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LANDLORD CONTROL OF TENANT BEHAVIOR: AN INSTANCE OF PRIVATE ENVIRONMENTAL LEGISLATION

JOHN A. HUMBACH*

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I. INTRODUCTION

Sic utere tuo ut alienum non laedas

Home is the ultimate refuge. For most of us, there is a need for a place where defenses can be down, where retreat can be had from both the offensiveness of others and offensiveness to others. And, for most of us, home is that place.¹

Regrettably this is less so every day. The inflow to urban areas, the cheapening of construction and the trend towards multi-family housing all have contributed to make being at home, for more and more people, an increasingly social encounter. No longer are the neighbors left behind at the street or front door. The neighbor's stereo, the dog that barks next door, the upstairs tenant's parquet floor—these are types of annoyances which can be with us all the time. And, at the same time, there is the plague of neighbors who complain that our own stereo, children, parties and activities are too loud or otherwise annoying. Such are concomitants of modern urban life.²

It is not suggested that these problems are new. Nor does the modern tendency to cram an increasing part of the population into high-density housing present any particularly unique new factors which in themselves would suggest the advisability of reexamining and reworking old solutions. The relevant factors which are new seem to be largely attitudinal: greater emphasis on tenant³ protection, espe-

1. It would be nice to avoid the psycho-sociological thicket. However, people routinely engage in activities through which they seek as well as deprive others of noneconomic values (e.g., psychic values). If the law is to rationally intervene in and regulate such activities, it must try, explicitly or at least implicitly, to take into account what these values are. The present inquiry concerns the private creation of conduct norms for situations where the interplay of psychic or like noneconomic values and aims tends to predominate. Unhappily, mere questions of definition might bog down the discussion for all time. Nonetheless, at the minimum, an explicit statement can be made as to what the relevant values are *assumed* to be. That is all that any reference to alleged psycho-social values purports to do herein.

2. Moreover, indications are that the segment of the population housed in multi-family or other non-detached housing will, by economic necessity, grow larger and larger as the per capita land area—particularly around desirable urban centers—continues to decline. One recent study, sponsored by three agencies of the federal government, has estimated that the cost of developing new housing on a non-detached plan can result in savings of up to 44 per cent compared with the cost of single-family housing. See Real Estate Research Corp., *The Costs of Sprawl: Executive Summary* 3 (1974), reported in *Time*, Nov. 4, 1974, at 63. The capital cost figures could not of course take account of the noneconomic (psychic) cost of crowding, but the question remains open whether people can or will incur greater monetary outlays in order to avoid such non-cash costs.

3. The discussion herein focuses on residential *leasehold* tenants. However, the problems discussed are, on the whole, not problems unique to the landlord-tenant context as such but apply in the case of all multi-family housing. Thus, even though the multi-family housing in question may happen to be owner-occupied, as in the case of condominiums, the same sorts of problems may be expected.

cially in tight housing markets; a judicial wariness about supporting attempts at private oppression under the guise of freedom of contract; and a reconfirmation and bolstering of a policy of tolerance under which certain differences among people (*e.g.*, racial or religious) must be tolerated and a growing feeling that other differences (*e.g.*, "lifestyle") should be.

The present Article suggests that the problem of incompatible neighboring tenants can be most efficiently and "justly" dealt with by permitting a substantial degree of landlord control over tenant behavior—with the removal of offending tenants, at the landlord's instance, being the most effective sanction of ultimate recourse in the effectuation of such control. For some courts, ceding this power of control to landlords would require a measure of constraint which they may find uncustomary or even distasteful. As institutions charged with doing justice, the courts' instinct to intervene in the norm-creating process is undoubtedly great, even when the parties before the court have ostensibly agreed beforehand to the norms of behavior (and consequences of violation) which are to apply. Of course, such intervention is appropriate when the privately established norms or consequences contravene some articulable public policy, such as prohibitions on visits by members of racial minorities or incarceration of an offending tenant as a sanction. But the courts have not limited their second guessing on the propriety of agreed norms or sanctions to cases

The question arises as to the extent to which the rules developed and being developed to serve in the landlord-tenant context can be adapted to fill out a body of law on community associations and the like. The case of cooperative ownership, which is landlord-tenant in form but owner-occupant in common understanding, is an intermediate case. See Comment, *Restrictions on the Use of Cooperative Apartment Property*, 13 *Hastings L.J.* 357 (1962). The general tendency seems to be to treat the status of the cooperative tenant vis-à-vis the "landlord" according to more or less the same rules which obtain in ordinary landlord-tenant relationships. See, *e.g.*, the analytical methodology in 1915 16th St. Co-op. Ass'n v. Pinkett, 85 A.2d 58 (D.C. Mun. Ct. App. 1951); *Zamzok v. 650 Park Ave. Corp.*, 80 Misc. 2d 573, 363 N.Y.S.2d 868 (Sup. Ct. 1974); *Justice Court Mut. Housing Cooperative, Inc. v. Sandow*, 50 Misc. 2d 541, 270 N.Y.S.2d 829 (Sup. Ct. 1966); 1 *American Law of Property* § 3.10 (A.J. Casner ed. 1952) [hereinafter cited as *Am. L. Prop.*]; 2 P. Rohan & M. Reskin, *Cooperative Housing Law and Practice* § 1.03 (1975); Note, *Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personalty?*, 73 *Colum. L. Rev.* 250 (1973). This treatment of cooperative arrangements may have interesting consequences, for example, the possibility that the person who is in effect the "owner" of an apartment can forfeit the right to possess the apartment. See, *e.g.*, 1915 16th St. Co-op. Ass'n v. Pinkett, *supra*; *Green v. Greenbelt Homes, Inc.*, 232 Md. 496, 194 A.2d 273 (1963). The economic pressure resulting from such a forfeiture may mean that the cooperative can force a cooperator to sell his property in certain events—where the arrangement has gone sour—even though no express right to force such a sale is reserved. Compare the trial court and appellate term opinions with the appellate term dissent in 930 Fifth Corp. v. King, 64 Misc. 2d 776, 315 N.Y.S.2d 966 (Sup. Ct. 1970), *aff'd*, 71 Misc. 2d 359, 336 N.Y.S.2d 22 (App. T.), *rev'd*, 40 App. Div. 2d 140, 338 N.Y.S.2d 773 (1st Dep't 1972).

where the adverse effect on the tenant violates some clear public policy. In New York, for example, tenants have been allowed to physically attack their neighbors,⁴ gas themselves in the kitchen,⁵ keep accumulated garbage and "unhygienic" animals in their apartments,⁶ and play piano scales twelve hours per day⁷ without jeopardizing their possessory rights or losing the sympathy of the courts. Perhaps the courts in such cases ask themselves, "Where can these people go?" But where can their neighbors go?⁸

The essential concern should be how best to maximize the security *and* the utility of possession for urban residential tenants in a world where activities, habits, lifestyles and tolerances vary but where the emanations and by-products of each person's life activity will sometimes unavoidably spill over, affecting the activities and tranquility of others. That is, for people whose respective activities and tranquility are not fully reconcilable (as long as they remain in physical proximity), how can the burdens of dislocation be minimized, both by minimizing the likelihood that an "objectionable" tenant will be forced to move and at the same time minimizing the likelihood that a tenant's "objectionability" will leave his neighbors with no choice but to move or to suffer "unduly."

Fundamentally, the problem is one of environmental regulation. And environmental regulation is itself a problem, broadly speaking, of nuisance.

The effect of nuisance law is to limit each possessor in the use of his real property for the benefit of neighboring possessors. Thus, a possessor of land, or of space in a building, cannot do with absolute justification all that he pleases with his premises, and this is true despite the fact that the possessor normally has exclusive use, enjoyment and control of his possession. There is no paradox here; it is

4. *Valley Courts, Inc. v. Newton*, 47 Misc. 2d 1028, 263 N.Y.S.2d 863 (Syracuse City Ct. 1965).

5. *Metropolitan Life Ins. Co. v. Moldoff*, 187 Misc. 458, 63 N.Y.S.2d 385 (App. T. 1946), *aff'd*, 272 App. Div. 1039, 74 N.Y.S.2d 910 (1st Dep't 1947).

6. *Truncali v. Kusstatscher*, 61 Misc. 2d 500, 306 N.Y.S.2d 174 (N.Y. City Civ. Ct. 1969).

7. *Twin Elm Management Corp. v. Banks*, 181 Misc. 96, 46 N.Y.S.2d 952 (N.Y. City Mun. Ct. 1943).

8. In the recent case of *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 224 N.W.2d 843 (1975), where the landlord was held responsible for offensive conduct caused by a tenant, the dissenting judge observed that imposing such responsibility on landlords will make it more difficult for "troublesome" tenants to find a place to rent. *Id.* at 420-21, 224 N.W.2d at 855-56.

On the other hand, the fact that "courts . . . 'make it impossible' to evict troublesome tenants" has been cited as a contributor to the abandonment of buildings, which has the effect of reducing the housing stock for all. *N.Y. Times*, Feb. 26, 1974, at 42, col. 2.

merely that the "premises" which a possessor exclusively controls cannot be defined simply as the volume enclosed by the premises' dimensions in space.

It is a physical reality that one person's premises are other persons' environment, and vice versa. The overall environment, consisting of everybody's individual possessions, is thus a "common asset" belonging to all who are in physical proximity. This is particularly true when the premises involved are stacked, apartment upon apartment, into great monuments to the social instincts of urban mankind.

Unlike space, which possessors may occupy on a separate and exclusive basis, the environment of neighboring possessors is not physically allocable. It is simply not susceptible to division into parcels whose owners have equal and corresponding rights of exclusive dominion and control: if any individual possessor is permitted to enjoy an absolute right of use, this will unavoidably result in a more limited right of use for the others. The spill-over from activities in one neighbor's space will impinge on the absolute utility of the space possessed by the others.⁹ If we are not to countenance unequal freedom to use the environment (whether achieved by right of law or by sheer power), then limitations upon the use of all—presumably for the maximum benefit of all—must be introduced.¹⁰

The traditional law of private nuisance is by no means the only source of such limitations on the use of the commonly owned environment. To remedy situations not effectively dealt with by the law of private nuisance, a number of other legal devices (*e.g.*, zoning codes,

9. For example, an apartment building environment cannot be used as a quiet surrounding at the same time that it is used as a place to engage in a noisy activity. Either the noisy neighbor must cease his sound-generating activity or the quiet-seeking neighbor must cease his use of the environment as a place of quiet. Either way, one of the incompatible uses will be impossible and the person who is forced to yield will be limited in his freedom to use.

10. An analogy may be drawn between the environment of a multi-tenant building and running water in its natural state, a more traditionally recognized "common asset." Like running water, such an environment is not *publici juris* (commonly owned) in the sense that it is *bonum vacans* which anyone may appropriate by merely asserting control (*e.g.*, by filling the environment with noise). Rather, like running water, it is *publici juris* only in the sense that all may make "reasonable" use of it who have a right of access to it. See note 260 *infra*. See also *McBryde Sugar Co. v. Robinson*, 54 Hawaii 174, 193-98, 504 P.2d 1330, 1342-44 (1973), cert. denied, 417 U.S. 976 (1974); *Embrey v. Owen*, 155 Eng. Rep. 579, 585 (Ex. 1851); *Mason v. Hill*, 110 Eng. Rep. 692, 700-02 (K.B. 1833); 3 Kent's Commentaries 439 (12th ed. 1896). Under the law of nuisance, absent private agreements concerning use (or in the event of their unenforceability), specific norms regulating the use of the environment, as in the case of running water, will take the form of refinements upon the meaning of the term "reasonable" as used in the preceding sentence. See note 260 *infra*. However, as with running water, the rights of and limitations upon competing users of an environment ought to be modifiable and thus regulatable by mutual agreement. Such agreements are the mechanism for regulation discussed in this Article.

land use regulations) have been resorted to, generally involving public intervention to effectuate local environmental control. Although the limitations on use imposed by such devices are couched in terms of restrictions upon the use of individual possessions, they are in fact, like the law of private nuisance, environmental regulations. This Article will attempt an analytical examination of a method for achieving this environmental regulation *privately*, a method which has a conceptual basis at least as old as the defeasible estates in land.¹¹

II. SOURCE OF AND MOTIVATIONS FOR LANDLORDS' POWER TO CONTROL TENANT CONDUCT

If one were to approach this topic with something of a historical bent, one might well begin with the traditional power of the feudal barons: exercising control through their manorial courts, the lords of yore could impose their will, nearly without limitation, upon the assorted villeins within their demesnes.¹² Indeed, were one to ap-

11. It will be seen that this private mode of environmental regulation has been accorded a less than warm reception by the courts. Perhaps the coolness of the courts' reception is directly related to the very ancientness of its conceptual underpinnings. See discussion in note 13 *infra*. Although transferors of land have long been able to control the transferee's use of the land, the exercise of such power to achieve desired environmental goals is apparently a comparatively recent phenomenon. See Bordwell, *The Common Law Scheme of Estates*, 18 Iowa L. Rev. 425, 441 (1933). Prior to the mid or late nineteenth century, it would probably be difficult or impossible to find examples of transferor-imposed land use controls that were not aimed solely at achieving some purpose (economic or otherwise) of the transferor himself. See *id.*; cf. *First Universalist Soc'y v. Boland*, 155 Mass. 171, 29 N.E. 524 (1892) (to assure fulfillment of purpose of transfer); *Lovat v. Ranelagh*, 35 Eng. Rep. 388 (Ch. 1814) (repairs, mode of cultivation); *Descarlett v. Dennett*, 88 Eng. Rep. 290 (Ch. 1722) (not to suffer a way across the land). For a more recent example, see *Oldfield v. Stocco Homes, Inc.*, 26 N.J. 246, 139 A.2d 291 (1958).

In any event, prior to the advent of widespread subdivision-type land development, viz., the parceling out of land (or space in a building) to a number of transferees who take from a common, entrepreneurial transferor, it is unlikely that environmental regulation for the benefit of transferees was an important motivating factor in the creation of defeasible estates. However, the adaptation of the defeasible estate device to private land use planning for the benefit of the transferees (especially in the landlord-tenant context) has seemingly not triggered a reevaluation and modification of the basic rules pertaining to that device. But cf. Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 Harv. L. Rev. 248, 250 (1940); Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees*, 27 Texas L. Rev. 158 (1948). However, where such adaptation has occurred, two major assumptions underlying those rules (that the transfer creates no continuing relation and that the transferor is merely benefiting himself as against the transferee) are not necessarily applicable. Moreover, the hostile attitudes of courts toward private land use restrictions themselves (see notes 23-25 *infra*), stemming from a time when land was relatively underdeveloped and its usefulness for all purposes was to be encouraged, continued to carry influence in situations where, in light of modern ideas about land use planning, their appropriateness is doubtful.

12. Nonetheless, even in the manorial courts, the practice appears to have been a good deal

proach this topic with an unsympathetically critical bent, this would be the ideal place to begin. For the application of feudal institutions to the modern situation has become something of a *prima facie* cause for condemnation, especially in the landlord-tenant area.¹³ And a feudal institution which smacks of fealty, of innately ascribed status and of tutelage for adult individuals seems clearly out of place in a time when pledges of allegiance to private persons (or almost any oaths at all, it sometimes seems) are regarded as quaint curiosities of a more primitive era.

To be sure, the efforts of a modern apartment owner to control tenant conduct could not be justified by arguing that the landlord, as successor to the feudal lord, is a quasi-representative of the state, charged with assisting the administration of justice and harmony. In an egalitarian society, it is generally only the state itself, acting constitutionally through its legislative, judicial and administrative organs, which should be allowed to unilaterally impose conduct standards on others.¹⁴ As one court has reacted: "A landlord may not

more democratic than seems sometimes to be assumed. See II W. Holdsworth, *A History of English Law* 375-85 (3d ed. 1927).

13. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074-75 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); 57 E. 54 *Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 355, 335 N.Y.S.2d 872, 873-74 (App. T. 1972); Uniform Residential Landlord and Tenant Act § 1.102, Comment [hereinafter cited as URLTA]; 1 Am. L. Prop., *supra* note 3, § 3.47; Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 Fordham L. Rev. 225 (1969).

Criticizing a legal principle because it has received long-standing recognition seems itself to be a fairly long-standing tradition of the common law. E.g., the attack on the Rule in *Shelley's Case* reported in *Van Grutten v. Foxwell* [1897] A.C. 658, 669 (H.L.) ("Its feudal origin was a disgrace. Its antiquity was a reproach. Some judges thought that on those grounds it ought to be 'discountenanced.'"). The mindless adherence to old rules, without their reexamination, is undoubtedly to be reproached. For even though the old law "is fun for the antiquarian and profitable for the lawyer . . . society pays a high price for these dubious benefits." Merryman, *Ownership and Estate (Variations on a Theme by Lawson)*, 48 Tul. L. Rev. 916, 945 (1974). Still, to reject the old law for its antiquity alone may be less a mark of modernity than a substitute for thought.

14. Not that the idea of private delegates to enforce state policies is entirely dead. The "private attorney generals" entitled to recover treble (i.e., "punitive") damages for criminal violations of the antitrust laws is a well-known instance. 15 U.S.C. § 15 (1970). Under the recent Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970), private citizens in civil actions may recover liquidated and punitive damages (amounting to a civil fine) from violators of the Act's criminal prohibitions on wiretapping. 18 U.S.C. § 2520 (1970). It is to be observed, however, that in both of these instances, the standards of conduct themselves are precisely prescribed by the state and only the enforcement decision is delegated (and that only in part).

For a case where private prescription of the standards themselves has been officially sanctioned, consider the broad power which the national securities exchanges had (until 1975) to

constitute himself a censor of the personal tastes, choice of friends or preferences in interior decoration of his tenant"¹⁵

But the *unilateral* imposition of conduct norms by extra-constitutional centers of authority is not exactly what is at issue. To the extent that a modern landlord does have any power to prescribe or enforce norms of tenant conduct, the source of that power is ostensibly the lease by which the legal relationship between landlord and tenant was established. The detailed rights and duties within a landlord-tenant relationship, including the duties and limitations on rights assumed by the tenant, can only exist (except where implied by law) by virtue of the parties' mutual agreement to them. It is this mutual agreement, or more specifically the presence therein of either a provision for the norms or a stipulation of them, that is the basis for the

adopt and enforce rules applicable to their members under section 6(c) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 886. Perhaps this last power is more accurately analogized to the power of feudal lords to privately exercise public jurisdiction pursuant to special grants from the King, who once could liberally "franchise" out judicial jurisdiction like Kentucky Fried Chicken stands. See G. Adams, *Council and Courts in Anglo-Norman England* 153-54 (1926).

For an insightful discussion on how private unilaterally imposed norms may gain validity, see Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529 (1971).

15. *Moss v. Hirshtritt*, 60 Misc. 2d 402, 405, 303 N.Y.S.2d 447, 450 (N.Y. City Civ. Ct. 1969). The court went on to concede that an exception would exist for cases where the tenant's tastes or preferences would "result in a willful violation of a substantial obligation of the tenancy inflicting serious and substantial injury upon the landlord." *Id.*

A somewhat related set of problems is presented by attempts of employers to fix and enforce conduct standards to be observed by their employees. For an excellent discussion, see Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404 (1967) [hereinafter cited as *Blades*]. Even though Professor Blades concedes that "the employee can never expect to be completely free to do as he pleases" and that the employer may even be "legitimately concerned with . . . the 'off hours' behavior of the employee" (*id.* at 1406), the unilateral imposition of conduct, especially lifestyle constraints by employers seems more difficult to swallow philosophically than similar impositions by landlords. There are at least two major distinctions.

First, the employer's main interest is in productivity; it is harder to see, at least in the absence of special circumstances, how employer imposed constraints would be germane to the employer's legitimate (i.e., understandable) interests in the employment relationship, except only such restraints, such as sobriety on the job, which directly affect productivity. Landlords, by contrast, have an important continuing interest in the character of their buildings; that character (physical or reputational), which is directly affected by tenant conduct, can be protected only by limitations on such conduct.

Secondly, the employer-employee relationship seldom involves any substantial interest of third parties (such as other tenants) whose concerns can be efficiently protected only by more or less centrally sourced constraints. If, as is probably true, tenants cannot as a procedural matter negotiate for conduct constraints on a mutual basis among themselves, the appropriateness of some sort of central source may be indicated.

modern landlord's power to prescribe and enforce.¹⁶ Thus, the issue resolves itself not to whether a landlord may validly impose conduct norms on the tenant unilaterally; rather the question is whether certain particulars of a consensually assumed arrangement are to be enforced.

As a prelude to considering this question, it may be helpful to make explicit the legal background against which landlords seek to prescribe restrictions on tenant conduct. A leasing transaction is a voluntary legal transaction by which both landlord and tenant deliberately undertake to modify their respective preexisting endowments of rights and obligations. The result is a new legal relationship, with new rights and new obligations created between the parties.¹⁷ Few of the details of this legal relationship—of the specific rights and duties acquired by each party respectively—need be expressly agreed to between them. Once the parties manifest the minimum of agreement which is required to change their legal positions to those of landlord and tenant,¹⁸ the

16. The adhesive character of lease forms typically used in routine leasing transactions appears to be at odds with the assumption that there is any "mutual" agreement with respect to many, if not most, matters covered in the lease—tenant conduct restrictions included. Admittedly, lease agreements are often not the freely negotiated transactions presupposed by the ideal of freedom of contract. Moreover, if prospective tenants have no realistic choice but to accept whatever terms the landlord offers, any conduct standard contained in such a "take-it-or-leave-it" lease must be considered in a sense to be "unilaterally" imposed (unless, of course, the tenant would have agreed to the standards even if the transaction *were* freely negotiated). Under circumstances where conduct restrictions are "unilaterally" imposed in this sense (and if there is a housing shortage or if landlords uniformly adhere to standard lease forms, such circumstances may be typical), the "unilateral" imposition of conduct norms by extra-constitutional centers of authority is at issue. And the issue goes to the question of the validity of the restrictions as "private legislation." *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *Colum. L. Rev.* 629 (1943); Shuchman, *Consumer Credit by Adhesion Contracts*, 35 *Temp. L.Q.* 125, 130 (1962). However, the question of whether the adhesive nature of leases ought to affect their enforceability as "consensual" transactions is separate from the question of whether even willingly agreed conduct restrictions ought to be enforced. Accordingly, for clarity of exposition, the appropriateness of enforcing "adhesive" lease terms will be considered separately. See section III(D)(1)(a) *infra*.

17. In addition, consonant with the theory that the tenant acquires an estate in rem, the legal posture of both the landlord and the tenant vis-à-vis the rest of the world is modified, the landlord having conveyed to the tenant the rights and protections which the landlord had formerly enjoyed as possessor. 1 *Am. L. Prop.*, *supra* note 3, § 3.38; 1 H. Tiffany, *Real Property* § 94 (3d ed. 1939) [hereinafter cited as *Tiffany*]. Since the focus of the present discussion is on the legal relationship between landlord and tenant, the effect of leasing on the in rem rights of the parties is only tangentially relevant.

18. Presumably, all that need be actually agreed (expressly or impliedly) between the parties is that the tenant should take possession of land or space which the landlord possesses and/or over which the latter exercises appropriate dispositive control. See 1 *Tiffany*, *supra* note 17, § 157. Without an agreement as to duration, a tenancy so created would be "at will." *Id.*; 1 *Am. L.*

law will take care of the rest, supplying necessary specific terms to round out the new legal relationship. Moreover, where the parties do agree to specific details (*e.g.*, that rent shall be paid monthly), but fail to do so completely (*e.g.*, by failing to specify the time or place of payment), the law fills in the gaps.¹⁹ On the other hand, with the notable exception of certain statutory protections which the parties are not free to waive contractually,²⁰ the law-implied "terms" of a lease are almost never mandatory and almost always yield to a contrary agreement of the parties.²¹ It is to the creation and expression of such contrary agreements on many particulars, generally to the advantage of the landlord, that a substantial part of a routine form lease is devoted.²²

Among the lease provisions intended to reduce the rights of the tenant are provisions which impose restrictions on the tenant's conduct or, more generally, which restrict the tenant in his use of the premises. In the absence of such conduct or use restrictions, "[t]he right to exclusive occupation granted by a lease entitles a tenant to use the premises in the same manner that the owner might have used them."²³

Prop., *supra* note 3, § 3.29. Whether the tenant must actually take possession before the relationship comes into existence depends on the local attitude towards the now generally outmoded concept of "interesse termini." See C. Moynihan, *Introduction to the Law of Real Property* 67, 166-67 (1962).

19. For example, law-implied terms would make the place of payment at the demised premises and would make the rent payable in arrears. See *Klinger v. Peterson*, 486 P.2d 373, 378 (Alas. 1971); 3A G. Thompson, *Real Property* § 1297, at 440-41 (J. Grimes ed. 1959) [hereinafter cited as Thompson]; 49 Am. Jur. 2d *Landlord and Tenant* §§ 555, 562 (1970).

20. An important recent example is the extensive tenant protections proposed by the Uniform Residential Landlord and Tenant Act which would prohibit any provision in a "rental agreement" by which the tenant "agrees to waive or forego rights or remedies under this Act." URLTA, *supra* note 13, § 1.403. See also, *e.g.*, Hawaii Rev. Stat. § 521-31 (Supp. 1975); Wash. Rev. Code Ann. § 59.18.230 (Supp. 1976). However, older nonwaivable tenant protective legislation may be cited. See, *e.g.*, N.Y. Gen. Oblig. Law § 7-103(3) (McKinney Supp. 1975); N.Y. Real Prop. Law § 234 (McKinney Supp. 1975). In addition, courts occasionally have held that judicially created "terms" which are to be read into leases cannot be waived by contrary stipulation. See, *e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970) (implied warranty of habitability based on Housing Regulations).

21. See *M. Karam & Sons Mercantile Co. v. Serrano*, 51 Ariz. 397, 77 P.2d 447 (1938); *Bovin v. Galitzka*, 250 N.Y. 228, 165 N.E. 273 (1929) ("absolute right" to insert provisions different from law-supplied rule); 49 Am. Jur. 2d *Landlord and Tenant* § 141 (1970).

22. Expressing "agreements to the contrary" is not, of course, the sole function of form leases in common use. In fact, one commentator has observed that a large part of a typical current form does no more than restate legal rules (usually those favoring the landlord) which would be applicable to the parties' relationship even without any recitation of them in the lease. *Berger, Hard Leases Make Bad Law*, 74 Colum. L. Rev. 791, 829 (1974) [hereinafter cited as *Berger*].

23. *Lyon v. Bethlehem Eng'r Corp.*, 253 N.Y. 111, 113, 170 N.E. 512, 513 (1930); accord, *Davidson v. Goldstein*, 58 Cal. App. 2d 909, 136 P.2d 665 (Super. Ct. 1943); *Turman v. Safeway Stores, Inc.*, 132 Mont. 273, 317 P.2d 302 (1957); *People v. Scott*, 26 N.Y.2d 286, 289, 258

As between the tenant and the landlord specifically, only the requirement that the tenant refrain from committing or suffering waste²⁴ qualifies the general right of use and enjoyment which the tenant presumptively acquires at common law as the possessor of the demised premises.²⁵ Of course, the doctrine of waste does not represent the only law-imposed constraint on the tenant's freedom to use and enjoy the demised premises; with particular reference to conduct which may affect the persons or property of others in the vicinity of the demised premises, the law of private nuisance, the duty to exercise ordinary care and, indeed, the law of torts generally may be thought of as limiting factors.

Presumably, the law of torts reflects the societally determined desirable balance between protecting activities and protecting others from the impact of activities.²⁶ As a matter of administrative necessity, the

N.E.2d 206, 208, 309 N.Y.S.2d 919, 923 (1970); *Bovin v. Galitzka*, 250 N.Y. 228, 165 N.E. 273 (1929); 1 *Tiffany*, supra note 17, § 94. Even where the lease does contain use restrictions, the tendency is to construe them strictly against the landlord, freely permitting "incidental uses," in order not to inhibit any utilization of the premises not clearly prohibited by the lease itself. E.g., *Beck v. Giordano*, 144 Colo. 372, 356 P.2d 264 (1960); *Delta Wild Life & Forestry, Inc. v. Bear Kelso Plantation, Inc.*, 281 So. 2d 683 (Miss. 1973); *Boyd v. Shell Oil Co.*, 454 Pa. 374, 311 A.2d 616 (1973); *Oakwood Smokeless Coal Corp. v. Meadows*, 184 Va. 168, 34 S.E.2d 392 (1945). But see 30-88 *Steinway St., Inc. v. Bohack Co.*, 42 App. Div. 2d 577, 344 N.Y.S.2d 205 (2d Dep't 1973).

