLTA's progressive approach to the problems of victims of domestic violence. To date, neither France nor England has specifically addressed the rights of the landlord and tenant when the tenant is involved in domestic disputes or sexual violence. Additionally, the general law in both jurisdictions would prove relatively unfavorable to tenants faced with those circumstances. In France, for example, although the landlord is permitted to evict the tenant prior to the end of the term on very limited grounds, violence is a clear basis for eviction.³⁷⁷ Even if the landlord was unable to secure an immediate eviction, he may be able to prevent renewal of the lease at the end of the term by citing the domestic violence incident as a "serious and legitimate reason" for lease termination.³⁷⁸ Moreover, a tenant seeking to terminate a lease in order to escape domestic violence would find herself obligated to continue paying rent for three additional months—the notice period required for termination. A tenant may take some consolation, however, in the fact that the law prohibits the landlord from collecting fees for the tenant's early or unexpected termination of the lease.³⁷⁹

In England also, victims of domestic violence have few, if any, protections. A tenant seeking to relocate enjoys slightly more freedom to do so quickly in England, where most assured shorthold tenancies can be terminated with two months' notice. However, a tenant who does not desire to leave the dwelling may be faced with the difficult choice of reporting domestic violence to the authorities or remaining in the premises. As in France, involvement in a domestic violence disturbance may constitute permissible grounds for immediate termination.³⁸⁰ Additionally, landlords, like

377. It is well established in French jurisprudence that threats or violence are sufficient cause to extinguish a residential lease contract in application of Article 1728 of the French *Code civil*. Cour d'appel [CA] [regional court of appeal] Saint-Denis, 3e civ. Sept. 1, 2006, Bull. civ. III, No. 05-00810 (upholding the eviction before term of tenants who repeatedly threatened their lessor with physical violence for *jouissance non conforme*, or non-conforming enjoyment of the lease) (Ft.); see also LAFOND & LAFOND, *supra* note 89, at 192–93.

378. See *infra* notes 334–35 and accompanying text. In contrast to the other detailed provisions concerning situations in which a lessor may terminate a lease at term, the "serious and legitimate motive" provision is broadly written to provide judges with significant discretion. AUBERT & BIHR, *supra* note 75, at 190–91. The only illustration provided by the legislature for what may constitute such a motive is the failure of the lessee to fulfill an obligation incumbent upon him. *Id.*

379. Loi du 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986 [Law 89-462 of July 6, 1989 for the amelioration of lease relations and modifying Law 86-1290 of December 23, 1986], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 1989, p. 8541.

380. The "discretionary" grounds include causing a nuisance or annoyance to other persons lawfully residing in the premises and committing an arrestable offence in, or in the

tenants, have the right to terminate periodic assured shortholds for any reason by giving notice of only two months.

Overall, the contrast between the revised URLTA and the law of England and France suggests that the United States is taking a more proactive role in safeguarding the rights of victims of domestic violence than those European jurisdictions. However, in keeping with the spirit of the functionalist approach, this conclusion must be drawn with caution. Instead, it may be the case that in both France and England the needs of domestic violence victims are adequately addressed outside of the realm of tenancy law and policy, obviating the need for specific rules in the housing context.

V. REGULATION OF STANDARD FORM PROVISIONS

Perhaps the most significant source of unfairness faced by residential tenants in the United States is their lack of bargaining power relative to landlords.³⁸¹ Residential leases are overwhelmingly standard form contracts of adhesion, presented to tenants by landlords on a take-it-or-leave-it basis.³⁸² Tenants are virtually powerless to negotiate their leases with their

locality of, the dwelling. Housing Act, 1988, § 7, sch. 2, Pt. II (Eng.). However, because the court must find that the order for possession is “reasonable,” a court’s discretion may militate against an order for possession against a victim, as opposed to a perpetrator, of domestic violence. Due to the difficulty experienced by landlords in evicting even perpetrators of domestic violence, the legislature in 1996 amended the Housing Act to permit *social* landlords (though not private landlords) to evict domestic violence offenders under certain limited circumstances. Housing Act, 1996, § 149 (Eng.).

After the amendment, a social landlord is permitted to evict a tenant on the ground of “domestic violence” when (1) the premises were occupied by a couple, (2) one of both of the partners is a tenant of the premises, (3) one partner has left and is unlikely to return, (4) he or she left because of threats or threats of violence by the other, (5) the violence was directed towards that partner or a member of that partner’s family who was residing with that partner immediately before he or she left, and (6) it is reasonable to make a possession order. Housing Act, 1988, § 7, sch. 2, Pt. II (Eng.).

381. Indeed, the imbalance of power between residential landlords and tenants is so severe that it has been described as “grotesque.” Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836 n.1 (1974) (“The blunt fact is that most people cannot rent apartments in our urban society without signing form leases that are simply grotesque in their one-sidedness”) (quoting *Morbeth Realty Corp. v. Velez*, 343 N.Y.S.2d 406, 411 (N.Y. Civ. Ct. 1973)).