24. Even this inroad on the leasehold tenant's general right of use and enjoyment is of statutory origin. Statute of Gloucester, 6 Edw. 1, c. 5 (1278), repealed, Civ. P. Acts, Repeal Act, 42 & 43 Vict., c. 59 (1879); Statute of Marlbridge, 52 Hen. 3, c. 23, § 2 (1227); see 5 R. Powell, *Real Property* ¶ 637 (1975) [hereinafter cited as Powell]. In some states, reenactments of these early statutes (or variations thereof) still supply a basis for relief in cases of waste (see, e.g., *Crewe Corp. v. Feiler*, 28 N.J. 316, 146 A.2d 458 (1958); Powell, supra at ¶ 650) but descendants of the common law action on the case "in the nature of waste" and parallel equitable doctrines provide additional nonstatutory bases for remedies in waste cases (Powell, supra at ¶¶ 637, 641, 650). For a discussion of the availability of the forfeiture remedy for waste, see note 115 infra.

25. In addition to the waste limitation on the tenant's general right of use and enjoyment, courts have also recognized an implied obligation on the tenant not to put the premises to a use which is materially different from that for which they were constructed, or to which they have been adapted and usually appropriated. See, e.g., *Rivera v. LaCrosse*, 490 F.2d 1380 (3d Cir. 1974); *F.W. Woolworth Co. v. Nelson*, 204 Ala. 172, 85 So. 449 (1920); *Gale v. McCullough*, 118 Md. 287, 84 A. 469 (1912); *Lyon v. Bethlehem Eng'r Corp.*, 253 N.Y. 111, 170 N.E. 512 (1930). However, this sort of implied restriction—which seems a reasonable enough candidate for a covenant implied in fact under appropriate circumstances—appears to receive more lip service than it does reliance as an operative basis for actually curtailing tenant freedom. The courts' reluctance, in the absence of waste, to prohibit any lawful uses against which the lease does not expressly provide reflects, no doubt, the attitude of hostility towards limitations on the general possessory right. See *Saad v. Hatfield*, 258 Ky. 525, 80 S.W.2d 583 (1935); *Turman v. Safeway Stores, Inc.*, 132 Mont. 273, 317 P.2d 302 (1957); *Carbon Fuel Co. v. Gregory*, 131 W. Va. 494, 48 S.E.2d 338 (1948). See also note 23 supra.

26. Actually, it is not critical to the analysis to make any assumptions about the policy objectives of tort law, and the assumption made in the text may be considered as only

balance must be struck on the basis of generalized assumptions concerning the values of "ordinary" persons acting in "normal" factual contexts and what would constitute "justice" for such persons and contexts.²⁷ The conduct standards implied by such generalized assumptions are expressed in terms of generalized duties of conduct, owed to generalized but limited classes of protected persons, with remedies of general application for their breach.

Undoubtedly, the generalized societally determined balance between protecting activities and protecting others from the impacts of activities, and the duties implicit in such balance, will not precisely fit every particular case. The law's protection may be unsatisfactory because the law defines the protected class too narrowly (standing²⁸), because its remedies are inadequate,²⁹ because its formulations of the standards are too subjective to permit easy proof,³⁰ or because its behavioral requirements fail to protect "special" concerns not shared by the "ordinary" person contemplated in making the generalized assumptions.³¹ Thus, the law-imposed duties, remedies, formulations and behavioral requirements will not, in every particular case, replicate the ones which the parties themselves would have established had they been free to negotiate the rules governing their prospective interactions. This is no less true in the landlord-tenant context than in any other. The landlord may be willing to relinquish some of his law-conferred protections (*e.g.*, protection from waste) in order to obtain something in exchange (*e.g.*, a higher rent, a longer lease term or a tenant-financed improvement). The landlord will presumably be willing to do so when the benefit received in exchange is worth more to the landlord than the rights relinquished. The tenant may likewise prefer to have certain benefits which the law does not confer, and he may be willing to give up in lieu thereof certain other benefits which he would normally have as a matter of law. Indeed, since leasing

provisional. As will be developed *infra*, the important point is that, whatever the objectives of tort law, it is a dissatisfaction with the protections afforded by law that prompts private agreements which purport to limit or expand the scope of a person's lawful activities or conduct and the consequences of transgressions.

27. Just as no assumptions need be made about the policy objectives of tort law, no assumptions need be made about what constitutes "justice" or the criteria therefor. Clearly, the question is more complicated than a judgment of what constitutes "fairness" or "Pareto optimality" in particular cases, if for no other reason than that such judgments are almost necessarily imperfect. For further discussion, see Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1093-1105 (1972).

28. See section III(A)(2) *infra*.

29. See section III(B)(1) *infra*.

30. See section III(C) *infra*.

31. See section III(D)(1) *infra*.

transactions are simply devices for allocating the value and potential benefits of land use, the particular requirements of the participants in such transactions are likely to be as diverse as the uses to which real estate may be put. Accordingly, it is most unlikely in the landlord-tenant context that the general tort law norms (*i.e.*, the generalized societally determined balance between protecting activities and protecting from activities) will perfectly parallel the balance which the parties probably would (if they could) privately negotiate.

It is no reproach to the substantive law of torts that private agreements are necessary in order to align the rights and duties of particular persons in accordance with the balance which, for their particular interactions, is mutually optimal. In the first place, as a prescription of norms, duties and remedies having general application, the law of torts could not be otherwise. Moreover, apart from such administrative concerns, there may be valid policy objectives—*e.g.*, wealth distribution, paternalism or concerns about transaction costs and nontransactionable external “costs”—which may lead to tort rules that depart deliberately from the rules likely to be established in private negotiations.³² For these reasons, the societally determined balance will almost always be imperfect, often leading parties to seek desired freedoms or protections in exchange for less valued freedoms or protections which the law would otherwise provide. It is against this background that the question is raised whether such exchanges should be permissible and enforced.

III. TYPES OF AGREEMENTS WHICH INCREASE THE LANDLORD'S CONTROL OF TENANT CONDUCT

Out of dissatisfaction with the protections provided by law, landlords may rationally attempt to improve their protection via private agreements with tenants. As observed in the preceding section, this dissatisfaction may relate to either the duties, remedies, formulations or behavior requirements which the law supplies.³³ Thus, there are at least four distinct ways in which such private agreements may supply protections greater than those which the law provides:

1. By conferring standing to complain of conduct (*e.g.*, illegal use of the premises) which is unlawful, but which is not normally remediable at the instance of the landlord;
2. By prescribing a remedy (*e.g.*, forfeiture) which the law does not provide;

32. Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1098-1105, 1113-15 (1972).

33. See text accompanying notes 28-31 *supra*.

3. By stipulating objective standards of conduct which are more susceptible to determinations of noncompliance and hence more readily enforceable than the vague and relativistic standards of tort law;

4. By protecting "special" concerns which might be described as idiosyncratic but nonetheless understandable. These may either be concerns of the landlord in his own right or they may be derivative concerns, affecting the landlord mainly in that he is interested in promoting the comfort and convenience of the greatest number of tenants.

These four ways of increasing available protections are listed in ascending order of their implications for tenant freedom. Indeed, the first and second methods (obtaining standing or a remedy) and probably the third (avoidance of tort law vagueness) involve no theoretical reduction of tenant freedom at all. They are directed rather at supplementing or streamlining the mechanism for enforcing constraints on tenant freedom which the law would impose anyway. Nevertheless, all four possibilities are hostile to the general possessory right of free use and enjoyment which the law favors.³⁴ The inhibiting effect which better enforcement possibilities have on conduct means that tenant freedom is likely, as a practical matter, to be impaired irrespective of how the increased protections are achieved. And, in any case, the conduct-related provisions in a given lease are likely to be mixed, containing elements from all four categories. Still, it is useful analytically to break down and separately treat the four categories of methods for increasing landlords' control: each offers its own justifications in support of enforcement of conduct-related lease provisions and each has its own implications for the withholding of enforcement.

A. *Standing*

1. Reasons for Allowing the Landlord Standing to Complain

Nearly always, when a landlord seeks to control tenant behavior, he does so in reliance upon lease provisions³⁵ authorizing the landlord to move in controversies that are essentially controversies between tenants. The question of standing comes down to whether and with what limitations recognition should be accorded the power to intervene which such provisions purport to confer.³⁶

34. See notes 23 & 25 *supra*.

35. For a discussion of possible exceptional situations, where the landlord may move without the benefit of such lease provisions, see text accompanying notes 61-78, 115-16 *infra*.

36. This issue is approached as something of an original question even though there is no real question of law as to whether a landlord may validly acquire standing by contract to enforce use and enjoyment restrictions against tenants. E.g., *Miles v. Lauraine*, 99 Ga. 402, 27 S.E. 739 (1896); *Bovin v. Galitzka*, 250 N.Y. 228, 165 N.E. 273 (1929); see 1 Am. L. Prop., *supra* note 3,

The antagonisms which arise among tenants in close proximity receive judicial attention, if not as criminal proceedings, then probably as legal proceedings by the landlord against a tenant who is alleged to have violated one or another provision of his lease. Controversies rooted in relations among tenants thus become cases between landlord and tenant.³⁷

It would not, of course, have to be so. If an offending tenant's activities unreasonably interfere with the neighboring tenants' enjoyment of their respective premises, the neighbors could maintain actions in their own rights for damages or injunction predicated upon the nuisance.³⁸ The possibility even exists that tenants may rely on uni-

§§ 3.40, 3.94. For a discussion and collection of cases, see Annot., 2 A.L.R.2d 1148 (1948). However, the reasons for the rule allowing standing so to be acquired, and the limitations on the rule which such reasons might suggest, receive little judicial discussion. Furthermore, doubts about the propriety of "free-enterprise" police powers for landlords may well be an unarticulated influence in deciding particular cases against the landlord; and being unarticulated, such doubts may even carry the decision without any consideration, explicit or otherwise, of possible justifications for such policing. See quotation from *Moss v. Hirshtritt*, 60 Misc. 2d 402, 303 N.Y.S.2d 447 (N.Y. City Civ. Ct. 1969), in text accompanying note 15 *supra*.

When landlords attempt to enforce restrictions on tenant conduct, the interest being asserted by the landlord is often factually derivative (see note 37 *infra*), something which may obscure the real conflict—tenant vs. tenant—which the courts are asked to resolve. The very fact that the landlord may be held to have waived or estopped himself from asserting a conduct restriction (see notes 52-53 *infra*), indicates that the courts do not always see the other tenants as the most direct beneficiaries of the protection.

In any event, approaching the issue of standing for the landlord as an original question appears better suited to revealing the various policy considerations, both those which commend the rule that allows landlords to contract for standing and those which suggest limitations on the rule.

37. It is not uncommon in reported cases to see specific references by the court to the fact that it was other tenants' complaints which prompted the landlord to bring proceedings against the breaching tenant. E.g., *Modern Amusements, Inc. v. New Orleans Pub. Serv., Inc.*, 183 La. 898, 165 So. 137 (1935); *Bonan v. Sarni Original Dry Cleaners, Inc.*, 359 Mass. 217, 268 N.E.2d 366 (1971) (commercial lease); *930 Fifth Corp. v. King*, 40 App. Div. 2d 140, 338 N.Y.S.2d 773 (1st Dep't 1972); *Louisiana Leasing Co. v. Sokolow*, 48 Misc. 2d 1014, 266 N.Y.S.2d 447 (N.Y. City Civ. Ct. 1966); *Valley Courts, Inc. v. Newton*, 47 Misc. 2d 1028, 263 N.Y.S.2d 863 (Syracuse City Ct. 1965).

38. Leasehold tenants, like any holders of possessory interests in land, have standing to maintain actions based upon alleged nuisances which interfere with the use and enjoyment of such interests (e.g., *Thompson v. Harris*, 9 Ariz. App. 341, 452 P.2d 122 (1969); Restatement of Torts § 823 (1939)), either to recover damages (e.g., *Sherman v. Fall River Iron Works Co.*, 84 Mass. (2 Allen) 524 (1861); *Cornes v. Harris*, 1 N.Y. 223 (1848)), or to obtain an injunction (e.g., *Martin v. Val-Lo-Will Sherman Co.*, 337 Ill. App. 166, 85 N.E.2d 358 (1949); *Fox v. Corbitt*, 137 Tenn. 466, 194 S.W. 88 (1917); *Grantham v. Gibson*, 41 Wash. 125, 83 P. 14 (1905)). For citations to other cases, see Annot., 12 A.L.R.2d 1228-30 (1950).

However, the imprecision with which two key elements of private nuisance (substantiality of harm and unreasonableness of activities) are defined (see note 260 *infra*) confronts prospective tenant-plaintiffs with practical problems of proof and advocacy which are, to say the least, formidable. This can especially be expected when the competing interests to be balanced in

form use restrictions contained in their leases as a basis for direct actions against their fellow tenants to enjoin their inconsistent uses of the premises, by analogy to equitable servitudes created pursuant to a common scheme or plan.³⁹ Yet, when the occupancy of a tenant becomes objectionable to the neighbors, it is often not (and probably usually not) the directly offended party who seeks protection at law; rather it is usually the landlord who moves.⁴⁰

nuisance cases are not even theoretically quantifiable, for example, the interests in personal comfort or convenience at home or the interest in carrying on an activity at home. Cf. text accompanying notes 264-75 *infra*. Considering also that for the residential leasehold tenant (i) litigation costs may easily exceed the value of the protection being sought, and (ii) it is relatively easy to leave a short-term leasehold, it is not surprising that nuisance actions, tenant vs. tenant, brought by residential leasehold tenants are, if reported cases are any indication, practically nonexistent.

39. The theory has been recognized in England (*Newman v. Real Estate Debenture Corp.*, [1940] 1 All E.R. 131 (K.B. 1939); cf. *Hudson v. Cripps* [1896] 1 Ch. 265 (1895)) but its acceptability in this country remains at best an open question, and a doubtful one at that (see *Hannan v. Harper*, 189 Wis. 588, 208 N.W. 255 (1926). See also *Stewart v. Lawson*, 199 Mich. 497, 165 N.W. 716 (1917); *K.G.O. Constr. Co. v. King*, 12 N.J. Misc. 291, 171 A. 164 (Dist. Ct. 1934); *Sefton v. Juilliard*, 46 Misc. 68, 91 N.Y.S. 348 (App. T. 1904); *Beebe v. Tyra*, 49 Wash. 157, 94 P. 940 (1908)). For an argument that the theory should apply in the case of cooperatives, see Comment, *Restrictions on the Use of Cooperative Apartment Property*, 13 *Hastings L.J.* 357, 364-66 (1962). Interestingly, however, the equitable servitude theory has been applied to lease covenants restricting competition. See Note, *Lessors' Covenants Restricting Competition: Drafting Problems*, 63 *Harv. L. Rev.* 1400, 1408-11 (1950); Note, *Restrictive Covenants in Shopping Center Leases*, 34 *N.Y.U.L. Rev.* 940, 940-44 (1959); cf. *White Star Realty Co. v. Schreiber*, 229 So. 2d 300 (Fla. Dist. Ct. App. 1969); cf. *Pekelner v. Park W. Management Corp.* (Sup. Ct.), in 176 *N.Y.L.J.*, Aug. 27, 1976, at 5, col. 3 (upholding damage action by tenant against landlord based on latter's failure to enforce restriction on piano playing by neighboring tenant). See generally Annot., 97 *A.L.R.2d* 4, 76-88 (1964).

Form leases often will expressly deny tenants the power to take action against other tenants based upon lease-contained use restrictions. See *Berger*, *supra* note 22, at 825. However, this denial of enforcement power to tenants does not necessarily mean, as has been argued, that "the inclusion of rules for tenant conduct must be inspired by something other than an interest in the peace and comfort of the tenants in the building." Bentley, *An Alternative Residential Lease*, 74 *Colum. L. Rev.* 836, 848-49 (1974). It may only mean that the landlord does not, by his conduct restrictions, want to give tenants still another weapon, legal action, with which they can harass each other. That is, the landlord, whose perspective in inter-tenant disputes may at least be more dispassionate, wants to retain control of the sword which he has created.

40. In background research for this Article, by far the majority of use restriction cases encountered involved proceedings, usually eviction proceedings, brought by landlords. Only rarely do tenants seem to bring (or at least pursue to a reported decision) legal proceedings to protect their occupancy against the spill-over effects of a neighbor's activities. Tenant-instituted proceedings are not, however, unknown. See, e.g., *Godard v. Babson-Dow Mfg. Co.*, 313 Mass. 280, 47 N.E.2d 303 (1943); *Sherman v. Fall River Iron Works Co.*, 84 Mass. (2 Allen) 524 (1861); *Bly v. Edison Elec. Illuminating Co.*, 172 N.Y. 1, 64 N.E. 745 (1902); *Zamzok v. 650 Park Ave. Corp.*, 80 Misc. 2d 573, 363 N.Y.S.2d 868 (Sup. Ct. 1974) (co-op tenant); *Ryan v. Steele*, 6 Misc. 2d 370, 163 N.Y.S.2d 471 (Sup. Ct. 1957); *Pool v. Higginson*, 8 Daly 113 (N.Y.C.P. 1878), and for a collection of older cases, see Annot., 34 *L.R.A. (N.S.)* 560 (1911). More often, though, it

The seeming preponderance of landlord-initiated proceedings in inter-tenant controversies suggests the presence of practical considerations which discourage tenants from taking action themselves. One can but speculate what those considerations may be, and quite probably the considerations differ depending upon the use (*viz.*, residential, commercial, etc.) that the offended tenant makes of his premises. Nonetheless, at least in the case of a residential tenant, a number of factors may be fairly confidently cited as contributors to the tendency to leave to the landlord the job of protecting tenants from each other:

—*Resources* available to the landlord for maintaining legal proceedings against offending tenants will usually exceed those available to the offended complainants. Even if the costs of a proceeding were likely to be about the same irrespective of who the moving party is, the landlord would still usually be in a superior position to bear such costs.

—*Convenience* of instituting proceedings is far more likely to be on the side of the landlord than on the side of the offended tenant; the landlord probably already has an established relationship with an attorney, and both landlords and landlords' attorneys are presumably better equipped by experience to bring the types of proceedings appropriate for eliminating offensive tenant conduct.

—*Effectiveness of the Available Remedies* to eliminate the offensive conduct is generally greater when the proceeding is brought by the landlord insofar as the landlord's ultimate (and usual) recourse will be to assert his reserved power to terminate the offending tenant's occupancy, a measure virtually certain to bring about the desired result (especially as compared with damages or injunctive relief).⁴¹

—*Expeditionness of Available Procedures* also favors the landlord rather than the offended tenants, again insofar as the landlord may terminate the offending tenant's occupancy and utilize a special summary procedure,⁴² streamlined to give quick relief, to enforce such termination. The costs of such special proceedings are almost inevitably less than the costs of the full scale action at law or in equity which a tenant would have to maintain in order to obtain damages or injunctive relief.

seems that tenants bring their complaints to the landlord for satisfaction (see, e.g., cases cited at note 37 *supra*), sometimes attempting to reinforce their complaints through self-help techniques which the law does not authorize. See, e.g., *Thompson v. Harris*, 9 Ariz. App. 341, 452 P.2d 122 (1969) (rent withholding); *Katz v. Duffy*, 261 Mass. 149, 158 N.E. 264 (1927) (abandonment); *Trustees of Sailors' Snug Harbor v. Sugarman*, 264 App. Div. 240, 35 N.Y.S.2d 196 (1st Dep't 1942) (rescission). But cf. 1 Am. L. Prop., *supra* note 3, § 3.53 for a discussion of limited types of cases where a tenant may relieve himself of liability for rent on a constructive eviction theory.

41. See section III(B)(1) *infra*.

42. E.g., N.Y. Real Prop. Actions Law Art. 7 (McKinney 1963).

—*Avoidance of Difficult Requirements of Proof* is possible when the landlord proceeds insofar as the landlord may rely on violations of more or less objective conduct standards, articulated in the lease, as the basis for relief. A complaining tenant, on the other hand, generally must rely on relatively subjective tort analysis—*e.g.*, in showing that his neighbor is committing a nuisance—involving both greater difficulty (and higher costs) of proof and less certainty of result.⁴³

—*Interest in Eliminating the Annoyance* is primarily the interest of the tenant; at best the landlord's interest is derivative, at least so long as the neighbors of the offensive tenant continue to pay their rent. However, the interest of the tenant in leased premises is always more transitory than the landlord's, and the tenant's financial stake in the premises is certainly less. When a tenant is annoyed, he may, far more realistically than the landlord, simply choose to leave. And given the cost burden of legal proceedings to abate an annoyance, to say nothing of the *relative* cost burden in light of the respective resources of landlord and tenant, the costs of moving to a new place will very likely make moving out the more cost-effective, and hence preferred, choice of residential leasehold tenants who are bothered by their neighbors.⁴⁴

43. See note 38 *supra*.

44. The tendency of residential leasehold tenants to leave it to the landlord to move against disturbing neighbors may also be a manifestation of the overall attitude and custom concerning "gross" lease arrangements in general, *i.e.*, that almost all of the usual burdens associated with deriving benefit from the real estate are, under a gross lease, left to the landlord. (By contrast, such burdens—including payments for insurance, taxes and repairs—are assumed by the tenant under a so-called "net" lease.) Certainly, the residential gross lessee customarily expects to have more things taken care of for him, from minor plumbing repairs to major structural renovations, than does, say, the owner-occupant of a single family house. And the residential gross lessor expects to have to take care of these, or most of them, as a matter of custom and goodwill, if not as a matter of law.

The nature of a multi-tenant structure necessarily reinforces the expectation that the landlord will bear the burden with respect to major items or common facilities, for example, maintenance of elevators and supplying of heat. On the other hand, it may be questioned whether there is anything in physical or social reality which compels centralizing in the landlord much of the minor in-apartment maintenance responsibility which landlords in fact bear and which they are expected (often in housing codes) to bear.

If it is decided that landlords *should* bear these minor burdens which tenants could easily take care of themselves, it is probably because of the relative transiency of the leasehold tenant's interest compared with the landlord's "permanent" interest in the premises. In any case, if the custom-supported (or law-supported) tendency to "leave it to the landlord" becomes a habit, it can easily be seen how a tenant's first response to a disturbing neighbor will be to go to the landlord with the complaint, irrespective of the relative degrees of interest of landlord and tenant in eliminating the annoyance. (Of course, once a "good" tenant complains of discomfort to the landlord, the landlord's interest in removing the disturbance, whatever that interest may have been before, is suddenly enhanced.)

Other reasons why tenants might take their complaints to the landlord are that the landlord

For whatever reasons, the fact is that tenants annoyed by their neighbors do not generally seem to resort for relief to legal proceedings; they will more likely seek "relief" by moving away, by informal pressure,⁴⁵ or perhaps by simply habituating themselves to the annoyance. But the fact that tenants seldom resort to legal proceedings for relief does not necessarily mean the perceived annoyances are not real, or irremediable, or not worth some trouble and expense in order to secure a remedy. It may mean only that the anticipated costs of obtaining judicial relief exceed either the value placed on being freed of the annoyance or the costs of an alternative solution, such as moving out. It is not hard to imagine that the anticipated burdens of a judicial remedy would usually exceed both of these; and this is especially so when one takes into account the magnifying effects which can result from uncertainty of outcome and lack of information about what would be involved in a lawsuit.

The annoyance which neighboring tenants cause each other may thus represent a very considerable body of "submerged" costs which are almost always simply borne by those upon whom they initially fall and which are almost never shifted to those who, under applicable legal principles, ought to bear them.⁴⁶ Unless there is some policy

may seem more authoritative and that action by the landlord insulates the complainant from the discomfiture of direct confrontation with the objectionable neighbor.

45. The effectiveness of what one commentator calls "the social force of neighborhood opinion" should not be entirely discounted. Note, Restrictive Regulations in Wisconsin Summer Colony Land Conveyances, 1950 Wis. L. Rev. 709, 710; see *id.* at 710-11. Obviously, though, in the absence of empirical surveys, we can only make an impressionistic evaluation of the relative effectiveness and cost-efficiency of this mechanism. No doubt the results will vary with, among other things, the possible variations in the mode of applying this "social force." In the Note just cited, there was indication that in dealing with conscious violators it is helpful to have a "focal point" for the application of the "social force," such as a community association, a common grantor or, one may assume, a landlord. *Id.* It was also observed that "many believe" a personal conference, in which "the nature of the restrictions is fully explained" to a prospective occupant, is the "best method to insure a minimum of trouble and unpleasantness afterwards." *Id.* at 711. Such a conference might serve not only an educative function but, probably even more significantly, a screening function as well. See Fuerst, Issues and Interpretations, 5 Real Estate Rev. No. 1, at 10-11 (1975).

46. This statement cannot be made without some assumptions about policy objectives that underlie or ought to underlie the "applicable legal principles." Several assumptions seem to be worthy of consideration.

The first of these assumptions is that persons engaged in activities should, in general at least, be caused to ultimately bear the "external costs" which result from the spill-over effects that such activities have upon neighboring premises. Accordingly, the occupants of the neighboring premises, who bear the burden of such spill-over effects in the first instance, should generally be able to shift such cost-burden back to the person whose activities are the cause of the cost.

Put more specifically into the context of multi-tenant buildings, the assumption is that the space which is severally possessed by tenants in such buildings is not only allocated as to

reason for making the "wrong" people bear these costs, the possibility of *indirect* modes of shifting these costs, modes having greater cost-effectiveness, ought to be considered. Thus, the practical impediments which discourage tenants from themselves taking action against annoying neighbors may be taken as a *prima facie* justification for giving landlords, who may act with great cost-effectiveness,⁴⁷ standing to take such action.

entitlements to exclusive physical occupancy, but it is also allocated, in a more complicated way, as to entitlements to effectuate physical or psychological consequences. Each tenant entitled to occupy a portion of the building is unqualifiedly privileged (*vis-à-vis* the other tenants) to effectuate physical or psychological consequences within his exclusively occupied space. But no such tenant is unqualifiedly privileged to "use" the portions allocated to the occupancy of other tenants by engaging in activities that have spill-over effects creating burdens or costs, psychic or otherwise, which fall ultimately (recourselessly) upon the neighboring tenants. For a discussion supporting this assumption on economic grounds, see Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.: Papers & Proceedings* 347 (1967), reprinted in E. Furubotn & S. Pejovich, *The Economics of Property Rights* 31 (1974); Hardin, *The Tragedy of the Commons*, 162 *Sci. Digest* 1243 (1968). This assumption is a recognition of the fact that the "environment" constituting a multi-tenant premises is in physical fact a common asset of all tenants. See notes 9-10 *supra* and accompanying text. The use of this common asset, *viz.*, the environment consisting of all neighboring premises, must be regulated to prevent its unequal appropriation by any particular tenant. Absent such regulation of environment use, any tenant could act to assert an absolute right of use, placing a burden upon the environment disproportionate to his undivided, commonly shared, qualified right of use.

This still leaves the problem of deciding which annoying tenant activities to tolerate, *i.e.*, which spill-over effects will be permitted. A rational decision of this question, based on a cost-benefit comparison (costs of annoying activities *vs.* the benefits thereof), will most likely be made only if the costs of the activities are ultimately borne by the persons engaging in the activities.

It is assumed also that people will, if left to their own devices, act (individually or through transactions with others) to maximize the net benefits of their activities by reducing or shifting to others the costs, including opportunity costs, which are borne to obtain the benefits. Further, it is assumed that it is socially desirable to encourage the reduction (though not necessarily the shifting) of the costs of obtaining such benefits.