382. See Marshall Pettyman, *The Landlord Protection Act, Arkansas Code § 18-17-101 Et Seq.*, 2008 ARK. L. NOTES 71, 72–73 (2008) (“There is an increasing realization that residential leases are not freely negotiated but rather imposed on a take-it-or-leave it basis by the landlord, especially the larger landlords.”); Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 791 (1974) (“Standard form leases for residential and short term business tenancies appear in all urban centers.”); Warren Mueller, *Residential Tenants and their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 249 (1970) (calling the residential lease “a classic example of the standard long-form contract”); see also Donald E. Clocksin, *Consumer Problems in the Landlord-Tenant Relationship*, 9 REAL PROP. PROB. & TR. J. 572, 572

landlords, and as a result, fall victim to the many one-sided terms contained therein. Moreover, the very form of the lease itself works injustice for residential tenants. Both intuition and empirical evidence suggest that most tenants do not read the leases that they sign, either because they are intimidated by their length, complexity, and use of legal jargon, or because they rightly believe that any attempts to negotiate would prove futile.³⁸³ Furthermore, many of those tenants who do read their leases, or attempt to do so, fail to fully comprehend the form terms contained within.³⁸⁴ The result is that residential tenants are largely ignorant of the content of the leases that they sign, and in any event, are incapable of securing terms any more favorable than those offered to them.

In order to ameliorate the worst effects of the landlord's superior bargaining position, URLTA expressly prohibits several clauses that are viewed as one-sided and likely to be harmful to tenants.³⁸⁵ These include any lease provision (1) in which a tenant waives or forgoes any right or remedy provided by the Act;³⁸⁶ (2) which authorizes a tenant to confess judgment on a claim arising from the lease;³⁸⁷ (3) which requires the tenant to pay the landlord's legal fees;³⁸⁸ or (4) which limits or indemnifies the landlord for liability.³⁸⁹ Any offending provision is deemed "per se unconscionable," and its deliberate inclusion allows a tenant to recover actual damages, in addition to a sum equal to three months' rent, and attorney's fees.³⁹⁰ Other contract terms that might be considered unfair to tenants are governed by URLTA's general unconscionability provision, which adopts the approach of the Uniform Commercial Code (U.C.C.) by explicitly authorizing courts to police rental agreements containing terms found to be unconscionable.³⁹¹

(1974) (discussing the relationship between unequal bargaining power and the use of form terms); Rabin, *supra* note 1, at 582–83 (explaining how market defects prevent competition for lease terms).

383. *See* Mueller, *supra* note 382, at 256–57, 276.

384. *See id.* at 258–63, 276.

385. *See* Subcommittee on the Model Landlord-Tenant Act, *supra* note 5, at 108; *see also* URLTA, *supra* note 2, § 1.403 cmt. ("Rental agreements are often executed on forms provided by landlords, and some contain adhesion clauses the use of which is prohibited by this section.").

386. URLTA, *supra* note 2, § 1.403(a)(1).

387. *Id.* § 1.403(a)(2).

388. *Id.* § 1.403(a)(3).

389. *Id.* § 1.403(a)(4).

390. *Id.* § 1.403(b).

391. *Id.* § 1.303 & cmt. ("This section, adapted from the Uniform Commercial Code and the Consumer Credit Code, is intended to make it possible for the courts to police explicitly against rental agreements . . ."). The standard for unconscionability adopted by the comment is:

whether, in light of the background and setting of the market, the conditions of the particular parties to the rental agreement, settlement or waiver of right or

The limitations placed on lease terms by URLTA have been applauded as a commendable first step toward protecting tenants from overreaching by landlords.³⁹² There are, however, those who argue that URLTA did not go far enough. For example, although the uniform law imposes penalties and liability for attorney's fees on the landlord who "deliberately" includes prohibited provisions "known by him to be prohibited," this statute requires the tenant to prove the landlord's state of mind—a difficult, if not impossible, task.³⁹³ Tenant advocates have suggested that the risk of including improper terms should be placed on the landlord, through the adoption of rules imposing absolute liability for prohibited clauses.³⁹⁴ Other commentators have argued that, rather than simply prohibit the inclusion of certain terms, the law ought to mandate the inclusion of recitations of the obligations of the parties, particularly those of the landlord.³⁹⁵ These proposals call for URLTA to improve the "contractual integrity" of the residential lease by requiring landlords to explain to tenants, *in writing*, the rights that they do and do not have.³⁹⁶

URLTA's adoption of U.C.C. unconscionability, though pioneering in its time, has also proved susceptible to criticism. One writer, commenting on courts' early use of U.C.C. section 2-302 to police lease contracts, remarked:

Even on its own turf, section 2-302 does not serve unconscionability doctrine well. . . . There is no indication whether section 2-302 can strike down arrangements that do not violate the standard of the industry, even when that standard falls far short of elemental fairness. Nor does the Comment explain when a bargain is so "one-sided," industry usage aside, as to be presumptively unconscionable. And neither the Code nor the Comment deals with the vital aspect of the *bargaining* context—the identity of the parties, their background and sophistication, their alternatives to making the deal at hand.³⁹⁷

claim are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the agreement or settlement.