However, the avoidance of costs itself involves costs (*e.g.*, information, transaction, or analogous costs) and these "cost-avoidance" costs may themselves to a greater or lesser extent impede such cost reduction (and benefit maximization). Hence, the "applicable legal principles" should be those calculated to minimize the impediment which such "cost-avoidance" costs may represent. See Coase, *The Problem of Social Cost*, 3 *J. Law & Econ.* 1 (1960). (Presumably, there is no social goal of shifting wealth from nonannoying tenants to annoying ones; therefore, wealth distribution goals are irrelevant.) From these assumptions, it is submitted, one may proceed to the conclusion stated in the next two sentences of the text that, if giving tenants direct rights to relief is ineffective to achieve desirable cost-reductions, then giving an indirect (derivative) right to seek relief to landlords may be justified.

47. The assumption that landlords can generally act with greater cost-effectiveness is critical to a determination that it is rational, and arguably that it is even desirable, to give landlords standing to act. The observations made in the text just preceding—that landlords may generally act more cheaply than tenants—is, of course, directed at only one half the question of whether landlords can act with greater cost-effectiveness. The other half of the question is whether the

The justification is only *prima facie*. Its acceptance would have to be with all of the reservations which might be raised against allowing standing to persons other than real parties in interest.⁴⁸ However, in the context of tenant conduct restrictions, the only pressing reservation would seem to be that the landlord, if he lacks a direct interest in the enforcement of the conduct restrictions, may exercise his enforcement

benefits which are expected warrant the costs to the landlord of obtaining relief, and for this purpose it is only the benefits which are expected by the landlord that are relevant.

The only direct benefits of terminating annoying tenant activities may be the benefits which accrue to the neighboring tenants. The benefit to the landlord is usually only indirect: contentment among existing tenants and attractiveness of his premises to prospective tenants. A discussion of whether these indirect benefits can, in themselves, supply a basis for standing follows in the next two sections.

For present purposes, it is taken that landlords may indeed act with greater cost-effectiveness, as evidenced by the preponderance of landlord-initiated actions brought to enforce conduct standards on tenants.

48. The reservations against allowing standing to a person not a real party in interest are somewhat similar to the policy considerations which underlie refusals to enforce use restrictions when no substantial benefit can be derived from the enforcement (e.g., *Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101 (1927); *Piper v. Reder*, 44 Ill. App. 2d 431, 195 N.E.2d 224 (1963) (compared relative hardships); N.Y. Real Prop. Actions Law § 1951 (McKinney 1963)), or when the restrictions are not calculated to benefit anyone (e.g., *Mitchell v. Leavitt*, 30 Conn. 587, 590 (1862); *Kaczynski v. Lindahl*, 5 Mich. App. 377, 380, 146 N.W.2d 675, 676 (1966) (liquor restriction upheld to preserve "aesthetic and saleable value of the remaining property"). See also Minn. Stat. Ann. § 500.20 (1947); Wis. Stat. Ann. § 700.15 (1975)). However, the latter policy, though related to the standing issue, is distinguishable insofar as it is rooted in the equitable notions of relative hardship. See, e.g., *Downs v. Kroeger*, *supra* at 745-46, 254 P. at 1102-03. Relative hardship should have no relevance to the issue of standing *per se* so long as it can be assumed that substantial injury has resulted to somebody.

More closely related to the issue of standing *per se* are cases holding that a developer, having parted with all lots in a development, may not have enforcement of use restrictions in the deeds by which his purchasers took title. *Bramwell v. Kuhle*, 183 Cal. App. 2d 767, 6 Cal. Rptr. 839 (Dist. Ct. App. 1960); *Kent v. Koch*, 166 Cal. App. 2d 579, 333 P.2d 411 (Dist. Ct. App. 1958); *Forman v. Safe Deposit & Trust Co.*, 114 Md. 574, 80 A. 298 (1911). However, in the first place, the interest of an apartment landlord is considerably less remote than that of such a developer. *Phillipse Towers, Inc. v. Ortega*, 61 Misc. 2d 539, 541, 305 N.Y.S.2d 546, 548 (Yonkers City Ct. 1969). Furthermore, it is more understandable (and likely) that apartment tenants will look to their landlord to enforce lease restrictions than for grantees in fee simple to expect the developer to come back and enforce the deed restrictions. See note 44 *supra* and accompanying text. And this is to say nothing of the fact that the landlord does have a continuing interest in the leased premises even though possession, for the time being, is in others.

Thus, more to the point perhaps are cases such as *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938) and *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956), where community associations were held to have "representative" standing to assert deed covenant rights on behalf of the real parties in interest. See also *Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913) where the original covenantee was allowed to enforce the restriction, even though not an owner of protected land, seemingly on the basis that "a contract is a contract."

powers only unevenly⁴⁹ or even abusively.⁵⁰ Uneven enforcement would be unfair to the tenant unlucky enough to be singled out for the landlord's wrath. Abusive motivation is not only "unfair," but it may undermine unrelated policy objectives as well; *i.e.*, the landlord may be motivated to assert the restrictions mainly to promote some unrelated unlawful purpose (*e.g.*, racial discrimination) which he could not promote explicitly.⁵¹ However, the problems both of uneven enforcement and abusive motivation can be handled on other bases, without

49. A past pattern of uneven enforcement of restrictions has sometimes been recognized as grounds for denying enforcement in a particular case. See, *e.g.*, *Kingsview Homes, Inc. v. Jarvis*, 48 App. Div. 2d 881, 369 N.Y.S.2d 201 (2d Dep't 1975) (dictum) and cases cited in note 52 *infra*. Other times it has been ignored. *Taylor v. Parklane Hosiery Co.*, — App. Div. 2d —, —, 385 N.Y.S.2d 380, 381 (2d Dep't 1976) ("no requirement that a landlord investigate the adherence of every commercial tenant . . . before seeking to enjoin the continued violation . . . by one of the tenants"); *Brigham Park Cooperative Apts. Section No. 2, Inc. v. Krauss*, 28 App. Div. 2d 846, 282 N.Y.S.2d 938 (2d Dep't 1967), *aff'd*, 21 N.Y.2d 941, 237 N.E.2d 86, 289 N.Y.S.2d 769 (1968); *Trump Village Sec. 3, Inc. v. Rothstein*, 62 Misc. 2d 742, 309 N.Y.S.2d 388 (N.Y. City Civ. Ct. 1970), *rev'd*, 66 Misc. 2d 221, 319 N.Y.S.2d 1018 (App. T. 1971). The presence in the lease of a provision that there should not be "waiver" because of landlord inaction may affect the question. Compare *Mutual Redev. Houses, Inc. v. Balducci*, 37 App. Div. 2d 943, 325 N.Y.S.2d 765 (1st Dep't 1971) (provision effective) with *Fritts v. Cloud Oak Flooring Co.*, 478 S.W.2d 8 (Mo. Ct. App. 1972) (provision ineffective).

50. This usage of the word "abusive" follows the usage in *Blades*, *supra* note 15, at 1413. However, the much broader civilian concept of "abus des droits" may be cited as providing a more fully developed doctrinal reference for the notion of "abusive motivation." See R. Schlesinger, *Comparative Law* 514-34 (3d ed. 1970). For present purposes, a discretionary power would be considered to be exercised abusively when the motivation either is unlawful or is to exert duress for a reason unrelated to the ostensible purpose of the discretionary power. Threatening to terminate a monthly tenancy in order to discourage tenants from asserting their legal rights, or to compel a tenant to accept an invitation for a date, would be examples of abusive motivation. A most characteristic instance of abusive motivation in the landlord-tenant field is retaliatory eviction. The leading case on the subject is *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972).

51. One commentator has observed, undoubtedly correctly, that: "[I]t is very possible that violation of a generally-unenforced lease term may be seized upon by a determined landlord as a means of concealing arbitrary action, discrimination, retaliation, or other impermissible motive for eviction. Naturally, the longer the list of obscure and trivial regulations, the greater the risk of such disingenuous action becomes." Bentley, *An Alternative Residential Lease*, 74 Colum. L. Rev. 836, 849 (1974) (footnotes omitted); cf. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 Yale L.J. 704, 736 (1931) ("A landlord . . . may never resort to his ironclad document save when for extraneous reasons the other party proves unworkable.").

At a later point, Bentley underscored this risk citing a case where the landlord apparently had almost no proof of a substantive basis for eviction but received judicial sympathy, and an eviction below, because there was a "personality conflict" between landlord and tenant (not a ground for eviction under the lease). Bentley, *supra* at 855 n.115. The case was reversed on appeal. *Acillo v. Rivera* (App. T.), in 171 N.Y.L.J., Jan. 7, 1974, at 21, col. 1.

Evidently, it was a fear that improperly motivated landlords would rely on trivial regulations to evict rent-control tenants that led to limiting such evictions to cases where the tenant's default was a nuisance or a violation of "a substantial obligation of his tenancy." See *Park E. Land Corp. v. Finkelstein*, 299 N.Y. 70, 74, 85 N.E.2d 869, 871 (1949).

resort to the imposition of limitations on fundamental standing. Uneven enforcement suggests such defenses as waiver,⁵² estoppel,⁵³ or laches.⁵⁴ Abusive motivation, when there appears to have been potentially improper bases for taking action, is gaining recognition as an independent basis for withholding the assistance of the courts.⁵⁵

52. See *Radcliffe Associates v. Greenstein*, 274 App. Div. 277, 82 N.Y.S.2d 680 (1st Dep't 1948); *Sol Apfel, Inc. v. Kocher*, 61 N.Y.S.2d 508 (Sup. Ct. 1946), *aff'd mem.*, 272 App. Div. 758, 70 N.Y.S.2d 138 (1st Dep't 1947) (but a tenant's mistake as to what was permitted was not grounds for reformation) and cases cited in note 49 *supra*. The theory that a legal right may be waived by implication, as shown from a course of conduct, presents no difficulty. 5 S. Williston, *Contracts* § 740 (3d ed. 1961). And there have been holdings to the effect that a pattern of not enforcing particular lease restrictions constitutes a waiver or evidence of an intention to waive such restrictions. See, e.g., *Baltimore Butchers Abattoir & Live Stock Co. v. Union Rendering Co.*, 179 Md. 117, 17 A.2d 130 (1941); *Morrison v. Smith*, 90 Md. 76, 44 A. 1031 (1899); cf. *Annot.*, 4 A.L.R.2d 1111, 1140-50 (1949). But cf. *Taylor v. Parklane Hosiery Co.*, — App. Div. 2d —, 385 N.Y.S.2d 380 (2d Dep't 1976), 930 Fifth Corp. v. King, 40 App. Div. 2d 140, 338 N.Y.S.2d 773 (1st Dep't 1972) (court enforced prohibition on pets despite other dogs in building).

In the analogous situation of uniform use restrictions in deeds, a pattern of nonenforcement will bar later enforcement in equity if the past laxity has been accompanied by a change in the character of the neighborhood rendering later enforcement of little benefit to anyone. *Logan v. Sprinkle*, 256 N.C. 41, 123 S.E.2d 209 (1961); *Romig v. Modest*, 102 Ohio App. 225, 142 N.E.2d 555 (1956); cf. *Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101 (1927). See also N.Y. Real Prop. Actions Law § 1951 (McKinney 1963) (codifying the principle and making it applicable to relieve against forfeiture for violation of use restrictions).

It may occur, either by lease provision (see, e.g., *Pollack v. J.A. Green Constr. Corp.*, 40 App. Div. 2d 996, 338 N.Y.S.2d 486 (2d Dep't 1972), *aff'd*, 32 N.Y.2d 720, 297 N.E.2d 99, 344 N.Y.S.2d 363 (1973)) or by statute (see, e.g., *Hawaii Rev. Stat. § 521-31(a)* (Supp. 1975)) that the landlord cannot, by inaction or perhaps otherwise, waive rights under the lease. What effect such disempowering has on the issue of standing is problematical, especially since estoppel, laches and abusive motivation would remain, in any event, as possible (and presumably nonrelinquishable) escape valves for the tenant.

53. See *Capital View Realty Co. v. Meigs*, 92 A.2d 765 (D.C. Mun. Ct. App. 1952); *Weaver Bros. v. Newlin*, 74 A.2d 65 (D.C. Mun. Ct. App. 1950); *Vendramis v. Frankfurt*, 86 N.Y.S.2d 715 (Sup. Ct. 1949), *aff'd*, 276 App. Div. 903, 94 N.Y.S.2d 903 (1st Dep't 1950) (tenant paid higher rent in reliance on freedom from piano playing restriction); *10th & 5th, Inc. v. Arrowsmith*, 186 Misc. 639, 59 N.Y.S.2d 239 (N.Y. City Mun. Ct. 1945), *aff'd*, 186 Misc. 864, 65 N.Y.S.2d 344 (App. T. 1946). But cf. *Southbridge Towers, Inc. v. Rovics*, 76 Misc. 2d 396, 350 N.Y.S.2d 62 (App. T. 1973) (no estoppel for failing to notify tenant of the prohibition set forth in the lease). Waiver is an intentional relinquishment of a known right whereas the gist of estoppel is detrimental reliance, irrespective of intent. See *Berger*, *supra* note 22, at 794-96. However, in the landlord-tenant area, as elsewhere, courts do not always take pains to distinguish the two. The cases just cited above are examples.

54. An example is *Valentine Gardens Cooperative, Inc. v. Oberman*, 237 N.Y.S.2d 535 (Sup. Ct. 1963). The court refused to enforce a prohibition on pets because of the landlord's laches in enforcing the prohibition. While the landlord delayed, the tenant's family had fallen in love with the dog, making its removal "harsh, unwarranted, and oppressive." *Id.* at 538; cf. *Annot.*, 12 A.L.R.2d 394 (1950).

55. As the court in *Mobil Oil Corp. v. Rubinfeld*, 77 Misc. 2d 962, 963, 357 N.Y.S.2d 589, 591 (App. T. 1974) (*per curiam*) stated: "[P]ublic policy would militate against enforcing a

On balance, even if the landlord does not have any direct interest in the enforcement of tenant conduct standards, and therefore may not be considered a "real party in interest," there does not appear to be any overriding objection to lease provisions giving the landlord the power to enforce such standards. It would thus appear that the landlord should have such power on pure cost-effectiveness grounds. Moreover, as will be shown presently, the landlord normally *does* have a real interest in the enforcement of tenant conduct restrictions; therefore, stating the question as though he does not, makes it unrealistically difficult to reach the conclusion that lease conferred standing should be upheld. But the point of so stating the question is to make clear that cost-effectiveness alone can serve as an *independent* basis for allowing landlord intervention in controversies between tenants, especially when the less cost-effective alternatives (*viz.*, direct actions by tenants) tend, because of their very burdensomeness, to be entirely deterred.

2. The Landlord's Standing as Conferred by Law

Even though the job of moving against a disturbing tenant seems in practice to be generally left to the landlord, the law has been distinctly ungenerous in conferring landlords with standing to take effective legal action against tenant misconduct. Under the traditional view, the leasing transaction is regarded primarily as a conveyance of an interest

contractual right where it is being exercised in furtherance of an illegal end." The court accordingly denied the landlord's attempt to exercise a termination option in order to coerce compliance with landlord's price-fixing scheme, citing *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964). Regrettably, it must be reported that on appeal the court was overruled on this point. 48 App. Div. 2d 428, 370 N.Y.S.2d 943 (2d Dep't 1975). Other cases recognizing abusive motivation as a basis for withholding enforcement of rights are: *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972) (retaliatory eviction); *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) (cancellation of malpractice insurance in retaliation against testimony by insured); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (discharge of employee motivated by bad faith, malice, retaliation). Other legal bases for protecting against abusive motivations in the employee discharge area are discussed in *Blades*, *supra* note 15, at 1410-19. See also 43 *Fordham L. Rev.* 300 (1974).

As an alternative basis for withholding relief in cases of abusive motivation the courts might imply a duty of good faith, akin to Uniform Commercial Code § 1-201(19), into leases. E.g., *Volpicelli v. Leventhal*, 48 App. Div. 2d 660, 367 N.Y.S.2d 541 (2d Dep't 1975); 57 E. 54 *Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 335 N.Y.S.2d 872 (App. T. 1972); accord, *Hawaii Rev. Stat.* § 521-10 (Supp. 1975).

Perhaps the most compelling objection to limiting discretionary powers through a "doctrine" of abusive motivation is that the key operative fact in each case would be the subjective state of mind of the person exercising the discretion, a fact which is difficult to ascertain. Approaches to this problem have varied from requiring the person complaining of abuse to provide "clear and convincing" evidence (see *Blades*, *supra* note 15, at 1429-30) all the way to requiring the discretionary actor to show a lack of abusive motivation in exercising the discretion (see, e.g., *Robinson v. Diamond Housing Corp.*, *supra* at 865).

in realty, and the landlord is considered to have little role in assuring that the premises will serve any useful purpose of the tenant.⁵⁶ The tenant is seen as an "owner" having the benefit of all the remedies available to any owner of a possessory estate in realty.⁵⁷ The landlord is traditionally not responsible to his tenant for acts of others even when those acts deprive the tenant of the very possession for which he had bargained.⁵⁸ In this state of the law, it may be logical to hold, as the courts generally have, that the landlord has no responsibilities in inter-tenant disputes (absent landlord complicity), and that the complaining tenant's recourse is against his fellow tenants, not against the landlord.⁵⁹ Accordingly, it is perhaps also logical (cost-effectiveness aside) to deny the landlord standing in such inter-tenant disputes and to allow an effective remedy only to the offended tenant.

It is perhaps logical, that is, provided that the offended tenant, and not the landlord, is the *only* one adversely affected by the offending tenant's conduct.

But since offensive tenant conduct, which may be illegal or a nuisance, can reduce the rentability of the landlord's property—and hence reduce the return-related value of his investment—it would rarely seem to be the case that the offended tenant would be the *only* one adversely affected by the offensive conduct. In the preponderance of situations, the landlord would probably also sustain injury due to the offensive conduct; thus, he too would appear to be a real party in interest with standing to move against such conduct, lease provision or no.

The harm done by offensive tenant conduct, by reducing rentability, injures what might be called the landlord's "reputational" interest in the premises. Thus, insofar as injuries to such reputational interest palpably impair the value of the landlord's property (as a return

56. See, e.g., *Bowles v. Mahoney*, 202 F.2d 320, 324 (D.C. Cir. 1952), cert. denied, 344 U.S. 935 (1953); *Suydam v. Jackson*, 54 N.Y. 450 (1873); *Smithfield Improvement Co. v. Coley-Bardin*, 156 N.C. 255, 72 S.E. 312 (1911).

57. 1 Am. L. Prop., supra note 3, § 3.53. One case even held that the landlord, having no right to possession during the term, could not maintain ejectment against a wrongful possessor of the leased premises. *Western N.Y. & Pa. Ry. v. Vulcan Foundry & Mach. Co.*, 251 Pa. 383, 388-89, 96 A. 830, 832 (1916).

58. See 1 Am. L. Prop., supra note 3, § 3.53. Of course the landlord could be held liable if he were in complicity with such dispossessing acts of others (*id.*) or if the interference with possession were by a third party holding paramount title (*id.* at §§ 3.47, 3.48). Furthermore, under one line of cases, the landlord may be liable to the tenant if the wrongful acts of others prevent the tenant from ever taking possession. *Id.* at § 3.37; see the very ample discussion in *Hannan v. Dusch*, 154 Va. 356, 153 S.E. 824 (1930).

59. E.g., *Thompson v. Harris*, 9 Ariz. App. 341, 452 P.2d 122 (1969) (tenant urinating on common wall); *Katz v. Duffy*, 261 Mass. 149, 158 N.E. 264 (1927); see cases cited in 1 Am. L. Prop., supra note 3, § 3.53 nn.11 & 12.

producing investment), such injuries are conceptually little different from physical waste.⁶⁰ Both are acts of a tenant tending to reduce the value of the reversioner's retained interest. In any case, a direct injury to the landlord's reputational interest supplies, in addition to cost-effectiveness, a second ground for recognizing lease-conferred standing for landlords to control tenant conduct.

Nonetheless, in the absence of physical waste, the landlord's recourse against a tenant whose conduct is illegal or a nuisance has been tightly circumscribed.

a. *Illegal Acts*

There have been occasional cases stating that the landlord may cancel the lease of a tenant who uses the premises for an illegal purpose,⁶¹ and statutes sometimes so provide.⁶² However, it may not be said that illegal conduct by the tenant constitutes a general basis for relief to the landlord, at least not unless he is protected by an agreement or unless he sustains some sort of "special" injury from which he is protected by the law of torts.

b. *Nuisances*

Although it has been said that the landlord may oust the tenant for committing a nuisance,⁶³ in most cases where nuisance is alleged as a ground for eviction some other basis for asserting the forfeiture has apparently existed.⁶⁴ Even when the landlord is willing to settle for

60. That rental real estate may have a reputational value which, if injured, is compensable was recognized in *Martin v. Medlin*, 81 Ga. App. 602, 59 S.E.2d 519 (1950) and *Sullivan v. Waterman*, 20 R.I. 372, 39 A. 243 (1898). In *Martin v. Medlin*, *supra*, which involved premises leased allegedly for use "as a one-family domicile," it was held that conversion of the premises to a house of assignation by the tenant, which "injured the value of the property," gave rise to liability for "any injury occasioned by [the] breach." 81 Ga. App. at 605, 59 S.E.2d at 521. The language employed by the court suggested that the court's theory of compensation was akin to the compensation theory which would apply in cases where waste by the tenant had resulted in deterioration in the capital value of the premises. Cf. *Crewe Corp. v. Feiler*, 28 N.J. 316, 146 A.2d 458 (1958), in which the tenant's acts (in improving the premises) increased the property taxes and thereby caused injury to the landlord's interest in the "rental yield" of the premises. Analogizing to the law of waste, which is concerned mainly with injuries to the *capital* value of the premises, the court held the tenant liable for the loss to his "rental yield" sustained by the landlord. *Id.* at 327, 146 A.2d at 463.

61. *Schwartz v. McQuaid*, 214 Ill. 357, 73 N.E. 582 (1905); *Voght v. State*, 124 Ind. 358, 24 N.E. 680 (1890); see 1 Am. L. Prop., *supra* note 3, § 3.43.

62. E.g., Mass. Ann. Laws ch. 139, § 19 (1972); N.Y. Real Prop. Actions Law § 711.5 (McKinney 1963).

63. 2 Powell, *supra* note 24, ¶ 247[1], at 372.103-04; see Hawaii Rev. Stat. § 666-3 (1968) for a statute providing for eviction in cases of nuisance.

64. E.g., *Silberman v. Hicks*, 231 S.W.2d 283, 285 (Mo. Ct. App. 1950) (waste); *Metropoli-*

damages or injunctive relief, the existing authorities are not much more accommodating.⁶⁵

For a landlord seeking damages, the first analytical hurdle to overcome is establishing that the alleged nuisance is causing or has caused any compensable injury to the landlord. Although private nuisances are thought of primarily as invasions of the right to use land, a right which is incident to possession, it is recognized that damages may also be recovered by "owners of non-possessory estates in land which are detrimentally affected by interferences with the usability of the land."⁶⁶ Thus, there does appear to be some authoritative basis for allowing a remedy for nuisance to a person in the position of the landlord, *i.e.*, to a reversioner. However, if the nuisance in question involves no waste (in the traditional sense) and if the only premises detrimentally affected are apartments leased to neighbors of the objectionable tenant, the possibilities for the landlord to have relief in damages for the nuisance are slight.

The difficulty arises as a consequence of the general rule that, where two or more persons have interests in property injured by a wrongdoer, their respective entitlements to recoverable damages are to be commensurate with the injuries to their respective estates.⁶⁷ Thus, the landlord may not recover damages for injuries to the tenant's estate.⁶⁸ Those injuries to the landlord's reversionary interest which

tan Life Ins. Co. v. Greenberg, 185 Misc. 122, 55 N.Y.S.2d 494 (App. T. 1945); see *Roseman v. Day*, 345 Mass. 93, 95, 185 N.E.2d 650, 651-52 (1962). For a discussion and collection of cases concerning the meaning of nuisance for purposes of World War II federal rent control regulations (which authorized eviction on the basis of nuisance), see Annot., 174 A.L.R. 989 (1948).

65. It has been said that the tenant has an implied obligation not to injure the landlord by committing a nuisance on the leased premises. *Mosby v. Manhattan Oil Co.*, 52 F.2d 364 (8th Cir.), cert. denied, 384 U.S. 677 (1931). However, this probably means nothing more than that tenants, like everyone else, are restricted in the use of their premises to the extent prescribed by the tort law of private nuisance. As is developed in the text which follows, the law of private nuisance is distinctly unhelpful to a landlord seeking standing to complain of annoying tenant activities unless the landlord is a *possessor* (as opposed to a lessor) of neighboring premises.

66. Restatement of Torts § 823(c) (1934); see *Bly v. Edison Elec. Illuminating Co.*, 172 N.Y. 1, 64 N.E. 745 (1902); *Kernochan v. New York Elev. R.R.*, 128 N.Y. 559, 29 N.E. 65 (1891); 6A Am. L. Prop., supra note 3, § 28.31; cf. *Sullivan v. Waterman*, 20 R.I. 372, 39 A. 243 (1898).

67. *Zimmerman v. Shreeve*, 59 Md. 357 (1883); *Nashville, C. & St. L. Ry. v. Heikens*, 112 Tenn. 378, 79 S.W. 1038 (1904); *Jordan v. Benwood*, 42 W. Va. 312, 26 S.E. 266 (1896).

68. When title to real estate is divided between the holder of a possessory interest and the holder of a future interest, it is sometimes held that the holder of the possessory estate may recover for injuries both on his account and on the account of the future interest owner as well. *Rogers v. Atlantic, Gulf & Pac. Co.*, 213 N.Y. 246, 107 N.E. 661 (1915); *United Traction Co. v. Ferguson Contracting Co.*, 117 App. Div. 305, 102 N.Y.S. 190 (3d Dep't 1907). Contra, *Jordan v. Benwood*, 42 W. Va. 312, 26 S.E. 266 (1896). However, recoveries by a landlord for injuries to the tenant's interest seem to be uniformly impermissible. *Nashville, C. & St. L. Ry. v. Heikens*, 112 Tenn. 378, 79 S.W. 1038 (1904); *Jordan v. Benwood*, supra; see 1916A L.R.A. 792, 805-11.

are compensable typically are described as the "permanent" or "continuing" injuries.⁶⁹ The tenant's compensable injuries are described, on the other hand, as those which are temporary or injurious to the "use and enjoyment."⁷⁰ That is, in the traditional formulation, the landlord, as reversioner, may recover for the reduction of so-called sale value; the tenant's recovery is for the reduction of rental value caused by the nuisance.

This division of recovery entitlements may at first blush seem rational. Insofar as the landlord has, for the term of the lease, traded off his rights of use and enjoyment in exchange for rent, double compensation would result if the landlord were also to recover for the loss which the nuisance causes to the "use and enjoyment" value, *i.e.*, rental value. It would be likewise unfair to the tenant if no damage recovery were available to the tenant for interferences with the rights of use and enjoyment which he has bought for the term of the lease.⁷¹ However, for reasons generally unrelated to the division of recovery entitlements, most nuisances are classified as temporary rather than permanent interferences.⁷² The effect of this classification is to greatly narrow the range of situations in which the landlord, as such, may have a damage recovery based upon a nuisance. To an ordinary fee owner-occupier, the tendency to classify nuisances as temporary rather than permanent is a source more of inconvenience than of injustice. Such an owner-occupier is relegated to multiple lawsuits, periodically brought, to redress his loss as it accrues. But in the end he may

69. See *Spaulding v. Cameron*, 38 Cal. 2d 265, 270, 239 P.2d 625, 629 (1952); *Cooper v. Randall*, 59 Ill. 317 (1871); *Akers v. Ashland Oil & Ref. Co.*, 139 W. Va. 682, 80 S.E.2d 884 (1954); 6A Am. L. Prop., *supra* note 3, § 28.33, at 92; Restatement of Torts § 823, comment d (1934).