Id. at cmt.

392. See, e.g., Mueller, *supra* note 382, at 277–78 (praising the URLTA's precursor, the Model Residential Landlord-Tenant Code, which prohibited the inclusion of any provision found to conflict with the mandatory provisions of the act).

393. See Bernard Black, Note, *A Model Plain Language Law*, 33 STAN. L. REV. 255, 285–87 (1981) (noting that the requirement that the tenant show the landlord *deliberately* included prohibited terms is "hard to enforce").

394. See, e.g., Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 879 (1974).

395. See, e.g., Berger, *supra* note 382, at 814–15, 819–20.

396. See *id.*

397. *Id.* at 811–12.

By endorsing the U.C.C. formulation for unconscionability, the drafters of URLTA incorporated the doctrine's weaknesses along with its strengths. And, whether due to these flaws or other forces, the unconscionability doctrine has been markedly underutilized and unsuccessful in policing residential leases.³⁹⁸ Unconscionability's primary flaw is that courts applying the doctrine have traditionally required strong evidence of *both* procedural unconscionability—an indication that there was some deficiency in the bargaining process beyond a mere disparity in bargaining power—and substantive unconscionability—unfairness in the terms of the contract themselves.³⁹⁹ While some evidence exists that courts are willing to find the requisite procedural unconscionability based only on the adhesive nature of form leases and a general lack of adequate housing,⁴⁰⁰ no guarantee exists that these factors will be sufficient in every case. As a result, the procedural prong of unconscionability acts as a barrier to the success of many unconscionability claims.

The ULC Drafting Committee has left the original provisions of URLTA addressing prohibited lease terms and unconscionability relatively untouched.⁴⁰¹ Only one minor change has been proposed, which is to include, as an enumerated prohibited provision, any term stating that the tenant will perform any of the duties imposed upon the landlord relating to the habitability of the premises.⁴⁰² However, this is not so much a substantive change as a necessary semantic one to make clear that the lessee cannot waive the implied warranty of habitability by obligating himself to perform the landlord's obligations.

The above criticisms of the uniform law's treatment of standard form contract provisions weigh in favor of exploring a different regime to police unfair contract terms—one that might better protect residential tenants and, at the same time, offer increased certainty and predictability to residential

398. A search in the Westlaw database ALLCASES for decisions containing the terms “unconscionability” and “residential lease” yielded only 42 cases, spanning from 1973 to 2013, in which the unconscionability of a residential lease provision was directly addressed by the court. The unconscionability claim was successful in 19 of those cases, or approximately 45%.

399. See Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability* 44 LOY. U. CHI. L.J. 1 (2012); see also Audrey Goldstein Fleissig, *Unconscionability: A New Helping Hand to Residential Tenants*, 1979 WASH. U. L.Q. 993, 1021 (1979) (noting the “pervasiveness of the two-pronged test” in residential lease cases).

400. See Fleissig, *supra* note 399, at 1022–26 (concluding that “[i]n upholding a finding of unconscionability, courts generally emphasize the lack of adequate housing and the adhesive nature of form leases as the most important, if not sole, evidence of procedural unfairness.”).

401. See RURLTA, *supra* note 131, §§ 106 (unconscionability), 203 (prohibited provisions in a lease).

402. *Id.* § 203(a)(3).

landlords. The experience of European countries in policing standard form provisions is considerable, spanning many decades and having culminated in international standards for fairness in consumer contracts. In both England and in France, a rich composition of international standards and domestic law is used to combat unfairness in standard form residential leases. The experience of these jurisdictions indicates that American law may benefit from increased regulation of standardized lease terms, and provides some guidance as to how this might be accomplished.

A. The EU Unfair Contract Terms Directive

The primary source of European Union law regulating residential leases is the Directive on Unfair Terms in Consumer Contracts (“Directive”).⁴⁰³ The Directive generally applies a test of “fairness” to standardized terms in consumer contracts of all types.⁴⁰⁴ Although the Directive does not explicitly address residential leases, both England⁴⁰⁵ and France⁴⁰⁶ have applied the national law compliant with the Directive to tenancy contracts.

According to the Directive, a non-negotiated standard form term is regarded as “unfair,” and thus unenforceable,⁴⁰⁷ if, “contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consum-

403. Council Directive 93/13/EEC, 1993 O.J. (L 95) 29 (EC). For a detailed discussion of the Directive and its history, see generally James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L L. 109, 131–41 (2003).