70. *Union Cemetery Co. v. Harrison*, 20 Ala. App. 291, 101 So. 517 (1924); *Cooper v. Randall*, 59 Ill. 317 (1871); *Sherman v. Fall River Iron Works Co.*, 84 Mass. (2 Allen) 524 (1861); D. Dobbs, *Remedies* § 5.3, at 332-35 (1973).

71. A corollary concern would be to avoid recovery by both landlord and tenant for the same injury. See *Cooper v. Randall*, 59 Ill. 317 (1871); Annot., 12 A.L.R.2d 1192, 1230-31 (1950).

72. See 6A Am. L. Prop., *supra* note 3, § 28.33; D. Dobbs, *Remedies* § 5.4, at 335-44 (1973); W. Prosser, *Torts* § 90, at 602 (4th ed. 1971). A detailed discussion of the basis on which courts resolve the difficult question of "permanency" would not be apposite. Suffice it to say that the determination seems to be less influenced by the factual characteristics of the nuisance than by a policy against legitimizing wrongs committed by persons willing to pay damages, permitting them to acquire rights by a sort of private eminent domain power. *Id.* This is not to say, however, that there are not instances where the factual probabilities or policy considerations lead the court to regard the invasion as "permanent," permitting (or requiring) claims for present and prospective injuries to be joined in a single action. *Spaulding v. Cameron*, 38 Cal. 2d 265, 269, 239 P.2d 625, 628 (1952); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 224, 257 N.E.2d 870, 874, 309 N.Y.S.2d 312, 317-18 (1970); *Akers v. Ashland Oil & Ref. Co.*, 139 W. Va. 682, 80 S.E.2d 884 (1954). See generally D. Dobbs, *Remedies* § 5.4, at 335-44 (1973). But such instances, as stated in the text, are the exception rather than the rule.

theoretically be made whole. However, in the case of a landlord, who may never contemplate taking direct advantage of use and enjoyment, *i.e.*, whose expected benefit is to be not possessory but derivative—in the form of rent which tenants are willing to pay—this classification preference can mean that recovery would, as a practical matter, be forever denied.

Undoubtedly, the cases are correct which hold that the tenant in possession at the time a nuisance commenced should be the only one entitled to recover for the *past* injuries caused by the nuisance, if the nuisance has affected only that tenant's right of enjoyment.⁷³ Since the landlord has previously shifted to the tenant the risk of obtaining the benefits of use and enjoyment during the term, it would be illogical and unjust to compensate the landlord for losses which have already occurred due to third party interferences with such use and enjoyment. Furthermore, if there are policy reasons preventing the allowance of prospective "use and enjoyment" damages for nuisances, even those likely to be "factually" permanent,⁷⁴ these too may be accepted; their adverse effect on landlord recoveries may be regarded as merely an incidental application of a "good" general rule.

What is not so understandable is why courts should extend this principle to deny compensation to the landlord even when the effect of a nuisance has been to palpably diminish the value of the one benefit which the landlord seeks to reap from the leased premises—their rental value. It may be readily seen how rental value might be affected by a nuisance in cases where the conduct constituting the nuisance had already been occurring prior to the time the directly offended tenants commenced occupancy; the offended tenants, as prospective tenants, may have been dissuaded by the nuisance from paying as high a rent or even from entering into leases at all.⁷⁵ But rental value may also be impaired because existing tenants may be persuaded to leave, at or before the normal expiration of their leases, something which equally contributes to an impairment of the landlord's expected investment return and, hence, the value of his premises.⁷⁶

The loss to the landlord as a result of such tenant reactions may be perhaps better described as a loss of "profit" rather than of rental value *per se*, but the fact remains that the landlord suffers a loss in value of his property as a return producing asset. The loss of rental value or

73. *E.g.*, *Van Sicken v. New York*, 64 App. Div. 437, 72 N.Y.S. 209 (2d Dep't 1901), modified on other grounds, 172 N.Y. 504, 65 N.E. 257 (1902).

74. See note 72 *supra* and accompanying text.

75. *Cf.* *Sullivan v. Waterman*, 20 R.I. 372, 39 A. 243 (1898) (lodging house).

76. The analogy of such losses to physical waste has already been mentioned. See text accompanying note 60 *supra*.

profitability ultimately will reduce the sale or capitalized value of his property as well. The determination of the amount of loss would inevitably be complicated by questions of causal connection and conjecture. However, even in situations when the causal connection and amount of loss are clear, such as where the landlord has been forced to accept a lower rental because of the nuisance, the courts have typically, but not uniformly,⁷⁷ refused to allow a recovery to the landlord.⁷⁸

The landlord may well face similar frustrations in obtaining injunctive relief against nuisances by the tenant. Citing nuisance cases which

77. E.g., *Kernochan v. New York Elev. R.R.*, 128 N.Y. 559, 29 N.E. 65 (1891); accord, *Hine v. New York Elev. R.R.*, 128 N.Y. 571, 29 N.E. 69 (1891); *Francis v. Schoellkopf*, 53 N.Y. 152 (1873) (damages equal the difference in the rental value free from the stench and subject to it). See also *Adams Constr. Co. v. Bentley*, 335 S.W.2d 912 (Ky. 1960), which held, without discussion, that the landlord can recover loss of rental value.

78. *Miller v. Edison Elec. Illuminating Co.*, 184 N.Y. 17, 76 N.E. 734 (1906); *Van Siclen v. New York*, 64 App. Div. 437, 72 N.Y.S. 209 (2d Dep't 1901), modified on other grounds, 172 N.Y. 504, 65 N.E. 257 (1902); cf. *Halsey v. Lehigh Valley R.R.*, 45 N.J.L. 26 (Sup. Ct. 1883). See also Annot., 12 A.L.R.2d 1192, 1230-31 (1950) and Annot., 34 L.R.A. (N.S.) 560 (1911) for additional discussion and cases.

For a time, it appears, the New York courts did allow landlords to recover for diminished rental value resulting from a nuisance. *Hine v. New York Elev. R.R.*, 128 N.Y. 571, 29 N.E. 69 (1891); *Francis v. Schoellkopf*, 53 N.Y. 152 (1873). In *Hine*, the court carefully distinguished the landlord's claim for *past* damages, in the form of diminished rental value, from actions based on "any theory of the continuing nature of the trespass" or "predicated upon any anticipation of its continuance." 128 N.Y. at 573, 29 N.E. at 69. However, the position was reversed in *Bly v. Edison Elec. Illuminating Co.*, 172 N.Y. 1, 64 N.E. 745 (1902), where the court distinguished the leading case espousing the older view, *Kernochan v. New York Elev. R.R.*, 128 N.Y. 559, 29 N.E. 65 (1891), stating that "*Kernochan's* case was not intended to be applied to the general law of nuisances but to a condition created by the construction and operation of the elevated railroads which has no exact parallel in any other department of our jurisprudence." 172 N.Y. at 16, 64 N.E. at 749. Other New York authority, *not* involving elevated railroads, was less satisfactorily distinguished. The court's concern in *Bly* seemed to be to preserve the right of action of lessees who "come to the nuisance."

Such tenants "who come to the nuisance" are generally protected, the rationale being that the cause of action arises not from the tortious act itself but from the injury which is presumed to be completed only when the tenancy begins. See Annot., 12 A.L.R.2d 1192, 1230 (1950); cf. *Bly v. Edison Elec. Illuminating Co.*, 172 N.Y. 1, 64 N.E. 745 (1902); *Dolata v. Berthelet Fuel & Supply Co.*, 254 Wis. 194, 36 N.W.2d 97 (1949) (purchaser). However, in attempting to protect possessors against injuries from nuisances, this reasoning seems to go too far. It assumes, probably unjustifiably, that the prior existence of the nuisance caused no reduction in the price which the possessor paid to acquire the possession. If the prior existing nuisance did cause such a price reduction, the possessor "who comes to the nuisance" has already been compensated by such reduction for the detriment which the nuisance involves. To allow a recovery by the possessor against the person committing the nuisance would be to double the compensation to the possessor. On the other hand, the landlord (or seller) who parted with possession at a reduced price, and thus *de facto* has borne the financial loss resulting from the nuisance, is left uncompensated for such loss.

deny damage recoveries to landlords,⁷⁹ courts have held that the landlord's entitlement to injunctive relief is likewise limited to injuries to the reversion, *i.e.*, to permanent injuries.⁸⁰ The difficulty is, of course, that—for independent policy reasons—the tendency is to classify nuisances as temporary rather than permanent,⁸¹ and in any event a nuisance being committed by a leasehold tenant would seem to be temporary by definition. The landlord may possibly succeed in obtaining injunctive relief, even where permanent damages are unavailable, by arguing that the nuisance, though not permanent is at least “continuing” or “recurring” or continues to be “threatened.”⁸² But at bottom, whatever the nuisance's durational characteristics, the landlord's real task is to convince the court that the nuisance affects his reversionary interest rather than merely the current (and continuing) interests of his tenants. Courts have sometimes been convinced of this,⁸³ and sometimes not.⁸⁴

* * * *

Several conclusions may be garnered from the foregoing discussion. If the landlord is to have any reasonable assurance of standing to complain about nuisance-creating (or illegally acting) tenants, he must contract for that standing in the lease. Furthermore, lease provisions empowering the landlord to complain are not merely officious arrogations of policing authority, such as would well justify strict construction or judicial avoidance wherever possible. Rather, they serve the legitimate objectives of (i) providing a more cost-effective alternative to countermeasures or proceedings initiated by the offended tenants themselves and (ii) protecting the landlord's genuine interest in the “reputational” (and hence return producing) character of his property. As such, lease provisions empowering the landlord to control tenant conduct supply an important and valuable mechanism for forestalling disputes between tenants, and for protecting the character of the buildings in which they reside. Seen in this light, such provisions deserve sympathetic consideration (though not rubber stamping) by the courts.

79. E.g., *Cooper v. Randall*, 59 Ill. 317 (1871); *Miller v. Edison Elec. Illuminating Co.*, 184 N.Y. 17, 76 N.E. 734 (1906).

80. E.g., *Indianapolis, Bloomington & W. Ry. v. McLaughlin*, 77 Ill. 275 (1875), *Sherman v. Levinston*, 128 N.Y.S. 581 (Sup. Ct. 1910). See also *Beir v. Cooke*, 37 Hun 38 (N.Y. Sup. Ct. 1885).

81. See note 72 *supra* and accompanying text.

82. See 58 Am. Jur. 2d Nuisances § 158 (1971).

83. E.g., *Weakley v. Page*, 102 Tenn. 178, 53 S.W. 551 (1899) (on grounds that rentability was adversely affected).

84. See cases cited in note 80 *supra*.

3. Standing and the Implied Warranty of Habitability

The discussion of standing might have ended with the preceding paragraph had the state of landlord-tenant law remained as it was at the beginning of the present decade. However, the growing acceptance, at an avalanche rate (for property law), of the so-called "implied warranty of habitability"⁸⁵ adds a new dimension to the issue. The implications of the implied warranty of habitability appear to supply a new (and perhaps the most compelling) basis for permitting landlord control of tenant conduct.

The implied warranty of habitability has resulted from a rethinking and a reformulation of certain basic assumptions⁸⁶ underlying the fundamental landlord-tenant relationship.⁸⁷ For better or for worse, it has resulted in an increased paternalization of that relationship.

No longer is the landlord regarded as having almost no role in assuring that the premises serve a useful purpose of the tenant.⁸⁸ Rather, the implied warranty of habitability subsumes that the thing bargained for by the modern residential tenant is not just bare space but "a well known package of goods and services,"⁸⁹ a place which is "livable."⁹⁰ For failing to meet this obligation, the landlord faces, among other things, loss of all or part of the rent,⁹¹ loss of the tenant, who may be excused from the lease,⁹² or even punitive damages.⁹³

85. Among the landmarks recognizing the implied warranty of habitability are *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Boston Housing Authority v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970). The warranty is also being established by statute. E.g., Mich. Comp. Laws Ann. § 554.139 (Supp. 1976); N.Y. Real Prop. Law § 235-b (McKinney Supp. 1975); Wash. Rev. Code Ann. § 59.18.060 (Supp. 1975). See also URLTA, *supra* note 13, § 2.104(a)(2).

86. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077-79 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 429-34, 462 P.2d 470, 472-75 (1969); *Tonetti v. Penati*, 48 App. Div. 2d 25, 29, 367 N.Y.S.2d 804, 807 (2d Dep't 1975).

87. This is the case at least with respect to residential tenancies, to which the implied warranty has generally been limited.

88. Compare text accompanying notes 58-59 *supra*.

89. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

90. *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970).

91. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

92. *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Tonetti v. Penati*, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975).

93. *Kipsborough Realty Corp. v. Goldbetter*, 81 Misc. 2d 1054, 367 N.Y.S.2d 916 (N.Y. City Civ. Ct. 1975).

There are already indications that the implied warranty of habitability will support holding the landlord responsible to tenants for the conduct of other tenants.⁹⁴ Apparently the first case to tie the implied warranty of habitability directly to landlord responsibility for tenant conduct is *Cohen v. Werner*.⁹⁵ In this action for rent against an abandoning tenant, the tenant defended claiming that "noise emanating from another apartment in the building was so great that [the] defendant could not continue to reside in his apartment."⁹⁶ The court found that the noise (of unspecified nature) was "so intense and so long-lasting as to render the apartment uninhabitable."⁹⁷ Further, the court observed that "[w]hile plaintiff [landlord] did not cause this noise, he did nothing at all to try to stop it although he had ample time to do so"⁹⁸ The court correctly stated that, under the traditional rules relating to constructive eviction, acts of other tenants, without any complicity on the part of the landlord, would not have justified the tenant's abandonment.⁹⁹ However, said the court:

The whole concept of the implied warranty of habitability rests on the undertaking of the landlord that the premises will be habitable. If it is not, then *the tenant is entitled to relief even if the landlord did not cause the uninhabitability*, at least in situations where, as here, the landlord could have taken steps . . . but chose to do nothing at all.¹⁰⁰

Exactly what steps the landlord could have taken is unclear from the opinion; but the landlord's failure to take such steps relieved the tenant from liability under the lease when he quit the premises.

94. *Cohen v. Werner*, 82 Misc. 2d 295, 368 N.Y.S.2d 1005 (N.Y. City Civ. Ct.), *aff'd mem.*, 85 Misc. 2d 341, 378 N.Y.S.2d 868 (App. T. 1975); cf. *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970) ("implied" obligation of landlord); *Zamzok v. 650 Park Ave. Corp.*, 80 Misc. 2d 573, 363 N.Y.S.2d 868 (Sup. Ct. 1974) (landlord's reserved right to reenter upon neighboring tenant's premises to effect repairs constitutes "control" and prevents landlord from disclaiming liability for alleged nuisance on neighboring tenant's premises). See also *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 224 N.W.2d 843 (1975) (liability for common area); *Tonetti v. Penati*, 48 App. Div. 2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975) (condition caused by previous occupant); *Rockrose Associates v. Peters*, 81 Misc. 2d 971, 366 N.Y.S.2d 567 (N.Y. City Civ. Ct. 1975).

95. 82 Misc. 2d 295, 368 N.Y.S.2d 1005 (N.Y. City Civ. Ct.), *aff'd mem.*, 85 Misc. 2d 341, 378 N.Y.S.2d 868 (App. T. 1975). *Cohen* has already been followed in a case upholding an action against a landlord for compensatory and punitive damages based upon the conduct of a noisy neighboring tenant. *Pekelner v. Park W. Management Corp.* (Sup. Ct.), in 176 N.Y.L.J., Aug. 27, 1976, at 5, col. 3; see Fox, *Landlord Sued by Ex-Tenant; Fled From Neighbor's Piano*, 176 N.Y.L.J., Aug. 27, 1976, at 1, col. 3.

96. 82 Misc. 2d at 296, 368 N.Y.S.2d at 1005.

97. *Id.* at 296, 368 N.Y.S.2d at 1006.

98. *Id.*

99. *Id.*; see note 58 *supra*.

100. 82 Misc. 2d at 298, 368 N.Y.S.2d at 1008 (emphasis added).

Although its holding was not totally unprecedented in New York,¹⁰¹ *Cohen* definitely represents a departure from prior New York law in permitting an implied warranty of habitability to support what is, in traditional terms, a constructive eviction based upon a third party's acts. The holding is however squarely consistent with other recent cases, of which *Kline v. 1500 Massachusetts Avenue Apartment Corp.*¹⁰² is the landmark, imposing liability on the landlord for foreseeable injury-producing acts of third persons generally.¹⁰³ Perhaps even more directly in point is the recent case of *Samson v. Saginaw Professional Building, Inc.*¹⁰⁴ where the landlord was held liable for acts of a tenant's psychiatric patient when the latter attacked another tenant's employee in a common elevator. The most extreme case of this genre is *Uccello v. Laudenslayer*¹⁰⁵ wherein the landlord was held liable for injuries which a tenant's guest received when attacked by the *same tenant's* dog. Although the oral lease (from month-to-month) did not prohibit the tenant from keeping the dog, the court pointed out that the landlord could have terminated the tenancy, getting rid of the dog; thus, the landlord retained a sufficient measure of control to be held liable.

In neither *Kline*, *Samson* nor *Uccello* did the courts rely explicitly on an implied warranty of habitability theory. In *Kline* and *Samson*, since the complained of conduct occurred in a common area, there was no need to.¹⁰⁶ Similarly, in *Uccello*, the landlord's duty was based upon his power to "control" the presence of the dog on the demised premis-

101. See *Home Life Ins. Co. v. Breslerman*, 168 Misc. 117, 5 N.Y.S.2d 272 (App. T. 1938); *Polk Arms, Inc. v. Kohler*, 144 Misc. 326, 258 N.Y.S. 809 (App. T. 1932). There is real doubt that either of these holdings, predicated on a constructive eviction theory, would have withstood an appeal. *Trustees of Sailors' Snug Harbor v. Sugarman*, 264 App. Div. 240, 35 N.Y.S.2d 196 (1st Dep't 1942). A little over a month before the *Cohen* decision, another New York City Civil Court held, based on an expressed undertaking to soundproof, that the landlord had precipitated a constructive eviction when noise from neighboring tenants caused the nonresidential complaining tenant (a psychotherapist) to move out. *Rockrose Associates v. Peters*, 81 Misc. 2d 971, 366 N.Y.S.2d 567 (N.Y. City Civ. Ct. 1975). See also *Neisloss v. Arter* (App. T.), in 173 N.Y.L.J., March 10, 1975, at 17, col. 3.

102. 439 F.2d 477 (D.C. Cir. 1970); accord, *Sherman v. Concourse Realty Corp.*, 47 App. Div. 2d 134, 365 N.Y.S.2d 239 (2d Dep't 1975).

103. The court in *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970) held that the landlord was liable to the tenant for foreseeable criminal acts committed by an intruder in a common hallway of an apartment house. This holding also represented a departure from the previously generally accepted rule. See cases cited in Annot., 43 A.L.R.3d 331 (1972).

104. 393 Mich. 393, 224 N.W.2d 843 (1975).

105. 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (Dist. Ct. App. 1975).

106. As a matter of common law, the landlord has traditionally had an affirmative obligation to exercise reasonable care with respect to common areas not in the possession of individual tenants. W. Prosser, *Torts* § 63, at 405-08 (4th ed. 1971).

es. Moreover, all three cases proceeded basically on a negligence theory;¹⁰⁷ the landlord breached his duty of reasonable care rather than an implied warranty of habitability. But irrespective of which legal doctrine the landlord's duty is founded upon, the import of these cases is the same; there is a judicial expectation that landlords should act to protect their tenants against the acts of others (including fellow tenants), and the landlord who fails to do so will be responsible for losses which may ensue. In a very recent case following *Cohen*, it has already been so held.^{107a}

It is not unreasonable that the implied warranty of habitability should be extended to impose landlord responsibility for tenant misconduct. The whole idea of the implied warranty, as the *Cohen* court noted, is to obligate the landlord "to maintain the apartment in a condition suitable for decent living."¹⁰⁸ An apartment is hardly habitable if surrounded by noisy or raucous neighbors, and it certainly is not if the neighbors perpetrate criminal acts upon their fellows. Moreover, it is in line with the assumptions underlying the implied warranty of habitability to extend its protection to cover acts of fellow tenants. The fact that the modern tenant is not a "jack-of-all-trades," able alone to keep his apartment livable, has justified shifting to the landlord the responsibility as to the *physical* characteristics of the premises.¹⁰⁹ Is the average residential tenant in any better position to control more subtle, but equally important, environmental characteristics such as the behavioral pattern of his neighbors? As already discussed, the relative cost-effectiveness of leaving this task to the landlord¹¹⁰—together with the fact that tenants apparently seldom sue each other¹¹¹—suggests that the tenant is not.

If the implied warranty of habitability does make the landlord responsible for offensive tenant conduct—and particularly if it is *desirable* that it do so—then seemingly, as a corollary, standing for landlords to control tenant conduct should be generously and certainly not grudgingly bestowed. It probably should be bestowed as a matter

107. Even so, the Kline court did refer to the landlord's obligation as being "implied in the contract between landlord and tenant." 439 F.2d at 485, citing *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970), the landmark implied warranty of habitability case.

107a. *Pekelner v. Park W. Management Corp.* (Sup. Ct.), in 176 N.Y.L.J., Aug. 27, 1976, at 5, col. 3; see note 95 *supra*.

108. 82 Misc. 2d at 297, 368 N.Y.S.2d at 1007, quoting *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 999, 343 N.Y.S.2d 406, 410 (N.Y. City Civ. Ct. 1973).

109. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078-79 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). See also note 44 *supra*.

110. See notes 44-47 *supra* and accompanying text.

111. See note 40 *supra* and accompanying text.

of law, giving the landlord a right of action whenever a tenant's conduct substantially impairs the habitability—the suitability for decent living—of a neighbor's premises. It should in any event be recognized whenever the landlord, in the lease, has reserved such a power of control, unless the standards imposed are clearly “unreasonable.”¹¹² Of course, landlords could be held strictly responsible for tenant conduct and yet still be kept powerless to do anything about it. But such a draconian course, apart from its “unfairness,” would only tend to frustrate rather than promote the objective of providing livable homes for most tenants.¹¹³

B. Remedies

The landlord's effort to obtain standing is of course only a step towards the main legal objective, namely, to obtain a remedy which affords effective protection against tenant conduct that is perceived to be offensive. And a lease may be drafted not only to confer the landlord with standing to complain against such conduct, but also to give the landlord a remedy, forfeiture, which the law does not provide.¹¹⁴

Despite its obvious efficacy in providing protection, forfeiture is the remedy least likely to be available to the landlord as a matter of law. Except in cases of waste¹¹⁵ or of disclaimer by the tenant of his

112. An attempt to identify the criteria to be observed in developing a definition of “reasonable” is made in section III(D)(2) *infra*.

113. In *Berlin Dev. Corp. v. Vermont Structural Steel Corp.*, 127 Vt. 367, 250 A.2d 189 (1968) the question arose as to whether a landlord could recover damages from a tenant whose breach of the lease injured other tenants. Recovery by the landlord was denied, and it was said that the possibility that the landlord could be held liable to other tenants was not contemplated at the time the lease with the breaching tenant was made. If, however, the possibility of landlord liability were contemplated when the lease with the breaching tenant was entered into (and an implied warranty of habitability suggested the appropriateness of imputing such contemplation), then presumably the landlord ought to be able to recover for the losses arising out of the breaching tenant's defaults. Whether the landlord's recovery can include *potential* (but yet unpaid) liabilities to other tenants remains an open question.

114. 1 Am. L. Prop., *supra* note 3, §§ 3.89, 3.94; 3A Thompson, *supra* note 19, § 1324.

115. To be technically accurate, in the case of tenants for years, the common law did not authorize forfeiture or any other remedy even for waste. Like the cause of action itself the remedy of forfeiture for waste was originally a statutory creation. The Statute of Gloucester, 6 Edw. 1, c. 5 (1278), repealed, Civ. P. Acts, Repeal Act, 42 & 43 Vict., c. 59 (1879) first supplied the forfeiture remedy (together with treble damages). In so doing, it expanded upon the previously enacted Statute of Marlbridge, 52 Hen. 3, c. 23, § 2 (1267), which provided that tenants making waste should “yield full damage, and . . . be punished by amercement greviously.” Translation from 5 Powell, *supra* note 24, ¶ 637 n.4. Neither the Statute of Gloucester nor its forfeiture provision was received as a part of the common law in most states; thus, the remedy of forfeiture as a matter of law exists, if at all, generally only by local statute. *Id.* ¶ 650. According to

landlord's title,¹¹⁶ the common law simply did not treat the tenant's unlawful acts on the premises (*e.g.*, breach of a covenant or committing a nuisance) as an occasion for terminating the lease.¹¹⁷ If the landlord wanted the power to effect a forfeiture, he had to stipulate for it, either by a condition or a limitation on the lease.¹¹⁸ Thus, a tenant who annoys his neighbors by committing nuisances or illegal acts on the premises may be liable for damages (to fellow tenants¹¹⁹ or possibly the landlord¹²⁰), may be subject to injunction¹²¹ or may be subjected to criminal penalties, but he could be virtually¹²² assured that his tenancy was safe, unless the lease provided to the contrary. And except where the rule has been modified by statute, such as statutes providing for eviction for illegal use,¹²³ this is still the law.¹²⁴ Hence, it is

Professor Powell, nineteen states have such statutes and one state, Maryland, recognizes forfeiture for waste by reception of the Statute of Gloucester. *Id.*

116. This obsolescent basis for forfeiting a leasehold is said to have arisen as a consequence of the feudal idea that tenants owed fealty to their lords on pain of destroying the tenure. R. Megarry & H. Wade, *Real Property* 654-55 (4th ed. 1975); 3A Thompson, *supra* note 19, §§ 1316-17. The doctrine has been limited in its application (*id.*), but still receives judicial recognition (*Port Arthur Towing Co. v. Owens-Illinois, Inc.*, 352 F. Supp. 392, 402 (W.D. La. 1972), *aff'd*, 492 F.2d 688 (5th Cir. 1974) (recognizing rule and thereby according salvation after nearly 100 years of "Shepardarian damnation"); *McNeill v. McNeill*, 456 S.W.2d 800, 804 (Mo. Ct. App. 1970)). Some courts have at best partially repudiated the doctrine. *E.g.*, *McMichael v. Craig*, 105 Ala. 382, 16 So. 883 (1895).

117. 1 Am. L. Prop., *supra* note 3, § 3.94. Wholly obsolete bases for forfeiture, *e.g.*, tortious alienation, are ignored. See 1 Tiffany, *supra* note 17, § 189.

118. See note 129 *infra* and accompanying text. A limitation on the lease, like a special limitation on a freehold, results in an automatic termination of the lessee's estate, whereas a condition (or condition subsequent) confers only a right of entry (or power of termination) having no terminal effect on the lessee's estate until exercised by the lessor, either by reentry or ejectment. *Cf. Conger v. Conger*, 208 Kan. 823, 828-30, 494 P.2d 1081, 1086-87 (1972); 1 Am. L. Prop., *supra* note 3, § 3.89. Both types of provisions operate to forfeit the tenant's right of possession, although local procedural considerations (such as the availability of summary proceedings) may recommend the selection of one over the other in actual drafting. *Burnee Corp. v. Uneeda Pure Orange Drink Co.*, 132 Misc. 435, 437-38, 230 N.Y.S. 239, 246 (App. T. 1928). See generally M. Friedman, *Preparation of Leases* 43-44 (1962); Niles, *Conditional Limitations in Leases in New York*, 11 N.Y.U.L.Q. Rev. 15 (1933).

119. See note 38 *supra*.

120. See notes 63-78 *supra* and accompanying text.

121. See notes 38, 79-83 *supra* and accompanying text.

122. He could not be entirely assured that his tenancy would be safe because of the possibility that a court might exercise its equitable powers to cancel the lease based upon the illegal use. See notes 61-62 *supra* and accompanying text.

123. *E.g.*, Mass. Ann. Laws ch. 139, § 19 (1972); N.Y. Real Prop. Actions Law §§ 711(5), 715 (McKinney 1963). Some states also have statutes authorizing eviction for breach of lease covenants even if the lease does not so stipulate. See note 129 *infra*.

124. *Roseman v. Day*, 345 Mass. 93, 94-95, 185 N.E.2d 650, 651-52 (1962); *Commonwealth v. Wentworth*, 146 Mass. 36, 37, 15 N.E. 138, 141 (1888); *McKenzie v. Carte*, 385 S.W.2d 520, 529 (Tex. Civ. App. 1964). See also 49 Am. Jur. 2d *Landlord and Tenant* § 1043 (1970).

customary, if not almost invariable, that the lease will provide that, in cases of tenant breach, the landlord may terminate, effecting a forfeiture of the tenant's term.¹²⁵

1. Remedial Alternatives to Forfeiture

Forfeiture is by no means the only potential recourse available to the landlord who desires to enforce lease-contained conduct restrictions against a recalcitrant tenant. The compensatory relief of damages¹²⁶

125. 1 Am. L. Prop., supra note 3, § 3.94; M. Friedman, *Preparation of Leases* 43 (1962 ed.).

126. If a tenant covenants in a lease to refrain from certain uses of the premises (or from certain conduct on the premises) and if the tenant then violates that covenant, the landlord may recover damages for the breach. *Frederickson v. Cochran*, 449 S.W.2d 329 (Tex. Civ. App. 1969) (cultivation restriction in agricultural lease); 1 Am. L. Prop., supra note 3, § 3.40; Restatement of Property § 528 (1944); for additional citations see 3A Thompson, supra note 19, § 1325 n.1. However, the paucity of reported cases in which actual damages have been awarded or even sought makes it difficult to deduce an authoritative basis for measuring or allowing such damages.

As a starting point, it may be presumed that the damage measure should be geared to compensate the landlord for the "net amount of the losses caused and gains prevented" by the breach (Restatement of Contracts § 329 (1932)), i.e., to place the landlord in as good a position as he would have been in had the breach not occurred (*Frederickson v. Cochran*, 449 S.W.2d 329, 332 (Tex. Civ. App. 1969) ("The measure . . . is the pecuniary loss shown to have been within the contemplation of the parties."); see D. Dobbs, *Remedies* § 12.1, at 786 (1973); cf. *Riess v. Murchison*, 503 F.2d 999, 1011 (9th Cir. 1974), cert. denied, 420 U.S. 993 (1975) ("Anything less is inadequate reparation [for breach of contract].")). However, the very fact that there are but few reported cases in point is no doubt indicative of the relative hopelessness of this aim.

Nevertheless, assuming that the landlord's primary interest is economic, to preserve the net rental yield of his investment, the basic measure of injury to the landlord's interest can at least be seen in terms of the impact which the breach has on such rental yield; hence, the damages would be the amount by which the breach has diminished the rental value of the leased premises and/or adjacent premises also owned by the landlord. Or, analogizing to the damage measure applicable in the case of waste or of a nuisance causing permanent diminution in rental yield, the appropriate measure might be the *capitalized* value of the reduction in rental value, such capitalized value being reflected in a lowered sale value for the premises as a whole. See D. Dobbs, *Remedies* § 5.4, at 335-44 (1973). See also *Smith v. United Crude Oil Co.*, 50 Cal. App. 466, 469, 195 P. 434, 435 (Dist. Ct. App. 1920), on remand from 179 Cal. 570, 178 P. 141 (1919) (the damages would "be those which plaintiff would have suffered by reason of his property being injured by a depreciation in value being produced, or by some other injury which would naturally occur because of the nonpermitted use"). Under certain circumstances, some measure other than the "diminution in value" measure may possibly be appropriate. E.g., *Sussman Volk Co. v. 88 Delicatessen, Inc.*, 100 N.Y.S.2d 303 (Sup. Ct. 1950) (cost of restoration for breach of prohibition on alterations). However, it seems clear enough that it is the detriment to the lessor (rather than any possible benefit to the lessee) which should serve as the basis for measuring the lessor's recovery for breach of the covenant. See *Speck v. Cottonwood Coal Co.*, 116 F.2d 489 (9th Cir. 1940) (Montana statute); *Smith v. Union Crude Oil Co.*, supra; cf. *Welitoff v. Kohl*, 105 N.J. Eq. 181, 189, 147 A. 390, 393-94 (Ct. Err. & App. 1929) (deed covenant).

The "diminution in value" measure of damages finds support by analogy in at least three types of cases, viz., those dealing with damages for breach of use covenants in deeds of fee interests,

those dealing with lease covenants restricting competition, and those dealing with contractual obligations which are related to the preservation of a reputational interest (e.g., goodwill) of the promisee.

Use Covenants in Deeds of Fee Interests

A number of cases may be found stating that, for violation of a deed covenant restricting use, the measure of injury is the diminution in the market value of the parcel intended to be benefited by the covenant. E.g., *Welitoff v. Kohl*, 105 N.J. Eq. 181, 147 A. 390 (Ct. Err. & App. 1929); *Ackerman v. True*, 175 N.Y. 353, 359-61, 67 N.E. 629, 630 (1903); see *Womack v. Ward*, 186 S.W.2d 619 (Tenn. Ct. App. 1944) (granting nominal damages with suggestion that actual damages would consist of depression of either rental or sales value of property intended to be benefited by the covenant). And, in an appropriate case, the "diminution in value" damages may be measured on a current (rental value) basis rather than upon a capitalized (sale value) basis. See, e.g., *Stauber v. Granger*, 495 P.2d 67 (Alas. 1972), a case which involved a deed restriction prohibiting certain multi-family dwellings. In *Stauber*, the covenantor violated this restriction by putting up prohibited structures with the result that the plaintiffs could "not enjoy the surroundings for which they had bargained [and were deprived of,] the privacy and quiet enjoyment which they would have had" were it not for the breach. *Id.* at 69. Presuming that the restrictions would, by their terms probably terminate four years hence, the court assessed damages "based on a yearly loss of enjoyment." *Id.* at 70.

On occasion, the actual amount of the award seems to have been arrived at quite arbitrarily. *Stauber v. Granger*, *supra*; *Mock v. Shulman*, 226 Cal. App. 2d 263, 38 Cal. Rptr. 39 (Dist. Ct. App. 1964) (\$500 damages for violation of covenant not to interfere with light and air). And when the injury from the breach is too difficult to quantify monetarily, recovery may be denied altogether. See *Sussman Volk Co. v. 88 Delicatessen, Inc.*, 100 N.Y.S.2d 303 (Sup. Ct. 1950) (lease covenant forbidding sale on premises of non-Kosher products). But see *Binghamton Plaza, Inc. v. Gilinsky*, 32 App. Div. 2d 994, 301 N.Y.S.2d 921 (3d Dep't 1969) (*per curiam*) (allowing at least nominal damages for breach of a deed covenant).

In applying the deed covenant cases by analogy in order to establish a damage measure for lease covenant cases, one potential difficulty might be identifying the parcel intended to be benefited by the covenant. Unlike the deed covenant cases, where the benefited parcel is usually obvious enough (generally being neighboring land retained by the grantor or his successors in interest), in lease covenant cases there exist at least three choices: (1) the benefited parcel may be the demised premises themselves (especially where the prohibited conduct would be in the nature of waste), (2) the benefited parcel may be the larger premises of which the demised premises are part (especially where the prohibited conduct would be in the nature of a nuisance), or (3) there may be no benefited parcel, i.e., the covenant may be personal (for example, where prohibited conduct would be an illegal activity, such as prostitution, for which the landlord may have statutory vicarious liability (see N.Y. Mult. Dwell. Law §§ 351-60 (McKinney 1974)) or where the prohibited activity might expose the landlord to onerous civil liability under the "public use" doctrine (see Restatement (Second) of Torts § 359 (1965))). In setting forth restrictions on the tenant's use of the premises, the lease will seldom be explicit about which of the foregoing interests of the landlord the covenant is supposed to protect. However, when actually applying the "diminution in value" measure (or other measure), it hardly seems that this inexplicitness should present any obstacle to recovery; for presumably, in extracting the use restriction covenant, the landlord intended to protect *all* of his interests which might foreseeably be jeopardized by the tenant's breach. The usefulness of breaking down the possibilities is therefore chiefly to assure exhaustiveness in measuring the damages for breach rather than to suggest any limitations on recoveries.

Lease Covenants Restricting Competition

Cases involving restrictions on competition are analogous insofar as such restrictions on "use" by one landowner are aimed at protecting the interests of persons holding nearby parcels. In such

cases, the diminution in the value (usually rental value) of the benefited parcel is a recognized measure of recovery for the breach (see 1 Am. L. Prop., *supra* note 3, § 3.42; Note, Lessors' Covenants Restricting Competition: Drafting Problems, 63 Harv. L. Rev. 1400, 1411-12 (1950); Note, Restrictive Covenants in Shopping Center Leases, 34 N.Y.U.L. Rev. 940, 950-51 (1959)) although in some cases a more direct measure of the breach induced injury (such as lost profits) may be employed to fix damages. *Id.*

In considering the damage measure in restriction on competition cases as an analogy to use restrictions imposed on tenants, at least two possible distinguishing factors should be observed. First, in the competition cases, the courts are dealing with activities depriving the covenantee of a deliberately conferred economic advantage (having a certain degree of market exclusivity) by a person trying to shift that same economic advantage, in part, to himself. Thus, the goal of allowing damages in such cases is arguably concerned more with "restitution" than with "compensation." In use restriction cases, on the other hand, the concern is with compensating for a deprivation of an economic advantage (rights in a reversion or in neighboring premises) where the activities causing such deprivation do not necessarily tend to appropriate any part of that advantage to the person engaged in the depriving activities. However, since the competition cases themselves do not recognize the restitutionary or "disgorgement" measure of recovery (see *Barr & Sons, Inc. v. Cherry Hill Center, Inc.*, 90 N.J. Super. 358, 217 A.2d 631 (App. Div. 1966); *Annot.*, 97 A.L.R.2d 4, 111-19 (1964)), this distinction should not be significant so far as damage measurement principles are concerned.

Secondly, in the restriction on competition cases, it is often the injured neighboring *tenant* who is the complaining covenantee, and the landlord or other lessees of the landlord are the ones whose activities are complained of as causing injury to the *tenant's* interests. Although this is the exact reverse of the use restriction cases (where the landlord is complaining of breaches of the covenant by the tenant), the distinction should also not be significant so far as damage measurement principles are concerned. For in both types of cases, the injury involved is the adverse effect on one owner of an interest in land resulting from a breach of covenant by persons interested in neighboring real estate.

Contractual Provisions Designed to Protect Reputation

A last group of cases which may supply some analogy to the breach of use restriction situation are those cases where a promisee claims damages for injury to his goodwill because of a breach of contract. The profitability of the landlord's investment is, of course, directly related to the rentability of the spaces in his premises, i.e., to the continuing attractiveness of such spaces to existing and potential occupants. Clearly, also, the activities of some occupants can—to the extent others are uncomfortably aware of such activities—reduce the attractiveness of the landlord's offerings in the market for rental space, i.e., the activities can "taint" the landlord's building, reducing its value.

The appropriateness of allowing recovery for injury to goodwill flowing from a breach of a promise (as to the quality of goods being sold) has been recognized. E.g., *Barrett Co. v. Panther Rubber Mfg. Co.*, 24 F.2d 329 (1st Cir. 1928); *Stott v. Johnston*, 36 Cal. 2d 864, 229 P.2d 348 (1951); *General Riveters, Inc. v. Morse Chain Co.*, 15 App. Div. 2d 859, 224 N.Y.S.2d 746 (4th Dep't 1962). In supporting such recoveries, the relationship of goodwill to expected future returns has been pointed to. *Id.* One of the difficulties in allowing recovery for goodwill has, in fact, been the concern that the alleged loss (of profits) would be too speculative or remote. See *Annot.*, 28 A.L.R.2d 591, 593 (1953). This concern might apply equally to the landlord seeking recovery: unless it could be shown that there was indeed a proximately caused (and contemplated) decline in the rents received for his properties—attributable to the tenant's breach of covenant—the prospects for an award of substantial damages would seem to be slim.

In this connection, there is the related question of whether and to what extent the landlord should be able to recover loss of profit or other consequential damages from a breaching tenant. For an indication that they may not be recoverable, see *Gila River Pima-Maricopa Indian*

and the specific relief of injunction¹²⁷ will usually be available as theoretical alternatives. For in the usual case, the restrictions on tenant conduct will be found to be framed as both covenants and conditions.¹²⁸ It is well settled at common law that damages and injunctive relief would not be available for breach of a mere condition, just as no forfeiture can be predicated on the breach of a mere covenant.¹²⁹ But if the restrictions on tenant conduct are framed as both covenants and conditions, the choice of which recourse to take for breach—damages, injunction or forfeiture—will be, theoretically, at least, up to the landlord.

Sometimes, even though the tenant's default is both a breach of covenant and of condition, the landlord may prefer to enforce conduct standards by employing one of the ordinary contract remedies, *viz.*, damages or injunction. The case of a basically sound and economically valuable long-term commercial lease is one example. However, in the great preponderance of situations, where the tenant's behavioral shortfall is of more than mere trivial interest to the landlord, removal of the tenant (via forfeiture of the tenant's possessory right) may

Community v. United States, 467 F.2d 1351, 1355-56 (Ct. Cl. 1972) (involving breach of undertaking to improve the demised premises in lieu of rent; held, damages were difference between the value of the unimproved land and the value it would have had if improved as agreed, but not "lost potential profits."). However, even if loss of profit or other consequential damages are not recoverable, such types of damages should not be confused with a demonstrable loss of rental value which might, due to the tenant's breach, be experienced by the owner of the premises intended to be benefited by the covenant. Loss of rental value, insofar as it affects capital (sale) value fairly directly, would seem to be more appropriately treated as a "diminution in value" rather than a "loss of profits" item of damages.

127. E.g., *Boh v. Pan Am. Petroleum Corp.*, 128 F.2d 864 (5th Cir. 1942); 1 Am. L. Prop., *supra* note 3, § 3.40.

128. 1 Am. L. Prop., *supra* note 3, § 3.94. Obviously, as a drafting matter, the landlord is in a position to provide himself with both contractual remedies (damages and injunction) as well as the forfeiture remedy, based on a condition or a conditional limitation, for nonobservance of prescribed conduct standards, subject only to the negotiating strength and acumen of the tenant and his counselors. The practice in form leases and negotiated written leases is generally to provide that defaults by the tenant in the performance of covenants will not only be contract breaches but will also be potential occasions for forfeiture (usually at the landlord's election). *Id.* Thus, the case of the landlord with a choice between damages, injunction, or forfeiture, may be fairly taken, it is submitted, as the usual case.

129. For cases to the effect that breach of a condition will not give rise to an action for damages or injunction, see, e.g., *Palmer v. Fort Plain & Cooperstown Plank-road Co.*, 11 N.Y. 376, 389 (1854); 3 A. Corbin, *Contracts* § 633 (1960); cf. *New York Cent. R.R. v. City of Bucyrus*, 126 Ohio St. 558, 186 N.E. 450 (1933). For cases to the effect that breach of a covenant will not in itself support a forfeiture, see, e.g., *Kerr-McGee Corp. v. Bokum Corp.*, 453 F.2d 1067 (10th Cir. 1972) (New Mexico law); *Klinger v. Peterson*, 486 P.2d 373 (Alas. 1971). However, the latter rule has been occasionally modified by statute. E.g., *Ariz. Rev. Stat. Ann.* § 33-361 (1974); *Cal. Civ. Code* § 1930 (West 1954) (authorizing rescission for breach of a covenant concerning use).

constitute the only economically efficient method of enforcing the prescribed conduct standards.¹³⁰ Removal of the offending tenant will be the only effective means of preventing interference with (or destruction of) the values which are sought to be preserved or promoted by imposing the conduct standards in the first place.

The damage remedy can usually provide only very imperfect compensation in lieu of the performance contracted for, especially where residential tenancies are involved. There the interests invaded (especially those of the neighboring residents) are usually subjective interests incapable of reduction to monetary equivalents. How much is it worth to have a good night's sleep, unmolested by the aural overflows from the neighbors' frolics, or to look forward to an evening of quiet contemplation at home? True, where the landlord is the moving party in a damage action, *his* interest may seem more quantifiable in monetary terms. After all, the landlord's interest is almost always purely economic. Nevertheless, even in assessing damages to the landlord, the measurement of compensation with anything approaching acceptable precision may be all but impossible. Even though the landlord's injury would be theoretically measurable by the revenue loss caused by the reduced attractiveness of his building to tenants,¹³¹ in practice this measure may be insubstantial, especially if the offensive tenant's conduct has not persisted long enough to drive neighboring tenants away.¹³² The scarcity of cases in which the landlord seeks compensation in damages for a tenant's breach of conduct or use restrictions is an indication of the inadequacy of this remedy.¹³³

In any case, why should the landlord be forced to accept a unilaterally imposed substitute form of revenue from his investment (damages instead of higher rents), and why should an offensive tenant be

130. This statement is made with particular reference to breaches of conduct or use type restrictions, and it would not necessarily apply to tenant's breaches consisting of mere failures to pay money. Such a failure may obviously not be trivial from the landlord's viewpoint, but nonetheless, forfeiture may be neither necessary nor even conducive to compelling the desired payment. In any event, the practice has been to treat nonpayment defaults specially, particularly where mere tardiness of payment and not its omission entirely is the crux of the landlord's complaint. 1 Am. L. Prop., *supra* note 3, § 3.96. The matter is discussed further in text accompanying notes 200-06 *infra*.

131. See suggested analogies discussed in note 126 *supra*.

132. It may also be limited by the requirement of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854), as to the foreseeability of such losses. *Shachtman v. Masters-Lake Success, Inc.*, 14 App. Div. 2d 584, 218 N.Y.S.2d 150 (2d Dep't 1961); *Frederickson v. Cochran*, 449 S.W.2d 329 (Tex. Civ. App. 1969). See also *Koutsourades v. Mericle*, 80 Misc. 2d 561, 363 N.Y.S.2d 295 (Dutchess County Ct. 1975) (damages for covenant to insure limited to premium, not loss due to fire); *Berlin Dev. Corp. v. Vermont Structural Steel Corp.*, 127 Vt. 367, 250 A.2d 189 (1968).

133. See note 126 *supra*.

supported in imposing such a substitution?¹³⁴ Perhaps more to the point, the damage remedy can scarcely serve as an effective curative mechanism from the viewpoint of the neighboring tenants.¹³⁵ And it is the neighbors' interests which are the ones most directly invaded by an offending tenant's conduct defaults.

Injunctive relief would theoretically avoid the deficiencies of the damage remedy, but in practical application it too does not seem well suited to the enforcement of conduct restrictions. In the main, this unsuitability stems from the fact that, for violation of the court's directive, little can be done short of incarcerating the offender. The specter—and, one would hope, the unlikelihood—that a tenant might be jailed for failure to remove a dog, install a carpet or refrain from late night piano playing is enough in itself to indicate the shortcomings of the injunctive remedy.

Thus, on balance, the remedial alternatives to forfeiture are probably not generally effective in affording the protection, to the landlord or neighboring tenants, that conduct restrictions are supposed to achieve. Damages are not effective because they are difficult to assess accurately and probably do not truly compensate in any event. Injunctive relief can be ultimately effective only if we are willing to put lease violators in jail. Thus, it is fitting to consider whether some other remedy, supplied by agreement, would be more effective and appropriate to enforce landlord-prescribed conduct restrictions. Forfeiture is such a remedy.¹³⁶

134. See *Dunklee v. Adams*, 20 Vt. 415, 421 (1848) ("How can it be said, that any particular sum of money will be a just compensation for the personal inconvenience and suffering occasioned by the breach . . . ?"). Obviously a person should not be permitted to take anything he wants simply because he is willing to pay for it. It is hostility to such private "eminent domain" with respect to "environmental" assets that, among other things, underlies the tendency to classify nuisances as temporary rather than permanent. See note 72 *supra*.

135. Courts should not be "controlled exclusively by money value, but may protect a home." *Miles v. Hollingsworth*, 44 Cal. App. 539, 549, 187 P. 167, 172 (Dist. Ct. App. 1920).

136. Conceivably there are agreement-based remedies, other than forfeiture, which a landlord could resort to in order to enforce conduct restrictions on his tenants. Provision could be made for explicit penalties or for other consequences of default (e.g., acceleration of rent, forfeitable security deposits) which are penalties in effect. These penalty-type remedies, though they may tend to induce tenant compliance, differ from forfeiture in an important respect; penalties may help to keep the landlord-tenant relationship from going sour, but only forfeiture gives the landlord a true "out" in the event it does go sour. The importance of the distinction is discussed in section III(B)(2)(c)(iv) *infra*.

Of course, the enforceability of penalty-type remedies would be, under present law, extremely limited at best, subject to all of the objections (discussed *infra*) raised against forfeiture and probably then some. See Macneil, *Power of Contract and Agreed Remedies*, 47 *Cornell L. Rev.* 495 (1962). Because of such objectionability, and because in practice landlords seldom resort to penalties in leases, they will not be discussed.

2. The Forfeiture Remedy and the Limitations on Its Use

Compared with the remedial alternatives of damages or injunction, the forfeiture remedy provides an annoying tenant's neighbors—and, derivatively, the landlord—with protection that is very effective indeed. Because forfeiture results in physical removal of the annoying tenant, it is by far the remedy most likely to achieve the desired result of eliminating the annoyance. Moreover, if the author's survey of the reported cases is any indication, forfeiture is clearly the remedy most sought by landlords disaffected by a tenant's behavior. Yet, forfeiture is a remedy which the courts have been most reluctant to apply, even when expressly agreed to in the lease. Due to the unique effectiveness of the forfeiture remedy, and to what appears to be a (consequent?) preference for it among landlords, a review of the court-imposed limitations on the use of forfeiture is justified. For, given its efficiency and apparent preferability, these court-imposed limitations constitute, as a practical matter, the most serious restrictions on the landlord's power to control tenant behavior.¹³⁷

a. *The Basic Enforceability of Lease Forfeitures*

It is an agreement¹³⁸ which forms the basis for imposing the landlord's conduct restrictions on the tenant; therefore, the extent to which such restrictions are enforceable via the judicial mechanism can be expected to be limited, *inter alia*, by the factors limiting the enforcement of agreements generally.¹³⁹ On the other hand, in the

137. It has been observed correctly that "where legal sanctions are not adequate, [the] power of contract [i.e., freedom of contract] is curtailed," except where self-help or agreed remedies are possible. Macneil, *Power of Contract and Agreed Remedies*, 47 *Cornell L. Rev.* 495, 498 (1962). Thus, to the extent that the agreed remedy of forfeiture is, practically speaking, necessary to give effective legal sanction to landlord-prescribed tenant conduct restrictions, the limitations on its availability may be seen as a *de facto* limitation on the landlord's power to control tenant conduct.

138. The word "contract," if used in a very broad sense, might be preferable to the word "agreement" since "contract" connotes legal enforceability whereas the word "agreement" has a more neutral connotation. However, in order to prevent confusion and to be strictly accurate legally (see *Acme Mkts., Inc. v. Dawson Enterprises, Inc.*, 253 Md. 76, 87, 251 A.2d 839, 846 (1969), quoting 1A A. Corbin, *Contracts* § 265 (1963)), the word "contractual" is avoided here; for insofar as forfeiture provisions are concerned, it is not narrowly speaking the contractual significance of such landlord-imposed norms but rather their "conveyance" significance, as conditions or conditional limitations on the lease, which underlies the landlord's claimed power to forfeit. See notes 118 & 129 *supra* and accompanying text.

139. E.g., the presence of fraud, incapacity, mistake, impossibility of performance, waiver, estoppel, or illegality, to mention some of the more usual ones. An agreement's semantic effectiveness in communicating the parties' intent to the interpreter is also an important factor limiting the enforcement of agreements generally. These "interpretive" barriers to enforcement

absence of such factors, when a tenant defaults and the lease provides for forfeiture, the landlord's right to assert the forfeiture might be expected simply to follow: agreements which are intended to be binding ought, in general, to be enforced. And sometimes courts have simply so held.¹⁴⁰ Indeed, if effect is not given to the conditions on the tenant's rights under a forfeitable lease, the limited estate¹⁴¹ which was originally transferred to the tenant will be enlarged, in effect, at the landlord's expense.¹⁴²

Furthermore, nonenforcement of the forfeiture may also mean that the offending tenant's limited estate¹⁴³ will be enlarged at the *neighboring tenants'* expense. For if denial of forfeiture relief means

often get mixed together with (or inappropriately substituted for) substantive grounds for nonenforcement. See note 190 and text accompanying notes 160-68 *infra*.

140. E.g., *School Dist. RE-2(J) v. Panucci*, 30 Colo. App. 184, 490 P.2d 711 (1971); *First Nat'l Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630, 638, 237 N.E.2d 868, 871, 290 N.Y.S.2d 721, 725 (1968) (the "[s]tability of contract obligation must not be undermined by judicial sympathy." (emphasis omitted)); *Mobil Oil Corp. v. Burdo*, 69 Misc. 2d 153, 159, 329 N.Y.S.2d 742, 750 (Dist. Ct. 1972) ("rights . . . may not be based on a consideration of the equities if . . . fixed by the plain language"); *Caranas v. Morgan Hosts-Harry Hines Boulevard, Inc.*, 460 S.W.2d 225, 229 (Tex. Civ. App. 1970); see *Feist & Feist v. Long Island Studios, Inc.*, 29 App. Div. 2d 186, 287 N.Y.S.2d 257 (2d Dep't 1968); *Dunklee v. Adams*, 20 Vt. 415, 421 (1848).

Unsurprisingly, the principle that agreements ought to be enforced if intended to be binding usually seems to find expression in forfeiture cases only where the court is disposed to uphold the forfeiture being asserted. Query, however, does not the general judicial hostility to forfeiture indicate that the contrary presumption is more appropriate with respect to forfeiture agreements, viz., that forfeiture agreements ought *not*, in general, to be enforced in the absence of special factors? If such contrary presumption were more appropriate in the case of forfeiture agreements (and no position on the question is taken here), it is submitted that one special factor supporting their enforcement would be a purpose of controlling tenant conduct for the benefit of the greater number of tenants.

141. To the purist, it might be preferable to talk of a "limited interest" rather than a "limited estate" in this context. For insofar as the forfeiture is predicated upon a condition (subsequent) rather than a conditional (special) limitation (see note 118 *supra*), the tenant's *estate* is not technically limited by the defeasance provision, though it is subject to being cut off. See Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 Harv. L. Rev. 248, 274-75 (1940). Realistically, though, the distinction is "nonsense." *Id.* at 274.

142. In an analogous context, one court has recently observed that "while equity does traditionally disfavor forfeitures, it does not license judicial eradication of rights . . . clearly vested by the contracting parties as part of their bargain." *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 843-44 (2d Cir. 1975) (licensing of intellectual property).

Of course, such enlargement of the tenant's estate might, under certain circumstances, be proper despite the implicit expropriation of one private interest (the landlord's) in favor of another private party. The presence of some of the factors mentioned in note 139 *supra* would, for example, justify such an enlargement with no violence at all to established notions of justice. Nonetheless, it is important to recognize such enlargement (and expropriation) for what it is when deciding whether or not, in a particular case, it is to be countenanced as the lesser evil.

143. See note 141 *supra*.

that *no* effective relief is available,¹⁴⁴ then the offending tenant will succeed in appropriating an excessive share of the common environmental asset¹⁴⁵ which was supposed to be shared by all tenants.¹⁴⁶

Nonetheless, forfeiture agreements have not been enforceable in the courts to the same extent as other agreements. The reasons why they have not may be divided into two general categories. First, there are reasons for nonenforcement which are applicable to agreements generally but which, in the context of forfeiture agreements, seem to receive stricter application than they do in other contexts. Among these one might list waiver, strict construction against the draftsman and failure to perform what is, broadly speaking, a condition precedent to the agreed remedy. Secondly, there are reasons for nonenforcement of forfeitures which are somewhat special to the forfeiture remedy even though they may sometimes apply to other types of agreements as well.¹⁴⁷ These special reasons for nonenforcement remain (reflecting their origins) characteristically equitable in their nature. They reflect equity's early concern with the disproportionate hardship of allowing the enforcement of certain agreements valid at law, and they include (i) the adequacy of the tenant's actual performance, or of damages, to protect the landlord's bargain and (ii) the relative hardship which would result from a forfeiture compared with the hardship to others as a result of a substantial noncompensable breach of the particular lease requirement.