404. Council Directive 93/13/EEC, *supra* note 403, at art. 1. The Directive applies to contracts concluded “between a seller or supplier and a consumer.” *Id.* A “consumer” is defined as a natural person acting outside of his trade, business or profession. *Id.* at art. 2. The term “seller or supplier” includes natural and legal persons and describes one who is acting within his trade, business, or profession. *Id.*

405. See, e.g., *The London Borough of Newham v. Khatun, Zeb, Iqbal and the Office of Fair Trading* [2005] Q.B. 37 (holding that the Unfair Terms in Consumer Contracts Regulations 1999, which implements the EU in England, applies to contracts relating to land); see also LAW COMMISSION, STATUS AND SECURITY, *supra* note 18, at 111 n.12 (noting that the application of the statutory instrument implementing the Directive to tenancy contracts was made clear in the statute itself, which removes the terms “goods and services” as a modifier of the types of contracts covered by the legislation); THE OFFICE OF FAIR TRADING, GUIDANCE ON UNFAIR TERMS IN TENANCY AGREEMENTS 2 (2005).

406. The *Code de la consommation* explicitly applies its provisions to all forms of contracts, including residential leases, in stating that “[t]hese dispositions are applicable no matter the form of the contract.” CODE DE LA CONSOMMATION [C. CONSOM.] [CONSUMER CODE] art. L.132–1 (Fr.) (“Ces dispositions sont applicables quels que soient la forme ou le support du contrat.”); see also *Cour de cassation* [Cass.] [supreme court for judicial matters] 3e civ., Sept. 29, 2010, Bull. civ. III, No. 09-10042 (Fr.) (applying the abusive clause provisions of the *Code de la consommation* to invalidate clauses in a residential lease).

407. Council Directive 93/13/EEC, *supra* note 403, at art. 6.

er.”⁴⁰⁸ The Annex to the Directive contains an illustrative “grey” list of terms that may be considered unfair.⁴⁰⁹ Importantly, however, the Directive applies only to contracts between consumers and “a seller or supplier.”⁴¹⁰ Thus, leases entered between tenants and non-professional landlords are not subject to its terms.⁴¹¹

The Directive is aimed at harmonization of law and thus requires Member States to adopt laws consistent with the Directive’s terms. The applicable rules in France and England, therefore, are not the Directive itself, but the domestic laws that have been adopted in those jurisdictions to implement its provisions. While reviewing that legislation, it is important to keep in mind that the Directive establishes minimum standards for the regulation of unfair contracts; Article 8 explicitly permits Member States to adopt “more stringent provisions” in order to ensure “a maximum degree of protection for the consumer.”⁴¹² In keeping with this authorization, France and England have both expanded upon the unfair terms contained in the Directive. In addition to legislation related to the Directive, the legislative and regulatory regimes governing residential leases also specifically enumerate many common lease terms that are considered null and void.

B. France

In France, the Directive has been implemented by special legislation contained within the *Code de la consommation* (Consumer Code).⁴¹³ Article L132-1 provides, consistent with the Directive, that in contracts concluded between professionals and consumers, terms which cause a significant imbalance between the rights and obligations of the parties to the contract are deemed unfair and are—as a result—unenforceable.⁴¹⁴ This standard effectively enables French courts to openly police consumer contracts on fairness grounds, without the need to establish in any *particular* case that disparities in bargaining power justify judicial intervention. Also consistent with the Directive, the *Code de la consommation* lists certain clauses that are deemed to be abusive,⁴¹⁵ and others that are presumptively abusive.⁴¹⁶

408. *Id.* at art. 3. Although this language appears to suggest a term must meet two criteria—that is, be contrary to the requirement of good faith *and* cause a significant imbalance in the parties’ rights and obligations under the contract—the “official position” is that a clause that causes a significant imbalance in the parties’ rights by definition is contrary to the requirement of good faith. *See* Maxeiner, *supra* note 403, at 134–35.

409. Council Directive 93/13/EEC, *supra* note 403, at Annex.

410. *Id.* at art. 1.

411. *See* Schmid, *supra* note 37, at 19.

412. Council Directive 93/13/EEC, *supra* note 403, at art. 8.

413. CODE DE LA CONSOMMATION [C. CONSOM.] [CONSUMER CODE] art. L132–1 (Fr.).

414. *Id.*

415. *Id.* at R.132-1.

These are not the only standards that serve to guide courts with respect to unfair terms in lease contracts. In addition, the *Commission des clauses abusives* (Commission) is charged with studying standard form contracts commonly used in consumer transactions and recommending the modification or suppression of terms that violate Article L132-1.⁴¹⁷ In turn, the agency has published recommendations concerning the terms of residential leases.⁴¹⁸ Although the Commission's recommendations are not binding on French courts, they are given considerable deference.⁴¹⁹ In the event of litigation concerning such a clause, the professional must show proof of the non-abusive character of the clause in question.⁴²⁰ The Commission may also be summoned by a court to prepare a non-binding opinion on the abusive nature of a clause that is the subject of litigation.⁴²¹

Moreover, the Mermaz Act lists *nineteen* additional specific types of clauses that are considered abusive in residential lease contracts and are

416. See *id.* at R.132-2.

417. *Id.* at L. 132-2.

418. There are a number of recommendations specifically applicable to residential leases. See, e.g., Recommandation 2000-01 du février 2000 émise par la Commission des clauses abusives, complétant la recommandation 80-04 concernant les contrats de location de locaux à usage d'habitation [Recommandation 2001-01 issued by the *Commission des clauses abusives*, completing recommendation 80-04 relative to residential lease contracts] Commission des clauses abusives [Committee of Unfair Terms] 2000-01 (2000) (Fr.) (recommending, for example, that clauses permitting the lessor to subtract unjustified sums from the security deposit for breach of the lease, requiring a spouse's signature on the lessee's notification for termination of the lease, or limiting the lessee's access to common areas such as the elevator or the principal stairwell be considered abusive); see also Recommandation 85-04 du 6 décembre 1985 concernant les contrats d'assurance destinés à couvrir divers risques de la privée (notamment le vol, l'incendie, les dégâts des eaux et la responsabilité civile) et couramment dénommés multirisques habitation [Recommandation 85-04 Dec. 6, 1985 for insurance contracts to hedge various risks of private (including theft, fire, water damage and liability) and commonly referred to as multi-risk habitation contracts] Commission des clauses abusives [Committee of Unfair Terms] 85-04 (1985) (Fr.); Recommandation 80-04 du 17 octobre 1980 concernant les contrats de location de locaux à usage d'habitation [Recommandation 80-04 Oct. 17, 1980 relative to residential lease contracts] Commission des clauses abusives [Committee of Unfair Terms] 80-04 (1980) (Fr.). A complete list of recommendations is maintained on the Commission's website. Recommendations émises par la Commission des clauses abusives, Commission des clauses abusives [Recommendations issued by the Commission on unfair terms], <http://www.clauses-abusives.fr/recom/index.htm> (last visited Oct. 28, 2013).

419. See Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants*, 62 BUS. LAW. 209, 222 (2006).

420. CODE DE LA CONSOMMATION [C. CONSOM] [CONSUMER CODE] art. L132-1 (Fr.).

421. *Id.* at R.132-6. Unlike the United Kingdom's OFT, the Commission does not have standing to seek judicial intervention in the drafting of standard form contracts. See Fabrizio Cafaggi, *The Great Transformation. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective*, 21 LOY. CONSUMER L. REV. 496, 528 (2009) (comparing the role of OFT in the United Kingdom with that of the Commission in France).

therefore reputed *non-écrites* (not written).⁴²² These include the following requirements: that the lessee be allowed to show the dwelling to potential buyers or tenants on holidays or more than two hours per working day; that rent be paid through automatic withdrawals from the lessee's account, advance agreements by the lessee to pay preset fees for repairs to the premises, and any clause setting fines for breaches of the lease, among others.⁴²³

C. England

The Directive has been implemented in England by the Unfair Terms in Consumer Contracts Regulations 1999 ("Regulations").⁴²⁴ The Regulations track the Directive in making unfair terms in contracts concluded between a consumer and a "seller or supplier" unenforceable,⁴²⁵ and adopts, verbatim, the Directive's definition of an unfair term.⁴²⁶ As in France, courts are permitted to police any residential lease agreement entered between tenants and professional landlords. To assist courts in this regard, and also to provide guidance to landlords and letting agents engaged in drafting leases,

422. Mermaz Act, *supra* note 63, at art. 4.

423. *See* Mermaz Act, *supra* note 63, at art. 4. The complete list of prohibited include terms that: (1) oblige the lessee to allow the premises to be visited for future sale or rentals on public holidays or for more than two hours per working day; (2) require the lessee to obtain rental insurance from a company chosen by the lessor; (3) require that the lessee pay rent via automatic withdrawal from the lessee's account or promissory notes executed in advance of the date that rent is due; (4) authorize the lessor to receive rent payments directly from the salary of the lessee; (5) impose collective responsibility on lessees for deterioration of common elements of the leased thing; (6) require the lessee to make advance payments for repairs, when estimates are made unilaterally by the lessor; (7) provide for automatic termination of the lease for reasons other than non-payment of rent, charges, or security deposit, the failure to procure rental insurance, or the failure to use the leased premises peacefully resulting in a judicial declaration of disturbance of the peace; (8) permit the lessor to diminish or eliminate services stipulated in the contract without equivalent compensation to the lessee; (9) permit the lessor to collect fines or penalties for breaches of the lease; (10) prohibit the lessee from participating in trade unions, associations, religious organizations, or political activity; (11) require the lessee to pay for the statement of condition of the leased premises, unless the statement is prepared by a *huissier* [bailiff] as provided for in Article 3; (12) require renewal of the lease for a term less than that required by Article 10; (13) prevent the lessee from taking judicial action against the lessor; (14) prevent the lessee from housing guests; (15) require the lessee to make a deposit payment greater than that required by law; (16) impose fees on the tenant greater than those imposed by law; (17) impose automatic responsibility on the lessee for degradation of the leased premises; (18) prohibit the lessee from seeking damages from the lessor when the lessor undertakes work on the leased premises that lasts more than forty days; (19) permit the lessor to automatically terminate the lease by simple injunction not subject to appeal. *Id.*

424. *See* The Unfair Terms in Consumer Contracts Regulations, 1999, S.I. 1999/ 2083 (U.K.), available at <http://www.legislation.gov.uk/uksi/1999/2083/contents/made>.