These limitations on the enforceability of the forfeiture remedy will be discussed in turn below.

b. Limitations on Forfeiture Which Are Applicable to Agreements Generally

Forfeiture as a remedy for lease violations is frequently described by the courts as being "harsh" or "drastic,"¹⁴⁸ a subject of judicial

144. See note 46 *supra* and accompanying text and section III(B)(1) *supra*.

145. See notes 9 & 10 *supra* and accompanying text.

146. The situation would be little different from one in which a tenant partitioned off a portion of a common area for his own exclusive use.

147. Sometimes their application to other types of agreements may be under another name, e.g., "unconscionability," or may be appropriate only for particular remedies, e.g., specific performance or an injunction.

148. E.g., *Fritts v. Cloud Oak Flooring Co.*, 478 S.W.2d 8, 11-12 (Mo. Ct. App. 1972); *Feist & Feist v. Long Island Studios, Inc.*, 29 App. Div. 2d 186, 191, 287 N.Y.S.2d 257, 262 (2d Dep't 1968) (dissenting opinion); *Moss v. Hirshtritt*, 60 Misc. 2d 402, 406, 303 N.Y.S.2d 447, 451-52 (N.Y. City Civ. Ct. 1969); *Bernstein v. Bernstein*, 210 N.Y.S. 539, 540 (Sup. Ct.), *rev'd on other grounds*, 214 App. Div. 790, 210 N.Y.S. 539, 541 (2d Dep't 1925), *aff'd per curiam*, 243 N.Y. 559, 154 N.E. 604 (1926). But cf. *First Nat'l Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630, 638, 237 N.E.2d 868, 871, 290 N.Y.S.2d 721, 725-26 (1968) ("Should we hold

"abhorrence."¹⁴⁹ Courts do not always articulate their reasons for these views of forfeiture, often offering vague comments such as "[t]he continuation rather than the extinction of grants is favored,"¹⁵⁰ "the right to retain property . . . is . . . sacred,"¹⁵¹ or "the law provides other remedies more consonant with justice."¹⁵² Harshness, drasticness or judicial abhorrence has sometimes appeared to serve ipso facto as a reason for refusing to enforce a forfeiture, for example in an occasional recent case decided on grounds of unconscionability.¹⁵³ But the primary impact of the courts' historical disfavor of forfeitures has been their resulting willingness to apply the ordinary reasons for nonenforcement of agreements somewhat expansively so as to avoid forfeitures.

For example, the doctrine of waiver would support the nonenforcement of a forfeiture based upon failure to perform an agreement provided that there has been an *intentional* relinquishment of a known right.¹⁵⁴ However, courts have frequently held that landlords have waived forfeitures even under circumstances where the intent, as objectively manifested, was rather obviously to enforce rather than relinquish the right to declare a forfeiture.¹⁵⁵ The general rule that any

that the termination of this lease is harsh and inequitable, then the same conclusion can be reached in every instance where a landlord exercises his contractual rights, and, in that event, the right of termination or any other right specified in a lease would be rendered meaningless and ineffectual.").

149. E.g., *Tollus v. Dutch Inns of America, Inc.*, 244 So. 2d 467, 472 (Fla. Dist. Ct. App. 1970); 614 Co. v. D.H. Overmyer Co., 297 Minn. 395, 398, 211 N.W.2d 891, 894 (1973); *Fly Hi Music Corp. v. 645 Restaurant Corp.*, 64 Misc. 2d 302, 304, 314 N.Y.S.2d 735, 737 (N.Y. City Civ. Ct. 1970), *aff'd mem.*, 71 Misc. 2d 302, 335 N.Y.S.2d 822 (App. T. 1972). In a similar vein, one commentator has said, "As restrictions for the benefit of other property, they [conditions] are crude weapons of the early law; their survival indicates a cultural lag." Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 Harv. L. Rev. 248, 250 (1940). However the focus of that Article was on conditions imposed on fees. Cf. text accompanying note 175 *infra*.

150. 220 W. 42 Associates v. Cohen, 60 Misc. 2d 983, 985, 302 N.Y.S.2d 494, 496 (App. T. 1969), paraphrasing 57th St. Luce Corp. v. General Motors Corp., 182 Misc. 164, 168, 46 N.Y.S.2d 730, 733 (Sup. Ct.), *aff'd mem.*, 267 App. Div. 978, 48 N.Y.S.2d 557 (1st Dep't), *aff'd* without opinion, 293 N.Y. 717, 56 N.E.2d 732 (1944).

151. *Mihans v. Municipal Court*, 7 Cal. App. 3d 479, 484, 87 Cal. Rptr. 17, 20 (Dist. Ct. App. 1970), quoting *Coal Co. v. Rosser*, 53 Ohio St. 12, 24, 41 N.E. 263, 265 (1895).

152. *Miller v. Reidy*, 85 Cal. App. 757, 761, 260 P. 358, 360 (Dist. Ct. App. 1927).

153. 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 335 N.Y.S.2d 872 (App. T. 1972); *Seabrook v. Commuter Housing Co.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (N.Y. City Civ. Ct. 1972), *aff'd per curiam*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. T. 1973); cf. *Weidman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (Rockland County Ct. 1975).

154. 5 S. Williston, *Contracts* § 678 (3d ed. 1961); cf. *Sessions, Inc. v. Morton*, 491 F.2d 854 (9th Cir. 1974); *In re Wil-Low Cafeterias, Inc.*, 95 F.2d 306, 309 (2d Cir.), cert. denied, 304 U.S. 567 (1938); 3A A. Corbin, *Contracts* § 757 (1960).

155. E.g., *Miller v. Reidy*, 85 Cal. App. 757, 260 P. 358 (Dist. Ct. App. 1927); *Woollard v*

act recognizing continuation of the tenancy constitutes a waiver,¹⁵⁶ and its specific application to acceptance of rent which accrues after the breach,¹⁵⁷ clearly evidence a judicial approach which exalts avoidance of forfeitures over determinations based on actual intent. Admittedly, this anti-forfeiture approach to waivers has not been uniformly followed,¹⁵⁸ and one may only impressionistically attribute the approach to the courts' "characteristic reluctance to enforce forfeitures."¹⁵⁹ However, it appears fair to conclude, on balance, that the courts have at least sometimes stretched the doctrine of waiver in order to avoid forfeitures which they did not wish to enforce.

Similarly, courts frequently avoid forfeitures by strictly construing the lease in order to hold either that there was no condition intended at all,¹⁶⁰ or that the condition was not breached.¹⁶¹ Sometimes a court may go so far as to "'construe' language into patently not meaning what the language is patently trying to say."¹⁶² Although strict construction against the landlord is sometimes justified on the grounds that it was the landlord who was responsible for drafting the lease and, hence, for any ambiguities it contains,¹⁶³ it has likewise been suggested

Schaffer Stores, Co., 272 N.Y. 304, 5 N.E.2d 829 (1936); Fairchild Realty Co. v. Spiegel, Inc., 246 N.C. 458, 98 S.E.2d 871 (1957).

156. 1 Am. L. Prop., supra note 3, § 3.95; 3A Thompson, supra note 19, §§ 1328-29.

157. See 3A Thompson, supra note 19, § 1329 ("[A]cceptance by the lessor of rent accruing subsequent to the breach of condition with knowledge of the existence of a cause for forfeiture is a waiver thereof."); id. § 1329 n.88 and cases cited therein; Woollard v. Schaffer Stores, Co., 272 N.Y. 304, 5 N.E.2d 829 (1936).

158. See, e.g., cases cited in note 154 supra. See generally 1 Am. L. Prop., supra note 3, § 3.95; 3A Thompson, supra note 19, §§ 1325-29.

159. 1 Am. L. Prop., supra note 3, § 3.95, at 383. Sometimes the court makes it clear that the abhorrence of forfeiture is the motivation for resort to the doctrine of waiver. See Duncan v. Malcomb, 234 Ark. 146, 351 S.W.2d 419 (1961); Miller v. Reidy, 85 Cal. App. 757, 260 P. 358 (Dist. Ct. App. 1927).

160. See H. Tiffany, Real Property § 96 (3d abr. ed. 1940); cf. Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 139 A.2d 291 (1958).

161. E.g., Miller v. Reidy, 85 Cal. App. 757, 260 P. 358 (Dist. Ct. App. 1927); Hughes v. Pallas, 84 Colo. 14, 267 P. 608 (1928); Branmar Theatre Co. v. Branmar, Inc., 264 A.2d 526 (Del. Ch. 1970); Grassham v. Robertson, 277 Ky. 605, 126 S.W.2d 1063 (1939); Wenger v. Wenger, 58 Lancaster L. Rev. 111, 114 (Pa. C.P. 1962) (One pair of slippers does not a permanent place of abode make.). A careful draftsman can effectively prevent avoidance of forfeiture on the theory that a covenant and not a condition was intended. See text accompanying note 160 supra. It is somewhat harder, however, to draft a lease in a way which prevents a court from interpreting it to find that there was no *breach* of condition. For a further discussion, see note 190 infra.

162. Llewellyn, Book Review, 52 Harv. L. Rev. 700, 702 (1939). Apparent examples are Boyd v. Shell Oil Co., 454 Pa. 374, 311 A.2d 616 (1973) and Murphy v. Traynor, 110 Colo. 466, 135 P.2d 230 (1943). See also discussion in Maginnis v. Knickerbocker Ice Co., 112 Wis. 385, 394, 88 N.W. 300, 302-03 (1901).

163. Branmar Theatre Co. v. Branmar, Inc., 264 A.2d 526 (Del. Ch. 1970); Charles E. Burt,

that the lease should be strictly construed against the landlord even when drafted by the tenant.¹⁶⁴ Judicial dislike of the forfeiture remedy seems clearly to be the more likely explanation for strict constructions against forfeiture, and courts often so concede.¹⁶⁵

In a similar vein, courts will strive to avoid forfeitures on the grounds that the procedural requisites and/or the conditions precedent to the remedy have not been met.¹⁶⁶

Thus, owing to its bad reputation in the courts, the remedy of forfeiture encounters pitfalls in the course of enforcement that most agreements, though ostensibly subject to the same rules, usually do not encounter. This differential application of generalized doctrines to the enforcement of forfeiture agreements is criticizable if only because it tends to disguise the norms which the courts are using in deciding whether to enforce a particular forfeiture or not.¹⁶⁷ Worse, the over-resort to doctrines such as waiver in order to avoid forfeiture may be a cover for the fact that there are no articulable norms being utilized at all. The courts may simply be refusing to enforce agreements they do not like.¹⁶⁸ Even apart from this criticism, however, the question may be asked whether the remedy of forfeiture is, in the leasehold context, truly the harsh or drastic one that it is assumed to be.

Inc. v. Seven Grand Corp., 340 Mass. 124, 127, 163 N.E.2d 4, 6 (1959); *Bevy's Dry Cleaners & Shirt Laundry, Inc. v. Streble*, 2 Ohio St. 2d 250, 256, 208 N.E.2d 528, 533 (1965).

164. *Acme Mkts., Inc. v. Dawson Enterprises, Inc.*, 253 Md. 76, 89, 251 A.2d 839, 847 (1969); cf. *Woodall v. Pharr*, 119 Ga. App. 692, 693, 168 S.E.2d 645, 647 (1969), *aff'd*, 226 Ga. 1, 172 S.E.2d 404 (1970).

165. E.g., *Miller v. Reidy*, 85 Cal. App. 757, 761, 260 P. 358, 360 (Dist. Ct. App. 1927) ("courts avoid enforcing covenants for forfeiture wherever possible"); *Branmar Theatre Co. v. Branmar, Inc.*, 264 A.2d 526, 529 (Del. Ch. 1970) ("The disfavor in which forfeitures are viewed gives a special reason for invoking this general rule of construction against the [draftsman]."); *Woodall v. Pharr*, 119 Ga. App. 692, 168 S.E.2d 645 (1969), *aff'd*, 226 Ga. 1, 172 S.E.2d 404 (1970); cf. *Riverton Country Club v. Thomas*, 141 N.J.Eq. 435, 440, 58 A.2d 89, 93 (Ch.), *aff'd*, 1 N.J. 508, 64 A.2d 347 (1948), quoting *Woodruff v. Woodruff*, 44 N.J.Eq. 349, 353, 16 A. 4, 6 (Ch. 1888) ("Conditions subsequent, especially when relied upon to work a forfeiture . . . are strictly construed.").

By interesting contrast, in a case where the lease was a "gift lease" (to a school district), the court rejected the rule of strict construction and held that "the plain meaning of the words . . . in the ordinary sense" should control. *School Dist. RE-2(J) v. Panucci*, 30 Colo. App. 184, 188-89, 490 P.2d 711, 713 (1971).

166. E.g., *Woodall v. Pharr*, 119 Ga. App. 692, 168 S.E.2d 645 (1969), *aff'd*, 226 Ga. 1, 172 S.E.2d 404 (1970); *Giannini v. Stuart*, 6 App. Div. 2d 418, 178 N.Y.S.2d 709 (1st Dep't 1958); see 3A Thompson, *supra* note 19, § 1326. The common law requirement of a demand for rent, in cases of forfeiture for nonpayment, is a typical example. 1 Am. L. Prop., *supra* note 3, § 3.94.

167. "Covert tools are never reliable tools," said Karl Llewellyn in criticizing the "intentional and creative misconstruction" of contracts. Llewellyn, Book Review, 52 Harv. L. Rev. 700, 703 (1939). See also the discussion at note 190 *infra*.

168. *Berger*, *supra* note 22, at 792.

Actually, when all relevant interests are considered, forfeiture may often, perhaps even typically, be the *least* drastic remedy available in offensive tenant cases. It neither threatens the offending tenant with jail (as would injunctive relief) nor, more importantly, does it let the tenant impose his idiosyncracies on his neighbors or the landlord. Nor do forfeitures of leaseholds necessarily involve the harsh deprivations of value which are associated with other kinds of forfeitures.¹⁶⁹ After all, the usual tenant pays rent only on a current basis, and what is inevitably lost by forfeiture—the tenant's benefit of bargain—will usually not be of substantial worth, especially in the case of residential tenancies.¹⁷⁰ The objectionable tenant will, of course, have to bear the costs and inconvenience of the move. But these losses can hardly be seen as an unjustified imposition once the alternatives are perceived: either the objectionable tenant must move and bear these losses or his neighbors must move—or suffer. Because in such cases there are substantial but irreconcilable interests on the part not only of the landlord and the objectionable tenant, but on the part of neighboring tenants as well, there may be no solution which permits the avoidance of all inconvenience for all concerned. Consequently, a mechanism such as forfeiture, which at least minimizes the potential for inconvenience, may be the best solution under the circumstances.¹⁷¹

169. Forfeitures may, of course, dependent upon the facts, vary in the degree of harshness which they involve, and there may be cases, e.g., where the tenant has a very valuable lease, in which "the harsh operation of the law" would call very strongly for equitable intervention against forfeiture. *Dunklee v. Adams*, 20 Vt. 415, 425 (1848).

170. The tenant's aggregate loss may also depend on the landlord's success in reletting the forfeited premises. If, by virtue of a "survival clause" in the lease or local law, the forfeiting tenant remains liable on a promise to pay rent or damages (e.g., *Hermitage Co. v. Levine*, 248 N.Y. 333, 162 N.E. 97 (1928)), the losses involved in a forfeiture could become substantial, even for a residential tenant whose lease calls only for a "market" rental. The costs of substitute premises, when added to the "survival" obligations under the forfeited lease, could result in a total burden which is substantial indeed, especially if the landlord did not relet the forfeited premises fairly quickly. However, as noted in the text, the alternative to imposing these losses on the offending tenant may merely be to force them upon his neighbors who, discontented because of the disturbance, may be constrained to abandon their own premises in violation of their own leases. The "implied warranty of habitability" might come to the neighbors' rescue—as suggested in section III(A)(3) *supra*. But this rescue still cannot, in the present state of the law, be guaranteed.

The loss to the forfeiting tenant may also be great if the tenant has a long-term lease at a favorable rental and/or has made substantial improvements in reliance upon a long-term tenancy. Neither of these is likely to be the case with residential tenants; however, a rent-control tenant whose possession is protected by law, and whose rent is kept below market by regulation, arguably stands to lose by forfeiture in the same way that a long-term commercial lessee stands to lose. For a discussion of "survival clauses," or the so-called "lessee's covenant of indemnity," see 1 Am. L. Prop., *supra* note 3, § 3.97.

171. See section III(B)(2)(c)(iv) *infra* for a discussion of the relationship of relative hardship notions to these issues.

Even on this basis, the forfeiture remedy can be criticized in that it does not solve the problem but only moves the problem to another location.¹⁷² Everybody has to live next to somebody. At least this is true in an urban setting. And unless we are to banish certain people from our cities altogether,¹⁷³ merely enforcing evictions now and again is arguably a solution to nothing. Perhaps one answer to this argument is that the threat of forfeiture, or a past eviction, will possibly have deterrent potential against offensive conduct; but on this basis forfeiture could be more effective than damages or injunction only in that its threat may seem more real. Perhaps a better answer is that, given the varying sensitivities of people and their varying levels of tolerance, it is not generally realistic to assume that an evicted tenant cannot make a satisfactory substitute arrangement. Of course, it may be said that the neighbors too could probably make satisfactory substitute arrangements. But they could usually do so only at a greater aggregate cost. Moreover, since any judicial hostility toward forfeitures would apply equally to the neighbors' new premises, the refugees from one annoying circumstance would be unprotected against encountering the same problems in their new place as well. Accordingly, even if forfeitures only move the problem around, this is probably more effective and less costly (to say nothing of more "fair") than it is to move around the people who have suffered as a result.

Of course, it is true that the use of forfeiture as a solution implies that some people, whose conduct is considered objectionable by others, will be prevented from living in the environment of their choice—not, one must admit, a very libertarian prospect. But unfortunately, when consideration is given also to the *neighboring* tenants' interests in living in the environment of *their* choice, this illiberal implication appears to be in either event unavoidable. Therefore, opting in favor of permitting a certain degree of self-segregation,¹⁷⁴ and permitting the enforcement thereof through lease forfeiture provisions, may be the only rational alternative to the random injustice of utter laissez-faire.

What the foregoing seems to suggest, in terms of policy, is that instead of the judicial abhorrence of forfeiture (at least in leasehold

172. However, no case has been found where the court refused to enforce a forfeiture on these grounds. Indeed, in one proceeding to evict a tenant who harbored roomers allegedly guilty of "narcotics addiction, prostitution, attempted rape, homicide and other disreputable occurrences," the court disregarded such arguments saying that they were not an "exculpatory shield against landlord's and the community's efforts to rid the area of this blight." *Remedco Corp. v. Bryn Mawr Hotel Corp.*, 45 Misc. 2d 586, 587-88, 257 N.Y.S.2d 525, 527-28 (N.Y. City Civ. Ct. 1965).

173. A worry expressed by the dissenting judge in *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 224 N.W.2d 843 (1975), who questioned whether former mental patients, stigmatized by their pasts, could ever find places to live.

174. See text accompanying notes 282-88 *infra*.

situations where behavioral standards are involved), forfeiture may indeed be the remedy of choice. Furthermore, despite judicial intimations to the contrary,¹⁷⁵ the forfeiture of leaseholds is not properly comparable to the drastic business of, *e.g.*, a condition subsequent on a fee. Leasehold forfeiture can be seen rather as merely a prearranged procedure for the cancellation of a mutual arrangement which has turned out to be bad. When the consequences to the neighbors of nonenforcement are considered, the harshness of lease forfeiture for breach of conduct or use restrictions is relative at worst.¹⁷⁶

c. Limitations on Forfeiture Which Apply Somewhat "Specially" to Forfeiture Agreements.

The harshness of lease forfeiture for conduct or use violations may at worst be relative, but the hardship to the tenant may still be, in many cases, entirely out of proportion to the benefit which the forfeiture is ostensibly asserted to protect.¹⁷⁷ And in many cases, courts have expressly relied on this ground of disproportionate hardship in relieving against forfeiture.¹⁷⁸

175. *Branmar Theatre Co. v. Branmar, Inc.*, 264 A.2d 526, 528-29 (Del. Ch. 1970).

176. For a further discussion, see section III(B)(2)(c)(iv) *infra*.

177. Of course, a landlord might be tempted to assert a forfeiture even though the benefit which the power of forfeiture was supposed to protect is of no interest to the landlord. That is, the landlord may be simply motivated by a desire to resume control of the premises for reasons unrelated to the tenant's violations such as when the tenant's lease is at a below-market rental or when an opportunity arises which the landlord believes would be more profitable than continuing with the existing tenant. Apparent examples of this are *Bernstein v. Bernstein*, 214 App. Div. 790, 210 N.Y.S. 539 (2d Dep't 1925), *aff'd per curiam*, 243 N.Y. 559, 154 N.E. 604 (1926) (see lower court's opinion at 210 N.Y.S. 539) and *Norman S. Riesenfeld, Inc. v. R-W Realty Co.*, 223 App. Div. 140, 148, 228 N.Y.S. 145, 153 (1st Dep't 1928); Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 Yale L.J. 704, 736-37 (1931). Obviously, this does not mean that the relative hardship question is resolved by balancing the value of the tenant's possession against the value which possession would have to the landlord. Similarly, even if the tenant's lease violations are the landlord's motivation in evicting, the value to the landlord of resuming possession *per se* is irrelevant to the question of relative hardship.

Incidentally, if the landlord is motivated to seek eviction by factors other than preservation of the benefit which the forfeiture was supposed to protect, the case would be one of "abusive motivation." See notes 50 & 55 *supra* and accompanying text.

178. *E.g.*, *Beck v. Giordano*, 144 Colo. 372, 356 P.2d 264 (1960); *Tollius v. Dutch Inns of America, Inc.*, 244 So. 2d 467 (Fla. Dist. Ct. App. 1970); *H.K.H. Dev. Corp. v. Metropolitan Sanitary Dist.*, 97 Ill. App. 2d 225, 247, 240 N.E.2d 214, 225 (1968); *Streeter v. Middlemas*, 240 Md. 169, 213 A.2d 471 (1965). The relative hardship rationale for relief against forfeiture is discussed in section III(B)(2)(c)(iv) *infra* and inferentially in the text accompanying notes 170-75 *supra*.

However, it was early held that the fact that forfeiture would cost the tenant nothing of economic value did not, in itself, prevent the court from relieving against the forfeiture. *Taylor v. Knight*, 22 Eng. Rep. 208 (Ch. 1725). The tenant was obligated to pay a so-called "rack-rent," *i.e.*, a rent equal to the full (rental) value of the land, and therefore no net economic benefit

Thoughts of disproportionate hardship seem to have weighed heavily in the courts' thinking when, in England, equity began dispensing relief to tenants from forfeitures which their defaults had triggered.¹⁷⁹ Equity granted such relief freely when the tenant's breach occasioned no damage or when full compensation in damages could be made.¹⁸⁰ Similarly, in cases of "little Damage"¹⁸¹ or a "trifling deficiency"¹⁸² in performance, equitable relief from forfeiture would be granted.¹⁸³ In all of these types of situations, of course, the hardship to the tenant of enforcing the forfeiture would appear to be disproportionate, either because the breach has caused little or no hardship to the landlord (in the case of little or no damages) or because any hardship to the landlord was merely transitory (in the case of a compensable loss).

Disproportionate hardship to the tenant does indeed appear to be a very logical basis for equitable intervention to prevent forfeitures, echoing as it does the broader equitable principles that "equity seeks to do justice"¹⁸⁴ and that equity will not assist in the enforcement of an obviously unbalanced bargain¹⁸⁵ or a penalty.¹⁸⁶ Moreover, compared with "harshness," "drasticness" or "abhorrence," disproportionate hardship is a somewhat more refined basis for relieving against forfeiture, taking into account as it properly does the hardship to others as well as the hardship to the breaching tenant. Nonetheless, the question remains whether disproportionate hardship to the tenant is itself a sufficiently refined test for determining the appropriateness of relief from forfeiture. The presence of a potential for disproportionate hard-

accrued for the tenant under his lease. However, the court held that relief against forfeitures was not limited to cases where beneficial leases were involved.

179. Law courts may have long granted relief from forfeitures covertly under the guise of interpretation (see text accompanying notes 160-65 *supra*), or of finding waivers by the landlord even where not actually intended (see text accompanying notes 154-59 *supra*). However, it was apparently the equity courts which were the first to openly relieve tenants from forfeitures.

180. E.g., *Sanders v. Pope*, 33 Eng. Rep. 108 (Ch. 1806); *Northcote v. Duke*, 27 Eng. Rep. 330 (Ch. 1765); *Hack v. Leonard*, 88 Eng. Rep. 335 (Ch. 1724); cf. *Wafer v. Mocato*, 88 Eng. Rep. 348 (Ch. 1724).

181. *Lovat v. Renelagh*, 35 Eng. Rep. 388, 390 (Ch. 1814).

182. *Sanders v. Pope*, 33 Eng. Rep. 108, 112 (Ch. 1806); accord *Dowell v. Dew*, 62 Eng. Rep. 918, 926 (Vice Chancellor 1842) (if "a tenant was to be ejected for a foul turnip-field, an unhinged gate, a broken shutter or small matters of that description, . . . there would scarcely be a lease in existence throughout the kingdom.").

183. Sometimes, a similar effect is achieved by statute. E.g., Cal. Civ. Code § 3275 (West 1970), as interpreted in *Atkins v. Anderson*, 139 Cal. App. 2d 918, 294 P.2d 727 (Dist. Ct. App. 1956); N.Y. Real Prop. Actions Law § 1951 (McKinney 1963).

184. Maxim quoted from *Ballentine's Law Dictionary* 413 (3d ed. 1969).

185. H. McClintock, *Equity* § 71, at 195-96 (2d ed. 1948).

186. *Id.* § 32, at 81-82. See also 1, 2 J. Pomeroy, *Equity Jurisprudence* §§ 72, 433 (5th ed. 1941).

ship appears to be inadequate as a general test for relief because, as a general criterion, it does not differentiate sufficiently among the *apparent* disproportionate hardship cases which are and are not deserving of relief.

The hardship of enforcing a forfeiture may appear to be disproportionate for several reasons:

—The hardship may appear disproportionate because the tenant has *substantially performed* his obligation and, though a technical default has occurred, it (and its adverse effect on the landlord or others) is trivial;

—The hardship may appear disproportionate where, despite a major default by the tenant, there has been *no real injury* occasioned by the breach;

—The hardship may appear disproportionate where, even though the tenant has committed a major default, causing substantial injury or loss to the landlord or others, the *payment of money damages will fully compensate* such injury or loss;

—Finally, the hardship may appear disproportionate even where money damages either cannot or will not, as a practical matter, supply adequate compensation for the substantial injury or loss to the landlord or others caused by a major default. In this fourth type of case (which is probably most typical of the cases where neighbors are seriously annoyed by conduct restriction breaches), the potential for disproportionate hardship exists because the annoyance caused by the breach, though substantial, may still be less than the *relative hardship* of eviction.¹⁸⁷

Even though the hardship to the tenant may be disproportionate in each of these four types of cases, the four types differ radically in terms of the protection which is afforded to benefits bargained for by the landlord. In the first three types of cases, the intended benefits of the breached agreement would be, we may assume, sufficiently, even if not fully, protected. In the fourth type of case, however, relief against forfeiture would mean no protection at all for the benefits that the tenant's compliance was intended to provide. This loss of protection, though certainly an important factor in deciding whether to relieve against a forfeiture,¹⁸⁸ cannot be allowed alone to control the determination of whether to grant such relief in a particular case. For even if

187. Notice that the comparison here is between the hardship of *eviction* as against the burden which the violator's breach causes to others. The relative hardship of eviction should be carefully distinguished from the relative hardship of compliance, the latter being (arguably) relevant to the reasonableness and validity of the restrictions themselves as well as to the appropriateness of the forfeiture remedy. See note 315 *infra*.