425. *Id.* at art. 8.

426. *Id.* at art. 5(1); *see also* Council Directive 93/13/EEC, *supra* note 403, at art. 3(1).

the Office of Fair Trading has issued nonbinding recommendations (“OFT Guidance”) interpreting the Regulations in the context of tenancy law.⁴²⁷

The OFT Guidance makes clear that terms can be found unfair on one of three grounds: substantive unfairness, procedural unfairness, or lack of transparency. With respect to substantive unfairness, the OFT elaborates on the meaning of a “significant imbalance” in the rights of landlords and tenants that will give rise to a finding of unfairness. According to the OFT, there need not be a particular imbalance to a particular tenant—instead, a term should be regarded as unfair (and thus enforceable) if it has the potential to cause detriment to any occupier under a lease.⁴²⁸ The OFT Guidance further stresses that a determination of fairness is made irrespective of the landlord’s intention in drafting it.⁴²⁹ The OFT Guidance goes on to explain that in contrast to substantive fairness, procedural fairness concerns circumstantial factors existing at the time of the contract’s execution that would render its provisions unfair to the tenant.⁴³⁰ The Guidance explains that factors giving rise to procedural unfairness include the length and complexity of the contract and whether the tenant was given adequate time to review the contract terms.⁴³¹ Finally, OFT maintains that the Regulations require contracts to be transparent.⁴³² Thus, terms must be presented in “plain and intelligible language,” and drafted in such a way that tenants can understand them without seeking legal advice.⁴³³ Any ambiguity will be interpreted in favor of the tenant.⁴³⁴ The Guidance suggests that providing tenants with summary or explanatory information accompanying the contract might assist transparency.⁴³⁵

The OFT Guidance goes on to discuss, in tremendous detail, numerous types of typical clauses found to be unfair under these standards. For example, elaborating on the Regulations’ prohibition of clauses that “have the

427. THE OFFICE OF FAIR TRADING, GUIDANCE ON UNFAIR TERMS IN TENANCY AGREEMENTS, (2005) (U.K.) [hereinafter OFT GUIDANCE], available at http://www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/oft356.pdf. While this guidance reflects the OFT’s view of the law, it is not binding in judicial proceedings. LAW COMMISSION, STATUS AND SECURITY, *supra* note 18, at 111. The Office of Fair Trading is charged by the Regulations with the duty to consider complaints relating to unfair terms in consumer contracts and is authorized to petition the proper court for an injunction preventing the continued use of such a term. *See* The Unfair Terms in Consumer Contracts Regulations, 1999, S.I. 1999/2083 arts. 10–12 (U.K.); *see also* OFT GUIDANCE, *supra*, at 2–3. In practice, this power has been used sparingly. *See* Cafaggi, *supra* note 421, at 528.

428. OFT GUIDANCE, *supra* note 427, ¶ 2.6.

429. *Id.*

430. *Id.* ¶ 2.7; *see also* LAW COMMISSION, STATUS AND SECURITY, *supra* note 18, ¶ 6.31.

431. OFT GUIDANCE, *supra* note 427, ¶ 2.7.

432. *Id.*

433. *Id.*

434. *Id.* ¶ 5.5.

435. *Id.* ¶ 5.8.

effect of...excluding or limiting the legal liability” of the landlord, the OFT Guidance makes clear that the law prohibits not only patent “exemption” clauses, but also clauses that have the same effect as an unfair exemption clause.⁴³⁶ Thus, the prohibition applies “to terms that ‘deem’ things to be the case, whether they really are or not, with the aim of ensuring no liability arises in the first place.”⁴³⁷ The OFT Guidance goes on to find that exculpatory clauses containing savings clauses, such as “as far as the law permits” or “save as may be prohibited by statute,” are also illegal.⁴³⁸ According to OFT, such clauses are “open to objection because they are not clear to those without legal knowledge. Tenants are not likely to be aware of the underlying statutory provisions.”⁴³⁹ The OFT Guidance continues with this level of particularity to address the illegality of over thirty separate clauses likely to be found in tenancy contracts, including terms “[u]nreasonably excluding the tenant’s right to assign or sublet” the property;⁴⁴⁰ terms requiring tenants to make certain “declarations,” such as one stating “the tenant has read and/or understood the agreement;”⁴⁴¹ and terms requiring certain payments, including not only excessive cleaning fees or requirements that the tenant procure insurance,⁴⁴² but also clauses requiring tenants to pay vaguely stated or open-ended charges.⁴⁴³