188. See 1 Am. L. Prop., *supra* note 3, § 3.96; Note, Equitable Relief from Forfeiture of a Lease Incurred by Breach of Covenant, 20 Harv. L. Rev. 640 (1907).

enforcement of a forfeiture may be necessary to provide the landlord or others with a substantial benefit for which the landlord has bargained, the possibility remains that the cost of assuring that benefit (*i.e.*, an eviction) is unjustifiably high given the value of the benefit protected. Other differences between the four types of cases, and their respective appropriateness for relief from forfeiture, are discussed below.

i. *Substantial Performance*: The case of substantial performance by the tenant should be an easy one for granting relief from forfeiture, and it is generally held that relief is proper in such cases.¹⁸⁹ Since the tenant's substantial performance will, by definition, provide virtually all that has been bargained for, it would be senselessly oppressive to extinguish the tenant's bargained-for benefits based upon a trivial performance shortfall. This is true even if the terms of the lease appear to require *exact* performance by the tenant as a condition to his continued possession.¹⁹⁰ To the extent that the lease gives such a drastic effect to a trivial performance shortfall, without regard to the substantial performance already provided, it is an obviously unbalanced bargain suitable for equitable type intervention.¹⁹¹

189. E.g., *Hughes v. Pallas*, 84 Colo. 14, 267 P. 608 (1928); *Grassham v. Robertson*, 277 Ky. 605, 126 S.W.2d 1063 (1939); *Intertherm, Inc. v. Structural Sys., Inc.*, 504 S.W.2d 64 (Mo. 1974); *Ogden v. Hamer*, 268 App. Div. 751, 48 N.Y.S.2d 500 (1st Dep't 1944); *Norman S. Riesenfeld, Inc. v. R-W Realty Co.*, 223 App. Div. 140, 228 N.Y.S. 145 (1st Dep't 1928).

190. Note that even where the lease appears to prescribe forfeiture for even trivial defaults, it may be fairly debated whether such an interpretation truly reflects what the parties really intended. Cf. *Atkin's Waste Materials, Inc. v. May*, 34 N.Y.2d 422, 314 N.E.2d 871, 358 N.Y.S.2d 129 (1974). The rule that use restrictions are strictly construed against the landlord (see notes 23 & 25 *supra* and accompanying text) provides an appropriate basis for avoiding forfeitures in such cases.

Sometimes, when a court refuses to enforce a forfeiture for an alleged tenant breach, it is difficult to tell whether the decision was reached on a "substantial performance" theory or by a strict construction of the lease provision allegedly in default. E.g., *Beck v. Giordano*, 144 Colo. 372, 356 P.2d 264 (1960); *Grassham v. Robertson*, 277 Ky. 605, 126 S.W.2d 1063 (1939); *Phillipse Towers, Inc. v. Ortega*, 61 Misc. 2d 539, 305 N.Y.S.2d 546 (Yonkers City Ct. 1969); *Carbon Fuel Co. v. Gregory*, 131 W. Va. 494, 48 S.E.2d 338 (1948). That is, it is unclear whether the court relieved against the forfeiture *despite* a technical default by the tenant or whether, by its interpretation of the lease, the court concluded that there was no default at all.

Ideally, the question of whether to enforce a forfeiture in cases of actual (albeit trivial) defaults ought to be kept analytically separate from the quite different question of whether or not there was a default at all. In the case of actual (though nonsubstantial) defaults, the landlord might still theoretically enforce the tenant's obligation by damage recovery, or, possibly, by injunction. He should not, of course, be entitled to any relief if there was no default at all. However, because of the difficulties in using damages or injunctive relief as enforcement techniques (see discussion in section III(B)(1) *supra*), it is often not significant, as a practical matter, that courts sometimes may strictly construe a lease contrary to actual intention where the avoidance of forfeiture might be more appropriately justified on a substantial performance theory.

191. See discussion of the analogous problem of overly strict conduct restrictions in section III(D)(2)(c) *infra*.

ii. *Absence of Real Injury*: Not so simple is the second type of apparent disproportionate hardship case, where the tenant's performance falls substantially short of the promise, but no real injury is suffered by the landlord or others.¹⁹² An example might be the case of a tenant who plays an electronic piano with earphones in violation of a lease prohibition on playing musical instruments after 9:00 p.m.

Obviously, if no one is truly damaged by the tenant's breach, there is little merit in imposing any hardship on the tenant for committing it.¹⁹³ The case is effectively indistinguishable from one of substantial performance even though, literally, the tenant may have committed a total default with respect to the restriction in question.

However, unless the landlord or other beneficiaries of the restriction are truly indifferent as to whether the tenant performs the particular obligation in default, it cannot be said that the breach has caused no injury.¹⁹⁴ For, absent such indifference, the tenant's default would by definition disappoint the landlord's expectation that the bargained-for benefit of the tenant's performance would be forthcoming. This disappointed expectation may not be damage in the legal (*i.e.*, tort) sense: *i.e.*, it may be *damnum absque injuria*. But the fact that the tenant may not have been under a law-imposed duty to supply the defaulted performance might be precisely the reason the landlord bargained for it by agreement. For example, the landlord may have sought by agree-

Another analogy, albeit imperfect, may be drawn to the rule of substantial performance with respect to conditions in contracts. There, a *material* breach of a condition is ordinarily required before the breaching party forfeits the quid pro quo for which he has bargained. However, in contract law, *strict* performance of an express condition is generally required, meaning that strict performance of lease conditions would be the rule if leases were treated as ordinary contracts. Another distinction between lease law and contract law is that contract conditions are usually conditions precedent whereas conditions in leases, being limitations on a conveyance of property, are, of course, conditions subsequent. See generally J. Calamari & J. Perillo, *Contracts* §§ 138-40 (1970).

192. See, e.g., *Cooley v. Bettigole*, 301 N.E.2d 872 (Mass. App. 1973) (forfeiture allowed for breach of covenant not to use premises for any purpose reasonably objectionable to landlord; tenant had placed cardboard sign in apartment window); *River Dev. Co. v. Ellsworth*, 44 App. Div. 2d 902, 356 N.Y.S.2d 150 (4th Dep't 1974) (forfeiture allowed for breach of restriction on a particular type of commercial use).

193. However, if the breach is willful or deliberate, the court may enforce the forfeiture even if the damage to the landlord was insignificant. See *Bernstein v. Bernstein*, 214 App. Div. 790, 210 N.Y.S. 539 (2d Dep't 1925), *aff'd per curiam*, 243 N.Y. 559, 154 N.E. 604 (1926).

194. Even if the landlord is less than totally indifferent he may still be virtually indifferent so that the injury is negligible. This sort of situation is probably indistinguishable from the no injury case.

However, as the degree of indifference declines, and the injury resulting from tenant defaults correspondingly grows, the case becomes one in which substantial hardship will potentially exist on both the landlord's side and the tenant's, depending on whether forfeiture is granted or not. The case becomes, therefore, one of *relative* hardship, discussed in section III(B)(2)(c)(iv) *infra*.

ment (*e.g.*, prohibiting dogs—or snakes) to protect special or idiosyncratic concerns, of himself or of the greater number of his tenants, which the general law (*e.g.*, of private nuisance) would not protect.¹⁹⁵ Or he may have sought to protect himself from injuries (*e.g.*, to the rental yield of his building) which the law considers either too conjectural to compensate, or too remote to permit the recovery of damages by the landlord.¹⁹⁶ If this is so, it would hardly do to say that the tenant had no obligation under his agreement just because he would have had no obligation in the absence of an agreement. Accordingly, in determining whether the tenant's default has resulted in no injury the notion of injury should not be limited to injuries ordinarily cognizable as a matter of law.¹⁹⁷ Any performance as to which the landlord or other intended beneficiaries are not truly indifferent will, if defaulted upon, result in injury.¹⁹⁸ If so, the case cannot be one appropriate for

195. See section III(D) *infra*.

196. A prohibition on signs in the windows is an example. See *Cooley v. Bettigole*, 301 N.E.2d 872 (Mass. App. 1973) and text accompanying note 132 *supra*.

197. Courts sometimes express this by saying that, even in the absence of compensable monetary loss, damages will be presumed for purposes of equity. *Jos. Guidone's Food Palace, Inc. v. Gardner & Guidone, Inc.*, 153 Ind. App. 9, 285 N.E.2d 834 (1972).

198. Of course, this is not to say that whenever a particular performance is called for by the lease any default in that performance will cause damage to the landlord. The lease may impose many requirements on the tenant as to which the landlord is totally indifferent. This may occur because the parties do not bother to tailor a form lease to their specific situation, with the result that restrictive provisions are left in the form even though neither party cares to have them. In the case of residential tenancies, it is probable that the use of form leases almost always results in superfluities of no concern to the landlord. See *Bentley, An Alternative Residential Lease*, 74 Colum. L. Rev. 836, 847 (1974). Less commonly, tenant obligations under a lease may become immaterial to the landlord due to a change of circumstances. Cf. *Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101 (1927).

Because the lease may well impose obligations on the tenant as to which the landlord is indifferent, if a landlord desires to cut short a tenant's estate for "improper" reasons, he may be tempted to avail himself of one of these superfluous provisions as a technical grounds for eviction. See note 177 *supra*. Analytically, such attempts may be considered to be cases of abusive motivation (see notes 50 & 55 *supra* and accompanying text); the absence of express language allowing termination without cause (see note 231 *infra*) justifies the presumption that none was intended.

The possibility of abusive motivation means that, absent damage cognizable as a matter of law, the court cannot simply take the landlord's word for the fact that he was injured by the tenant's breach. Neither can the court reliably utilize some sort of reasonable man test to ascertain the existence of damage (or lack of indifference); to do so would destroy one of the most useful functions of private agreements limiting use, *i.e.*, the protection of special or idiosyncratic concerns which the general law cannot take into account. See text accompanying notes 339-41 *infra*. However, because the proof to corroborate the landlord's claims of damage will often be evidence of prior course of practice, the doctrine of waiver and the technique of strict (or practical) construction will also often be available as bases for avoiding the asserted forfeiture in cases of no injury.

relief from forfeiture on a "substantial performance" type of theory. If relief from forfeiture is to be available nonetheless, for example on relative hardship grounds, it must be *despite* the substantial hardship to others which will result.¹⁹⁹

iii. *Substantial But Compensable Breaches*: The third type of case of apparent disproportionate hardship is where the tenant's default causes a substantial injury or loss but one which is fully and realistically²⁰⁰ compensable. In this type of case, the landlord (or others) can have substantially the benefit bargained for (or its value) without the necessity of enforcing a forfeiture, provided only that the tenant is solvent and that the relief from forfeiture is conditioned upon the tenant's paying the full compensation due.²⁰¹ When the tenant does make full payment, the case becomes, in effect, a case of substantial performance, appropriate for relief from forfeiture, as previously discussed.

However, two assumptions must be made in order to convert this third type of case into essentially a substantial performance case. First, it must be assumed that the forfeiture power is intended as security and not as primary value bargained for under the lease.²⁰² Second, it must be assumed that the bargained-for benefit can be effectively rendered by the payment thus secured.²⁰³ Where these assumptions are appropriate, forfeitures may be properly relieved against, on essentially a substantial performance theory, whenever the power of forfeiture has served its purpose by inducing the payment due.²⁰⁴ In fact, these two assumptions probably do apply in the greatest number of

199. See discussion in section III(B)(2)(c)(iv) *infra*.

200. The word "realistically" is inserted here to take account of the fact that neighboring tenants may have no rights of compensation at all in relation to the violative conduct (see notes 38-39 *supra*), or that any rights they do have may be, as a practical matter, not enforceable (see text following note 40 *supra*). Incidentally, just because the leases in question preclude tenants from suing each other for breach of their provisions, it does not follow that tenants should not be regarded as beneficiaries of those provisions and entitled to their protection, for the purposes here under discussion. See note 39 *supra*.

201. Of course, prior to the time that the tenant pays the full compensation, the landlord (or other beneficiaries) is deprived by the tenant's default of a substantial benefit for which the landlord has bargained. Meanwhile, however, the power of forfeiture is held by the landlord as a powerful incentive to the tenant to perform and as an "out" in case the tenant does not. Cf. section III(B)(2)(c)(iv) *infra*.

202. See *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385, 396, 88 N.W. 300, 303 (1901).

203. See *Cesar v. Virgin*, 207 Ala. 148, 92 So. 406 (1921); *Hill v. Barclay*, 33 Eng. Rep. 1037 (Ch. 1810). See generally 3 J. Story, *Commentaries on Equity Jurisprudence* §§ 1732-37 (14th ed. 1918); *Annot.*, 69 L.R.A. 833 (1906).

204. "[T]he theory . . . all the way through [is] that there has been no real violation of the contractual intent of the parties." *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385, 394, 88 N.W. 300, 302-03 (1901).

landlord-tenant forfeiture cases, mostly involving the failure to make a payment (typically rent) as the event of default. It was apparently on the basis of these two assumptions, and by easy analogy to the rules applicable to mortgages (where they most clearly applied), that equity began relieving against forfeitures triggered by tenant defaults.²⁰⁵ And it remains practically universally true that, for nonpayment of rent, relief from forfeiture will be granted provided only that the tenant make good on the arrearages.²⁰⁶ However, these assumptions do *not* apply in many situations of tenant default, notably including defaults in the observance of conduct restrictions or of use restrictions generally. The failure to distinguish those cases where they do not apply led to a generosity in relieving against forfeiture that, even at an early date, "became in some degree alarming."²⁰⁷

The reason that the assumptions do not apply to conduct restriction cases is that monetary damages are simply unsuitable to compensate for conduct restriction breaches, at least in the residential context.²⁰⁸ Indeed, it is rare to find a case of this genre which even mentions the possibility of monetary recompense for past breaches in relieving against forfeiture.²⁰⁹ And in no known American case has a court even considered giving compensation to neighboring tenants who are damaged by a defaulting tenant's violation of a use or conduct restriction.²¹⁰ The fact that the benefit sought by conduct restrictions is monetarily noncompensable means that denial of forfeiture for violation of such restrictions will usually (subject to the effectiveness of

205. See cases cited at note 180 *supra*.

206. "The covenant for forfeiture . . . was intended 'as a mere security' . . ." *Cedrom Coal Co. v. Moss*, 230 Ala. 32, 34, 159 So. 225, 227 (1935). See also *Thompson v. Coe*, 96 Conn. 644, 115 A. 219 (1921); *Famous Permanent Wave Shops, Inc. v. Smith*, 302 Ill. App. 178, 23 N.E.2d 767 (1939); *Farmer v. Pitts*, 108 Neb. 9, 187 N.W. 95 (1922); 1 Am. L. Prop., *supra* note 3, § 3.96.

207. *Eaton v. Lyon*, 30 Eng. Rep. 1223, 1224 (Ch. 1798). "They got into the habit of construing terms and conditions of covenants as being only *in terrorem* . . .," i.e., as a penalty to induce performance. *Id.* However, the English equity courts would withhold relief from forfeiture when compensation via damages did not appear possible. E.g., *Wafer v. Mocato*, 88 Eng. Rep. 348 (Ch. 1724); see 3 J. Story, *Commentaries on Equity Jurisprudence* § 1737 (14th ed. 1918).

208. See section III(B)(1) *supra*.

209. One example is *Sussman Volk Co. v. 88 Delicatessen, Inc.*, 100 N.Y.S.2d 303 (Sup. Ct. 1950). The court considered the possibility of damages, but denied recovery (while enjoining the complained of use) because the damages were too difficult to quantify monetarily. See also *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304, 5 N.E.2d 829 (1936); *Brooklyn Properties, Inc. v. Cargo Packers, Inc.*, 1 App. Div. 2d 1040, 152 N.Y.S.2d 359 (2d Dep't 1956) (alterations of premises in violation of lease; damages allowed in lieu of forfeiture). In most use restriction cases where relief from forfeiture is given, there is simply no mention of compensation to the landlord for the prior breaches.

210. See note 39 *supra* and accompanying text.

possible injunctive relief) frustrate the obtaining of the benefits, to himself and to others, bargained for by the landlord.²¹¹ This belies one of the two above assumptions which are required in order to justify relief from forfeiture on a "substantial performance" type of theory, namely that the bargained-for benefit can be effectively protected by a payment.

Moreover, since the breach of conduct restrictions is generally noncompensable monetarily, it is highly doubtful whether there is any justification for the other of the two assumptions, namely that forfeiture powers are intended to give the landlord merely a security. The unsuitability of the damage remedy makes it pointless to provide security for the monetary payment which it contemplates. Of course, when applied to the obligation to pay rent, or to perform other acts which have quantifiable monetary significance to the landlord, a power to forfeit can indeed operate like a security, much as a mortgage. If the payment required is not forthcoming, the landlord (like a mortgagee) has recourse to a valuable asset (possession for the remainder of the lease) in order to get something that is at least comparable to what he had originally bargained for. However, when applied to conduct restrictions, the power of forfeiture cannot serve even a similar purpose.²¹² Hence, the other of the two above assumptions is belied. The power of forfeiture cannot be assumed to be intended as security, at least as applied to breaches of conduct restrictions.

Thus, in conduct restriction cases, it is doubtful that we can accept either of the assumptions necessary to convert a "compensable breach" case into a "substantial performance" type case. Accordingly, where a forfeiture is asserted for a breach of conduct restriction, it is unlikely that the theoretical possibility of compensation by money damages would in itself ever justify relief from forfeiture.

iv. *Substantial Noncompensable Breaches*: If, as just asserted, forfeiture powers are not useful (and probably not intended) to serve as "security,"²¹³ i.e., a secondary right to secure some other, primary

211. In effect, this may mean that the power to prescribe use restrictions is itself limited, since the absence of an effective remedy to enforce use restrictions means that the "rights" or benefits which they purport to confer are more apparent than real. See Macneil, *Power of Contract and Agreed Remedies*, 47 Cornell L. Rev. 495, 516 (1962).

212. The realization that a power of forfeiture cannot serve as a security in such cases seems to have been behind the eventual English rule which was generally to deny relief from forfeitures when the tenant's breach was of a "collateral covenant," e.g., a covenant to repair, to insure, or to use for a particular purpose. See *Hill v. Barclay*, 33 Eng. Rep. 1037 (Ch. 1810); 3 J. Story, *Commentaries on Equity Jurisprudence* §§ 1734-35 (14th ed. 1918). However, American courts have been considerably less rigid in refusing relief from forfeiture in "collateral covenant" cases. See 1 Am. L. Prop., *supra* note 3, § 3.96; Annot., 69 L.R.A. 833, 853-58 (1906).

213. In the conduct restriction context.

value bargained for under the lease, the question may then be asked: What purpose are such powers to serve? An obvious possibility is that forfeiture powers are created to work as penalties, operating *in terrorem* against a tenant contemplating a default.

Although courts relieve against forfeitures both because they are considered to be "merely security"²¹⁴ and to be penalties,²¹⁵ and although the two functions often overlap, they are different. As security (*e.g.*, for rent), forfeiture gives the landlord a collateral backup in case the agreed performance fails; a penalty gives him only a weapon to coerce the agreed performance itself. And whereas a security is generally enforceable whenever necessary to protect the interest secured, the enforcement of a penalty would raise rather dramatically the issue of relative hardship. For a penalty, by definition, imposes a burden which is disproportionate to the loss from the breach which is penalized.²¹⁶ Indeed the whole idea that relative hardship²¹⁷ should justify relief from forfeiture is at bottom a reflection of the penalty nature of forfeitures. And courts have tended, for at least three centuries, to view a landlord's forfeiture powers as being in the nature of a penalty.²¹⁸

Most people, based on introspection and perhaps "common knowledge," would probably agree that the threat of eviction exerts a deterrent effect on tenants who would violate their leases. Furthermore, it is probably fair to assume that landlords, when they think about it, consider that their powers of forfeiture exert such a deterrent effect. Indeed, if one may talk about the purpose of landlords in inserting forfeiture provisions in leases, the purpose may probably be said to be more to promote compliance than to supply a basis for evicting violators. After all, a landlord gets no return from empty apartments.

It may be speculated that the coercive effect of forfeitures, in

214. See discussion in section III(B)(2)(c)(iii) *supra*.

215. See following discussion in this section.

216. H. McClintock, *Equity* § 32, at 81-82 (2d ed. 1948).

217. The reference here is to relative hardship of the remedy compared with the hardship to others resulting from noncompliance. As is elsewhere pointed out, the relative hardship of *compliance* (compared with the hardship resulting from noncompliance) presents an entirely different set of questions. See note 315 *infra*.

218. See note 207 *supra*. More recent expressions of this tendency include *Fly Hi Music Corp. v. 645 Restaurant Corp.*, 64 Misc. 2d 302, 304-05, 314 N.Y.S.2d 735, 738 (N.Y. City Civ. Ct. 1970), *aff'd mem.*, 71 Misc. 2d 302, 335 N.Y.S.2d 822 (App. T. 1972); 51C C.J.S. *Landlord and Tenant* § 102 (1968); 2 J. Pomeroy, *Equity* § 459 (5th ed. 1941); 3 J. Story, *Commentaries on Equity Jurisprudence* § 1732 (14th ed. 1918); Bentley, *An Alternative Residential Lease*, 74 *Colum. L. Rev.* 836, 847 (1974). For the observation that courts often fail to distinguish between penalties and forfeitures, see Macneil, *Power of Contract and Agreed Remedies*, 47 *Cornell L. Rev.* 495, 515 (1962).

addition to disproportionate hardship, accounts for a good deal of the judicial indisposition towards enforcing them, even though damages or injunctive relief may be by and large ineffective remedies. But on a policy basis it would seem that it is not so much the coercion itself which is objectionable but rather the disproportionate hardship involved in the coercion.²¹⁹ That is, deterring people from breaching their agreements is not per se objectionable, but it becomes so if accomplished through sanctions which are disproportionate to the value of the agreement to be kept.²²⁰ Thus, both law and equity will allow compensation but both have long refused to aid in the enforcement of private penalties which overcompensate a promisee at the expense of the promisor.²²¹ Powers of forfeiture, which can be easily seen as being essentially overcompensation, would thus seem to be appropriately subject to the same refusal even if they had no coercive effect at all.

However, consistent with the penalty-as-coercion view, relief from forfeiture may be denied *despite* disproportionate hardship where the tenant's breach has been "willful,"²²² in "bad faith,"²²³ or the result of "gross negligence."²²⁴ In England, in reaction to early generosity in relieving against forfeiture,²²⁵ it became established that, except in nonpayment cases, relief could be granted to the tenant only in cases of breach due to "fraud, accident, surprise, or mistake,"²²⁶ a rule which also acquired a following in some American jurisdictions.²²⁷ The result

219. After all, an important function of agreements, and perhaps the most important, is to serve as a lever for interparty adjustments. See Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *Yale L.J.* 704, 706, 716-26 (1931).

220. Implicit in this statement is the assumption that the objects of the agreement to be performed do not make the agreement itself one which, from a policy viewpoint, the courts are reluctant to enforce. See section III(D)(2) *infra*. Traditionally, agreements restricting the use of land are viewed with considerable disfavor by the courts. See notes 23 & 25 *supra*. Thus, disfavor of conduct restrictions themselves, together with a distaste for the mechanism selected to induce performance, has in itself provided a double reason for refusing enforcement via forfeiture in the usual case.

221. Macneil, *Power of Contract and Agreed Remedies*, 47 *Cornell L. Rev.* 495, 499-514 (1962).

222. E.g., *Bonfils v. Ledoux*, 266 F. 507, 511 (8th Cir. 1920); *Dreisonstok v. Dworman Bldg. Corp.*, 264 Md. 50, 284 A.2d 400 (1971); *Darvirris v. Boston Safe Deposit & Trust Co.*, 235 Mass. 76, 126 N.E. 382 (1920); *Bernstein v. Bernstein*, 214 App. Div. 790, 210 N.Y.S. 539, 541 (2d Dep't 1925), *aff'd per curiam*, 243 N.Y. 559, 154 N.E. 604 (1926).

223. E.g., *Blue Ridge Metal Mfg. Co. v. Proctor*, 327 Pa. 424, 194 A. 559 (1937).

224. E.g., *Kann v. King*, 204 U.S. 43, 58-61 (1907).

225. See note 207 *supra*.

226. 14 *Halsbury's Laws of England* ¶ 1150, at 621 n.(e) (3d ed. 1956).

227. E.g., *Thomas v. Given*, 75 *Ariz.* 68, 251 P.2d 887 (1952); *Finkovitch v. Cline*, 236 Mass. 196, 128 N.E. 12 (1920); *Baxter v. Lansing*, 7 *Paige* 350 (N.Y. Ch. 1838); *Henry v. Tupper*, 29 *Vt.* 358 (1857).

is a policy which, by its exceptions, implicitly recognizes the deterrence flavor of forfeiture but which permits a very free imposition of the "penalty" nonetheless.

Given the definite penal aspect of lease forfeitures, it may be asked why courts enforce them at all.

One reason may be historical. By the time equity began relieving against forfeitures (beginning with mortgages), the concept of defeasible estates may simply have been too well entrenched²²⁸ to permit a general prohibition on them.

There are, however, important policy reasons for enforcing forfeitures as well. Defeasance for certain acts, *e.g.*, committing waste, may be the only practical way to protect a future interest holder from the acts' adverse consequences. The same may be said of defeasance conditioned on activities which many may find objectionable but against which the ordinary remedies of law and equity do not effectively protect.²²⁹ In eliminating such objectionable conduct, forfeiture may operate penally, both in terms of its coercive effect and of the disproportionate burden which it imposes on the evicted violator. But the only alternative to permitting the use of the forfeiture mechanism for protection may be to license the objectionable conduct unconditionally.²³⁰

Finally, though, the question may be appropriately asked whether in the conduct or use restriction context it is proper to treat forfeitures as penalties at all.

Like security, a private penalty is a secondary right which is bargained for, not for its own sake, but in order to help assure protection of some other primary value. In the case of conduct restrictions, the primary value so protected would be the tenants' conformity to conduct standards designed to promote a desired intrabuilding environmental condition or character. By deterring non-compliance, a penalty (or more precisely, its threat) can promote the achievement of this primary value.

However, it does not follow that a power of forfeiture is merely a penalty in the sense of a secondary right bargained for only to help assure some other value which is primary. The power of forfeiture may be viewed as being itself a primary value, bargained for as an alternative, similar to a commercial-lease termination clause.²³¹

228. Conditions on the continuation of estates apparently date back to the year 1250 and before. See Bordwell, *The Common Law Scheme of Estates*, 18 Iowa L. Rev. 425, 441 (1933).

229. See section III(B)(1) *supra*.

230. Assuming that neither damages nor injunctive relief offers effective or appropriate recourse. See *id.*

231. For example, a clause calling for termination on sixty days notice, if the landlord should

Commercial-lease termination clauses take account of the fact that, at the beginning of a long-term arrangement, it is sometimes impossible to predict accurately the future course of events. Accordingly, it is logical to make a sort of prearrangement for rescission in case certain events, anticipated but not necessarily expected, should arise, making continuation of the basic arrangement undesirable to the party who bargained for the right to rescind. This prearrangement for rescission may be seen as precisely the function which forfeiture powers, tied to conduct restrictions, serve. They are a solution to an otherwise insoluble problem of proximity.