D. Comparative Lessons

Several observations about the European approach to standard form leases stand out when contrasted with that of URLTA. First, due to the influence of the Directive, standardized contracts entered between professionals and consumers are presumed to be so lacking in bargaining power that courts are permitted to police those contracts for substantive fairness without requiring additional evidence of procedural flaws.⁴⁴⁴ This presumption gives the approach of the Directive a distinct advantage over the two-prong American unconscionability doctrine. Whereas American law currently requires a court to find specific evidence of a deficiency in the bargaining

436. OFT GUIDANCE, *supra* note 427, ¶ 3.7.

437. *Id.*

438. *Id.*

439. *Id.*

440. *See id.* ¶¶ 4.22–4.28.

441. *Id.* ¶¶ 4.29–4.36.

442. *See* OFT GUIDANCE, *supra* note 427, ¶¶ 4.7–4.8.

443. *See id.* ¶ 4.4.

444. This is consistent with “modern” theoretical approaches to contract law which have shed strict adherence to the classical emphasis on freedom of will in favor of balancing contractual freedom with other values, including the protection of weaker parties and promotion of the common good. *See* Sebastien Grammond, *The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective*, 49 CANADIAN BUS. L. J. 345, 349 (2010).

process sufficient to give rise to judicial intervention, French and English law deem the existence of a consumer contract to meet that requirement. URLTA could emulate this facilitation of judicial oversight by implementing a presumption of “procedural unconscionability” for all lease contracts entered between consumers and professional landlords. Although such a change would deviate sharply from existing law, it would afford courts greater latitude to engage in scrutiny of questionable provisions on grounds of substantive fairness.

Foreign experience also counsels that courts ought to have substantial guidance in determining what types of clauses might be deemed unfair. In France and England, administrative agencies play an active role in elaborating the standards for fairness. In the United States, although state agencies might take on this responsibility, the ULC should consider expanding upon URLTA’s unconscionability and prohibited terms provisions to provide additional content for the unconscionability standard as it applies to residential leases. While the uniform law currently proscribes a number of terms outright, that list is quite limited in comparison to the litany of terms prohibited or strongly discouraged by French and English law. Many common standardized terms, such as terms imposing fees, tenant declarations, and terms misstating the rights and obligations of the parties, could also be expressly prohibited. Indeed, even the incorporation of precatory language into the comments of existing law would serve to discourage the use of such clauses by landlords.

Finally, the European approach weighs strongly in favor of mandating increased transparency and disclosure in standardized leases. Although courts in this country are not accustomed to policing contracts on the basis of clarity alone, RURLTA could mandate that lease terms drafted by a professional landlord must appear in plain, intelligible language, and that any ambiguity in those terms will be interpreted in favor of the tenant in case of dispute. At the very least, the revised uniform law could compel landlords to furnish tenants with a written lease, a requirement that does not exist in the present law. Additional “contractual integrity” could be achieved by expanding URLTA’s current disclosure requirements. Present law requires the landlord to disclose only the identities of the owners and managers of the leased property.⁴⁴⁵ Although RURLTA, in its current iteration, would also require landlords to disclose “all rules, and conditions which govern the tenancy,”⁴⁴⁶ the scope of this requirement is unclear. It appears that the lan-

445. URLTA, *supra* note 2, § 2.102.

446. RURLTA, *supra* note 131, § 301(a)(1). The RURLTA also requires disclosure of (1) “any condition of the premises which would breach a duty owed to a tenant under Section 303 and of which the prospective landlord knows or had the prospective landlord done a reasonable inspection of the premises should have known;” (2) “whether the premises are in foreclosure or the landlord is knowingly in default on any obligation to pay money or per-

guage merely requires a landlord to spell out rules and regulations relating to the tenant's use of the premises, but not other aspects of the lease.⁴⁴⁷ However, improved clarity—both of the law and of leases themselves—could be achieved by requiring professional landlords to set forth the rights and obligations of the parties, at least with respect to fundamental components of the lease.

VI. CONCLUSION AND CALL FOR ADDITIONAL STUDY

When URLTA was first drafted, law reformers looked only to their own backyards for inspiration. Today, comparative law can guide the drafters of RURLTA to a revision built on the experience not only of American jurisdictions, but also of the world beyond our borders. The objective of this Article has been a modest one—to begin the exploration of foreign solutions to the problems inherent in tenancy law. However, these pages have barely looked beneath the surface of the deep pool of collective knowledge of tenancy law shared by jurisdictions outside of the United States. Additional comparative work is still required, not only for the topics addressed in this Article, but for other aspects of tenancy law and policy as well.

Beyond habitability, security of tenure, and the regulation of standardized contract terms, other topics treated within URLTA could benefit from comparative study. For example, the treatment of security deposits by landlords is a topic of pressing concern to the ULC.⁴⁴⁸ Key issues include the proper characterization of the tenant's security deposit as property of the landlord or of the tenant, requirements that the landlord hold security deposits in escrow and pay interest on principal, and the landlord's obligations respecting their return.⁴⁴⁹ Given the ubiquity of security deposits in residential tenancies and the considerable potential for their abuse by landlords, it should be unsurprising that European jurisdictions heavily regulate their payment, possession, and return. In France, a regulated contract model is utilized whereby the landlord may collect a deposit not exceeding one month's rent, provided it is promptly returned after the deduction of costs for repairs.⁴⁵⁰ Though the regulation of security deposits in France has pro-

form another obligation that could result in foreclosure;" and (3) "in the case of prepaid rent, the month or other period of the lease to which the prepaid rent is to be applied." *See id.* § 301(a)(2)–(4); *id.* § 301 cmt.

447. *See id.* § 306.

448. *See* Noble-Allgire, *supra* note 131.

449. *See id.*

450. Mermaz Act, *supra* note 63, at art. 22; AZÉMA, *supra* note 89, at 22 (explaining that the Mermaz Act provides the lessor with two months to return the security deposit, minus justified sums due to him). Beginning at the expiration of the two-month period within which the lessor must return the security deposit, any unreturned sums begin to accumulate interest

ceeded relatively smoothly, the same has not been true in England. Widespread reports of landlords refusing to return deposits has led to the mandatory use of tenancy deposit “schemes”—arrangements whereby third party administrators collect and hold security deposits for the benefit of both parties to the lease.⁴⁵¹ Further study of these models, and those of other jurisdictions, might prove profitable for the reform of American law.

It must also be remembered that URLTA does not treat tenancy comprehensively. In particular, URLTA provides no coverage of eviction proceedings or rules relating to dispute resolution. Their omission from the uniform law is not indicative of their importance to landlord-tenant law as a whole. Indeed, regimes and institutions for dispute resolution shape tenancy law “in action,” which is arguably far more relevant to landlords and tenants than the law on the books. Calls for improving legal aid services to tenants, establishing and maintaining housing courts, and encouraging successful alternative dispute resolution in landlord-tenant disputes can be measured against the extensive experience of foreign jurisdictions in addressing the statutory rights of tenants. Both France⁴⁵² and England⁴⁵³ have developed procedural mechanisms aimed at providing inexpensive and informal resolutions of disputes between landlords and tenants.⁴⁵⁴ These might be emulated, or at least inspire similar designs here.

The revision of URLTA comes at a pivotal time for residential tenants. The recent mortgage crisis has forced a record number of homeowners into

for the benefit of the lessee. Mermaz Act, *supra* note 63, at art. 22; AZÉMA, *supra* note 89, at 22.

451. See DRISCOLL, *supra* note 182, at 314–22.

452. In France, many landlord-tenant conflicts are settled by local *commissions départementales de conciliation* (conciliation committees) made up of members of tenants’ and landlords’ associations. These *commissions* have jurisdiction over disputes involving rent, inventory of fixtures, deposits, charges for services, and repairs incumbent upon tenants, among others. See Mermaz Act, *supra* note 63, at art. 20.

453. In England, housing disrepair claims are made subject to the Pre-Action Protocol for Housing Disrepair Cases. See generally Debra Mo, *Disrepair Disputes*, 148 SOLIC. J. 738 (2004) (describing the operation of the Pre-Action protocol for Housing Disrepair Cases). This protocol, introduced in 2003, contains a set of procedural guidelines “intended to encourage the exchange of information between parties at an early stage” in the dispute and “to provide a clear framework within which parties in a housing disrepair claim can attempt to achieve an early and appropriate resolution of the issues.” See Pre-Action Protocol for Housing Disrepair Cases, 2003, CPR, art. 1, available at http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_hou (last visited Jan. 28, 2013). According to one tenant advocate, these guidelines ensure that “[i]t should never be necessary for a tenant to litigate in order to secure [] remedies [for disrepair], as a result of the modern emphasis on alternatives to court-based action.” Luba, *Landlords Repairing Obligations Part 2*, *supra* note 263, at 98. In addition, the Law Commission recently completed a study aimed at further improving the resolution of housing disputes. See LAW COMMISSION, HOUSING: PROPORTIONATE DISPUTE RESOLUTION, *supra* note 113.

454. See Schmid, *supra* note 37, at 24–25.

rental arrangements, driving up the cost of rent and drastically decreasing the availability of affordable rentals. The tight market and the effects of the recession can generally be expected to work together to expose residential tenants to all forms of abuse and exploitation by landlords. The urgency of crafting law that will ensure tenants' access to a steady supply of safe and affordable housing is just as great now as it was forty years ago when the landlord-tenant revolution was at its peak. Comparative law, perhaps the most useful tool for law reform, can be used to hasten our progress in doing so. We must not allow this second chance for innovation to pass us by.