The author has found no case which purports to treat commercial-lease termination clauses as penal, probably because their operation is usually triggered by events outside the tenant's control.²³² It is only when the tenant's own acts can trigger the termination that the resulting loss of possession can logically be considered a deterrent or "penal."²³³

However, the possible deterrent effect of lease forfeiture powers tied to conduct restrictions should not cause one to lose sight of the fact that, like commercial-lease termination provisions, they also represent a bargained-for alternative right. The alternatives are (i) continuation of the landlord-tenant relationship so long as it is mutually satisfactory as defined in the lease and (ii) termination of that relationship if, as events develop, it turns out not to have been propitiously entered into in the first place.²³⁴

decide to sell the premises or if some other unanticipated commercial contingency should occur. It has been said that such a clause creates "a tenancy for years with a special limitation" (*Indian Ref. Co. v. Roberts*, 97 Ind. App. 615, 634, 181 N.E. 283, 290 (1932)) and such clauses seem to receive routine enforcement (2 R. Powell, *Real Property* ¶ 245[1] (Supp. 1975). See also *Cleveland Wrecking Co. v. Aetna Oil Co.*, 287 Ky. 542, 154 S.W.2d 31 (1941); *Acme Mkts., Inc. v. Dawson Enterprises, Inc.*, 253 Md. 76, 251 A.2d 839 (1969); 1A A. Corbin, *Contracts* § 265 (1963); 1 Tiffany, *supra* note 17, § 149).

232. See *Sabinson v. Jelin Prods., Inc.*, 55 N.Y.S.2d 851, 853 (Sup. Ct. 1945) ("The [termination] agreement did not provide for a forfeiture."). But cf. *Shell Oil Co. v. Marinello*, 120 N.J. Super. 357, 294 A.2d 253 (Super. Ct. 1972), modified, 63 N.J. 402, 307 A.2d 598 (1973), cert. denied, 415 U.S. 920 (1974) (termination of gas station franchise); *Mobil Oil Corp. v. Lione*, 66 Misc. 2d 599, 322 N.Y.S.2d 82 (Dist. Ct. 1971).

233. In the commercial-lease termination situation, it does not make sense to say that the tenant is being "punished" (although he may be greatly inconvenienced) for the external events triggering termination; it is only in the conduct related forfeiture case that the tenant is in a sense punished by the forfeiture—in the sense that it at least may have once been in the tenant's power to avoid the forfeiture triggering conduct. But the fact that the tenant could have avoided the loss of possession by simply doing what he said he would do (as one of the inducing factors to the lease), seems if anything to give even more reason for routine enforcement of conduct related lease forfeitures, in the manner of commercial-lease terminations. At least it would not follow that the enforcement of such forfeitures should, in the manner of ordinary penalties, be limited to cases where the degree of harm done or guilt justifies the punishment.

234. It may be objected that, in the typical residential form lease, only the landlord has the

In any event, to deny effective enforcement of landlord-imposed conduct restrictions prevents the landlord from giving his tenants legal protection for the environmental benefits which, among other things, may have induced the tenants to enter into their leases. The landlord can offer the tenant legal protection against wrongdoers' interferences with the physical benefits offered in exchange for the rent, including benefits (*e.g.*, air conditioning) which the tenant is not entitled to as a matter of law. There appears to be no reason in principle why the landlord should not likewise be able to offer effective protection for psychic benefits (*e.g.*, a tasteful setting or freedom from neighboring piano players) which the law does not obligate the landlord to give.²³⁵ Moreover the fact that the lease may not legally *require* the landlord to supply the particular benefit or protection does not suggest in any way that he should not be *permitted* to supply both the benefit and the protection if he so desires. However, whenever conduct restrictions are not effectively enforced, the result may be to prevent the landlord from assuring his tenants important benefits which attracted them to the building in the first place.

The only practical alternative for tenants denied such benefits (but who desire to have them) may be to move to another building, one having conditions or character better suited to their needs. Again, though, absent legal protection of such benefits, the new building may itself become unsuitable, requiring another move, *ad infinitum*. And to the extent that tenant conduct restrictions cannot be effectively enforced, it is entirely likely that any new building which appears at first to be suitable will, eventually, become unsuitable, since there would be little legal deterrence to prevent prospective tenants, who plan to violate the conduct restrictions, from moving in.

If a competition between irreconcilable interests cannot be resolved without hardship to somebody, and if forfeiture resolves that competition with the least overall hardship, then the hardship which forfeiture does cause should be disregarded. To do otherwise²³⁶ would be to deprive others (neighboring tenants and derivatively the landlord) of

power to terminate the relationship when it turns out not to have been propitiously entered into. But this is beside the point. Whether or not a bargain is fair is not measured solely by the degree of identity (or content reciprocity) of its terms. Beyond this, it may be added that the applicability of the implied warranty of habitability may well make the power of termination "mutual," whether the lease says so or not. See section III(A)(3) *supra*.

235. Courts have occasionally recognized that a landlord should be permitted to impose restrictions which protect only psychic benefits, and to have enforcement by forfeiture. *Fin-kovitch v. Cline*, 236 Mass. 196, 128 N.E. 12 (1920). See also *Cooley v. Bettigole*, 301 N.E.2d 872 (Mass. App. 1973) (signs); *Triangle Management Corp. v. Inniss*, 62 Misc.2d 1095, 312 N.Y.S.2d 745 (N.Y. City Civ. Ct. 1970).

236. In the absence of adequate substitute remedies. See section III(B)(1) *supra*.

benefits which the landlord bargained for in the lease—benefits which the breaching tenant agreed to provide. Instead of having the intended benefit of being either free of or rid of objectionable neighbors, the beneficiaries of the conduct restrictions would be required either to suffer the annoyance or move out themselves.²³⁷ Thus, in refusing to enforce a forfeiture on grounds resembling disproportionate hardship, that “the punishment [should] fit the crime,”²³⁸ the court would be virtually licensing the nonperformance of both parts of a two-part promise, *viz.*, that the defaulting tenant comply with certain restrictions and that his possession should terminate in the event of noncompliance. If neighbors feel compelled to move away from a violator’s annoyances, the persons to be protected by the first part of the promise would, in effect, end up suffering the punishment prescribed by the second. In any event, the neighbors would suffer some punishment due to the breach.

Due to the fact that, given a substantial noncompensable breach, the neighbors would almost inevitably suffer some punishment in any event, there are good reasons for disregarding the hardship which forfeiture does cause, even if it may be *disproportionate*. This is because, as will be developed more fully in a later section,²³⁹ there is simply no way of measuring whether the relative hardship to the tenant facing eviction exceeds the burdens of his noncompliance on the neighbors whom he has annoyed. Certainly, in determining relative hardship, the interests of *all* affected parties should be taken into account, and the hardships should be weighed not only in terms of their individual burdens but also in terms of the numbers of people on whom the burdens fall. This suggests in itself that on balance the relative hardship will probably be greater in aggregate for the neighboring tenants (if only because of their usually greater number) thus favoring enforcement of the forfeiture. But there is no way to be sure. In this relativistic morass of multilateral comparative hardships, the only island of certainty is the offending tenant’s two-part agreement—to comply or to leave. The enforcement of this agreement according to its terms would be, it is submitted, the only way to assure “just” results in the usual case, where the burdens of noncompliance fall on many. And this is so even though, in extraordinary cases, such enforcement may work injustice to a tenant whose substantial noncompensable breach did not bother the neighbors enough to make them wish that they did not have to put up with it.²⁴⁰

237. Or, in the landlord’s case, sell out.

238. *Fly Hi Music Corp. v. 645 Restaurant Corp.*, 64 Misc. 2d 302, 305, 314 N.Y.S.2d 735, 738 (N.Y. City Civ. Ct. 1970), *aff’d mem.*, 71 Misc. 2d 302, 335 N.Y.S.2d 822 (App. T. 1972).

239. See section III(D) *infra*.

240. It may also be argued that relative hardship is an inappropriate basis for relieving

Thus, it is suggested that the irony of punishing the protected may be avoided only by frankly recognizing forfeiture provisions not as being penalties, or relative hardship cases, but rather as being bargained-for alternatives—analogous to commercial-lease termination clauses. Despite the deterrent effect of such powers, they also serve as an important bargained-for alternative right to get out of an arrangement gone sour.

d. *Conditional Stays to Mitigate the Harshness of Forfeiture*

Although forfeiture may be the least harsh remedy when all of the relevant interests, including the neighbors', are taken into account, forfeiture remains a harsh remedy nonetheless. It may not involve the futility (and consequent unfairness to the protected parties) of the damage remedy or of the injunction-without-contempt remedy; nor does it involve the potentially extreme harshness of civil contempt, if that were to follow a violation of an injunction. But even though forfeiture may be the best solution to a difficult problem of incompatibility, it is still a bad solution.

However, much of the harshness of forfeiture could be eliminated, while preserving most of its benefits, if court-ordered evictions were not absolute in their terms but rather were conditional upon the tenant's future failure to comply with the lease. Courts have frequently used this technique to avoid forfeitures, typically by staying the order of eviction for, say, thirty days and providing for dismissal of the landlord's dispossession action if the tenant ceases within that time to be in default.²⁴¹ Of course, such conditional stays can be effective only to

forfeitures because a full quid pro quo for the potential inconvenience of a forfeiture is implicit in the rental level (or some other landlord-provided consideration) prescribed in the lease. Undoubtedly, in intelligently negotiated commercial leases, the landlord's retention of a termination right is a factor bearing on the rent which he can require. In the case of residential leases, particularly in a tight housing market, the presence of consideration in this form may be seen as being far more problematical. But even in a tight housing market, a tenant could undoubtedly find a landlord who would forego his forfeiture powers provided that the tenant agreed to a high enough rental. In this sense, paying only the market rental for the standard market lease (i.e., one which provides for forfeiture) can be said to be a way of receiving consideration in exchange for the forfeiture power.

241. E.g., *Interstate Restaurants, Inc. v. Halsa Corp.*, 309 A.2d 108 (D.C. Ct. App. 1973); *930 Fifth Corp. v. King*, 40 App. Div. 2d 140, 338 N.Y.S.2d 773 (1st Dep't 1972); *Southbridge Towers, Inc. v. Rovics*, 76 Misc. 2d 396, 350 N.Y.S.2d 62 (App. T. 1973); *Lavanant v. Lovelace*, 71 Misc. 2d 974, 337 N.Y.S.2d 962 (App. T. 1972), aff'd mem., 41 App. Div. 2d 905, 343 N.Y.S.2d 559 (1st Dep't 1973); *30-88 Steinway St., Inc. v. H.C. Bohack Co.*, 65 Misc. 2d 1076, 319 N.Y.S.2d 679 (N.Y. City Civ. Ct. 1971), aff'd mem., 42 App. Div. 2d 577, 344 N.Y.S.2d 205 (2d Dep't 1973); *Triangle Management Corp. v. Inniss*, 62 Misc. 2d 1095, 312 N.Y.S.2d 745 (N.Y. City Civ. Ct. 1970); *Trump Village Sec. 4, Inc. v. Cooper*, 61 Misc. 2d 757, 306 N.Y.S.2d 759 (N.Y. City Civ. Ct. 1969), aff'd mem., 66 Misc. 2d 220, 319 N.Y.S.2d 1018 (App. T. 1971); *Mideast Holding Corp. v. Tow*, 60 Misc. 2d 422, 302 N.Y.S.2d 706 (N.Y. City Civ. Ct. 1969).

protect the landlord or others from the consequences of the tenant's *prospective* defaults; there is no way the tenant can cure past conduct defaults, and no remedy (except possibly damages) can do much about those. However, as to future defaults, such conditional stays on eviction can be enormously effective (if forfeiture is as harsh as everyone says) and, after all, the incentive to assert a forfeiture can only be to prevent the *prospective* consequences of default in any event.²⁴²

Under some circumstances (*e.g.*, tenant is simply unable to comply), it may not be appropriate to subject the forfeiture to a conditional stay. But if the tenant's violation is of a conduct or activities restriction, and if the tenant is not unable or unwilling to correct the violation as to the future, then the ordering of an eviction subject to a conditional stay would seem usually to be both appropriate and useful.

Nearly all of the cases which I have found using the conditional stay technique have arisen in New York. Perhaps this is because, in other jurisdictions, opinions are not so frequently reported in the trial level cases in which such stays would be granted. Curiously, though, the New York cases²⁴³ appear to be directly contrary to a 1968 holding of that state's highest court.²⁴⁴ The Court of Appeals then held that once the lease had terminated by operation of a conditional limitation,²⁴⁵ it could not be "revived" by the courts. Hence, said the court, the lower court's attempted twenty day conditional stay of eviction was beyond the courts' powers "absent a showing of fraud, mutual mistake or other acceptable basis of reformation."²⁴⁶ While this may now be New York law²⁴⁷ (albeit a rule which is largely ignored by the subordinate courts²⁴⁸), it certainly is not a rule which traditional precedent would have required.

The alleged difficulty with relieving against forfeitures framed as conditional limitations (as opposed to those framed as conditions) is

242. Arguably, asserting forfeitures can also be motivated by a desire to deter pre-forfeiture defaults on the part of other tenants. However, the routine granting of forfeiture subject to stays would probably not undercut any such deterrent purpose, and such a purpose is therefore an irrelevant consideration here.

243. See examples cited in note 241 *supra*.

244. See *First Nat'l Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 (1968).

245. For the distinction between conditions and conditional limitations, see note 118 *supra*.

246. 21 N.Y.2d at 637, 237 N.E.2d at 870-71, 290 N.Y.S.2d at 725.

247. The rule was recognized but distinguished unconvincingly in *Lewis v. Clothes Shack, Inc.*, 67 Misc. 2d 621, 322 N.Y.S.2d 738 (App. T. 1971) and *Fly Hi Music Corp. v. 645 Restaurant Corp.*, 64 Misc. 2d 302, 314 N.Y.S.2d 735 (N.Y. City Civ. Ct. 1970), *aff'd mem.*, 71 Misc. 2d 302, 335 N.Y.S.2d 822 (App. T. 1972), and it was sidestepped in *57 E. 54 Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 335 N.Y.S.2d 872 (App. T. 1972).

248. See cases cited in note 241 *supra*.

that, by operation of the conditional limitation, the lease will always have already been terminated "automatically" before the case even comes to court.²⁴⁹ There is nothing left for equity to save. However, courts exercising equitable jurisdiction have historically relieved against forfeitures despite the fact that the lease and the tenant's interest had been quite terminated before reaching the court.²⁵⁰ To prevent the forfeiture effect, the landlord was simply required to grant a new lease for the remainder of the old term.²⁵¹ And in relieving against forfeiture, equity could of course impose equitable conditions on its relief,²⁵² hence the validity of *conditional* stays on eviction. In sum, there appears to be no historical or theoretical objection (outside of states like New York) to conditional stays of eviction in order to give the tenant a chance to cease his default and return to good standing under his lease.

Moreover, the granting of such conditional stays on eviction seems eminently sensible. It gives both the landlord and the tenant (to say nothing of the neighbors) an opportunity to establish a satisfactory mutual arrangement such as was presumably contemplated in the first place. It avoids unnecessary dislocations of tenants who may have been objectionable but are willing to try to get along, and it still permits the landlord and the neighbors to be free of a tenant who simply refuses to conduct himself in a non-bothersome manner.

Moreover, despite the fact that courts sometimes say they prefer injunction as a less harsh alternative than forfeiture,²⁵³ the fact is that the granting of forfeiture subject to a conditional stay is actually better suited than injunctive relief to attaining the agreed protection objectives with minimum hardship. All that the landlord or neighbors presumably want from a noncomplying tenant is either for him to comply in the future or to leave. Nobody wants him to be held in civil contempt or, worse, in jail (assuming it could come to that²⁵⁴). Thus,

249. See note 118 *supra*; *Beach v. Nixon*, 9 N.Y. 35, 36 (1853); *Burnee Corp. v. Unceda Pure Orange Drink Co.*, 132 Misc. 435, 230 N.Y.S. 239 (App. T. 1928). See also *Jabbour Bros. v. Hartsook*, 131 Va. 176, 185, 108 S.E. 684, 686-87 (1921); Niles, *Conditional Limitations in Leases in New York*, 11 N.Y.U.L.Q. Rev. 15 (1933).

250. E.g., *Taylor v. Knight*, 22 Eng. Rep. 208 (Ch. 1725); cf. *Dendy v. Evans*, [1910] 1 K.B. 263, 266-67. See also 3 J. Story, *Commentaries on Equity Jurisprudence* § 1736 (14th ed. 1918); 16 Halsbury's *Laws of England* ¶ 1447 (4th ed. 1976).

251. *Id.*

252. See *Howard D. Johnson Co. v. Madigan*, 361 Mass. 454, 280 N.E.2d 689 (1972). See also *930 Fifth Corp. v. King*, 40 App. Div. 2d 140, 338 N.Y.S.2d 773 (1st Dep't 1972).

253. Cf. note 315 *infra*.

254. Of course, it is almost unimaginable that, for default under a lease, even in violation of an injunction, a tenant would be sent to civil jail like a common alimony dodger. This is precisely the problem with injunctive relief: the threat is so drastic that it does not seem (and, hopefully, is

forfeiture subject to a conditional stay is not only logical (in that it gives the aggrieved parties the alternatives they really want) but it is far more "reasonable" than the injunctive relief alternative as a remedy for disturbing tenant conduct.

In conclusion, where the possibility exists for enforcing an asserted forfeiture subject to a conditional stay to cure (and the possibility would almost always exist in cases of conduct or activities defaults), forfeiture would seem to be the best of possible remedies for a situation where no remedy is perfect. But, it should be added, even if it is not possible or appropriate to grant forfeiture subject to such a conditional stay,²⁵⁵ forfeiture may still, as previously argued, be the remedy of choice.

C. *Objective Standards*

In the absence of an agreement imposing limitations upon tenant conduct, the only applicable limitations would of course be those imposed by law. As has already been observed,²⁵⁶ such limitations include those imposed by the doctrines of waste, nuisance and negligence, and by the substantive law of torts generally; to these might be added limitations imposed by the statutory law, especially the criminal law.

However, if the landlord is to enforce any of these limitations, he must generally do so in reliance upon special lease provisions conferring him with standing to complain.²⁵⁷ Furthermore, if he is to enforce these limitations effectively, he must probably have a power of forfeiture, which must also be provided for in the lease.²⁵⁸ Yet, even with standing to complain and a power of forfeiture at his disposal, the landlord may still find it difficult to efficiently enforce even the law-imposed limitations on tenant conduct. This difficulty will arise because the law-imposed standards—especially those based on waste, nuisance or negligence doctrines—are too imprecise in their formulation and too unpredictable in their application to permit anything like efficient, low cost enforcement.²⁵⁹ The subjectivity of these standards may mean that no enforcement at all is feasible where, as is charac-

not) real. Incidentally, no cases reporting the incarceration of recalcitrant tenants have been found.

255. Perhaps particularly so if the objectionable tenant's recalcitrance is the cause of the inappropriateness.

256. See text accompanying notes 24-26 *supra*.

257. Except, of course, the landlord always has standing to sue for waste, and he would have standing to sue for negligence whenever the duty of care was owed to him.

258. See section III(B) *supra*. See generally section III(A) *supra*.

259. See notes 38 *supra*, 260-62 *infra* and text accompanying notes 264-75 *infra*.

teristic in the residential landlord-tenant context, dollar amounts are relatively small and the relevant factual backgrounds of the cases are not, as an evidentiary matter, always so clear-cut or easy to elucidate. Consequently, lease provisions concerning tenant conduct can increase protection in a third important way: by providing objective standards of conduct, susceptible to easier proof of noncompliance, in place of (or in addition to) the subjective and relativistic standards of tort law.

The formulations of the substantive tort norms, such as those regarding nuisance and waste, are unsuitably vague to serve as standards for most *specific* landlord-tenant relationships precisely because they are designed rather to serve the broad generality of cases. Since the many particular fact-situations cannot be predicted, the law of torts must be flexible, for it could not possibly prescribe the *precise* behavioral requirements which are to be applicable in particular cases. Thus, the conduct which constitutes a nuisance,²⁶⁰ negligence²⁶¹ or

260. As used here and throughout this Article, the word nuisance refers to those wrongs consisting of substantial invasions of another's property interest in the private use and enjoyment of his land. See Restatement of Torts § 822 (1939). Although it is probably impossible to arrive at any precise definition of nuisance, or even of so-called private nuisance (see W. Prosser, Torts §§ 86-87, 89 (4th ed. 1971); 1 F. Harper & F. James, Torts § 1.23 (1956)), the sort of wrongs here under discussion may be broadly described as "a condition . . . maintained on one property which is an illegal burden or servitude upon another." *Zamzok v. 650 Park Ave. Corp.*, 80 Misc. 2d 573, 576, 363 N.Y.S.2d 868, 873 (Sup. Ct. 1974).

In order for the complained of activities to constitute actionable nuisance, there must be a "substantial" interference with the quiet enjoyment of the complainant's interest as a consequence of such acts. Restatement of Torts § 822 (1939); 6A Am. L. Prop., supra note 3, §§ 28.22, 28.25. Furthermore, even if the invasion of the interest in question is intentional, to be actionable it must also be "unreasonable." Restatement of Torts §§ 826-31 (1939); 6A Am. L. Prop., supra note 3, §§ 28.25-28.

The two key prerequisites of nuisance (substantial interference and unreasonableness) are deliberately imprecise in their content; whether or not there is a nuisance in a particular instance "must be determined by reference to all the conditions of the parties, the circumstances of the situation, and the balancing of advantages and disadvantages incident to the defendant's conduct for all concerned." 1 F. Harper & F. James, supra, § 1.24, at 71. Thus, activities otherwise lawful may be a nuisance if performed in an inappropriate location or if the resultant harm could have been more effectively avoided (6A Am. L. Prop., supra note 3, § 28.26); and even intentional invasions of another's use and enjoyment may be privileged if the utility of the harmful activity outweighs the gravity of the harm done. Restatement of Torts § 826 (1939).

The precise behavioral requirements of the norms of nuisance are in fact probably the least predictable of all the subdivisions of torts; for not only are the defendant's conduct, situation, and knowledge taken into account, but also unknown (and unknowable) factors concerning the plaintiff and the public at large can weigh heavily or decisively in the relativistic analysis. The relevance of so many factors in the balancing process can make convincing proof of nuisance a somewhat difficult and tedious process.

261. The formulaic definition of negligence, designed to account for the "infinite variety of situations which may arise," is hardly unique in its application to the property context and need not be recounted here. See W. Prosser, Torts § 32, at 150 (4th ed. 1971). Assuming damages are

waste²⁶² is necessarily relative and circumstantially determined. The relativism of circumstances lies at the heart of the fundamental question of whether or not the defendant breached or even owed a duty to the plaintiff. The words which define the standards themselves provide only the roughest sort of guidance.

However, for a landlord seeking to protect his own genuine interests and those of neighboring tenants, reliance on relativistic tort standards is neither desirable nor necessary. The prospective relation between a given landlord and a given tenant does not present the wide variety of possible circumstances that indicates the need for a flexible standard. Rather, the kinds of problems likely to arise in a given landlord-tenant relationship may be predicted with a fair degree of accuracy, and the behavioral norms appropriate to deal with (or forestall) those problems may be readily prescribed in the lease. The uncertainty of the standards which results under relativistic tort analysis, an uncertainty which invites litigation, may thus be replaced by lease-prescribed objective standards of greater specificity and susceptible to easier determinations of compliance or noncompliance. It is indeed a function of written agreements to supply such certainty.²⁶³

The need for objective standards is particularly acute in the case of conduct of a nuisance-like nature. Reference has already been made to the difficulties involved in proving actionable nuisance, resulting from the fact that the definition of nuisance is couched in necessarily

proven, the three key elements of negligence liability—that the defendant had a duty, that the duty was breached (failure to use reasonable care) and that the breach was the proximate cause of the injury—are all, of course, circumstantially determined. And how much care is “reasonable care” is relative, depending on the degree of risk involved, gravity of possible harm, etc. The precise behavioral norms of negligence law are perhaps more predictable than those of nuisance, but they too are often unpredictable, and the results of the circumstantial and relativistic analysis are often open to controversy. Compare majority with dissenting opinion in *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 224 N.W.2d 843 (1975).

262. Although it is generally true that any *destructive* acts of a tenant are actionable as waste, at least if the damage is substantial, in the case of *ameliorative* waste—modifications which arguably *improve* the value of the premises—the analysis in modern cases is becoming more and more relativistic and circumstance-oriented. See *Crewe Corp. v. Feiler*, 28 N.J. 316, 146 A.2d 458 (1958); 5 Powell, *supra* note 24, ¶ 640; 5 Am. L. Prop., *supra* note 3, § 20.11; Niehuss, *Alteration or Replacement of Buildings by the Long-Term Lessee*, 30 Mich. L. Rev. 386 (1932). The length of the lease, the materiality of the modification, the anticipation of obsolescence and the probable intent of the parties all may enter into the determination of whether particular “improvements” do or do not constitute waste. *Id.* Thus, with waste, as with nuisance and negligence, the precise norms are circumstantially determined and it may often be impossible to reliably predict whether any particular effect on the premises is or is not waste.

263. *Trump Village Sec. 4, Inc. v. Cooper*, 61 Misc. 2d 757, 759-60, 306 N.Y.S.2d 759, 762-63 (N.Y. City Civ. Ct. 1969), *aff’d mem.*, 66 Misc. 2d 220, 319 N.Y.S.2d 1018 (App. T. 1971). See also Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 631-32 (1943).

imprecise terms.²⁶⁴ However, in the offensive tenant context, where the injuries are more likely to be psychic than monetary, the most formidable problem may be showing that the persons affected by the nuisance are not simply hypersensitive or idiosyncratic. For the law of nuisance does not protect against every discomfort caused by a neighbor's acts, but only against those which would cause annoyance, inconvenience or offense to a person having "ordinary sensibilities" and tastes.²⁶⁵

There is, as might be expected, no little difficulty in determining from the cases exactly what is unbearable to an ordinarily sensitive person and what, on the other hand, would be objectionable only to the hypersensitive. For example, music produced by highly skilled musicians may be sufficiently objectionable to constitute a nuisance.²⁶⁶ At the same time, the apprehension of immolation, caused by sparking trains passing a nearby fuel dump, apparently is not.²⁶⁷ Still, conduct inducing an unfounded fear may be a nuisance.²⁶⁸ Obnoxious odors may²⁶⁹ or may not²⁷⁰ be sufficiently disturbing to constitute a nuisance. Proving noise as a nuisance seems to involve particular difficulties, probably because almost all human activities produce some noise and must, to a degree, be tolerated. However, for a residential tenant, a tinsmith next door may be adequate cause for complaint, though an all-night rumbling from above,²⁷¹ a whirring sewing machine or "the discord of ill-played music" is not adequate cause²⁷²—even if the "music" is played twelve hours per day²⁷³ or is the work of an amateur drummer.²⁷⁴ It has been suggested that, to constitute a nuisance, the

264. See note 260 *supra*.

265. See *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 488-89, 104 N.E. 371, 373 (1914), quoted in 1 F. Harper & F. James, *Torts* § 1.25, at 75 (1956). See also *Rogers v. Elliott*, 146 Mass. 349, 15 N.E. 768 (1888); *Krocker v. Westmoreland Planing Mill Co.*, 274 Pa. 143, 117 A. 669 (1922); 6A Am. L. Prop., *supra* note 3, § 28.25; J. & H. Joyce, *Nuisances* § 20 (1906); W. Prosser, *Torts* § 87, at 577-78 (4th ed. 1971).

266. *Meadowbrook Swimming Club, Inc. v. Albert*, 173 Md. 641, 197 A. 146 (1938).

267. *Harper v. Standard Oil Co.*, 78 Mo. App. 338 (1899). But see *Hendrickson v. Standard Oil Co.*, 126 Md. 577, 95 A. 153 (1915).

268. *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910).

269. *Washington Cleaners & Dyers, Inc. v. Albrecht*, 157 Md. 389, 146 A. 233 (1929); *Taylor v. Mayor & Council*, 130 Md. 133, 99 A. 900 (1917) (distinguishes nuisance from takings in eminent domain).

270. *Wade v. Miller*, 188 Mass. 6, 73 N.E. 849 (1905).

271. See *Pool v. Higginson*, 8 Daly 113 (N.Y.C.P. 1878).

272. *Id.* at 117-18. But recall that well played music *may* be a nuisance. See text accompanying note 266 *supra*.

273. *Twin Elm Management Corp. v. Banks*, 181 Misc. 96, 46 N.Y.S.2d 952 (N.Y. City Mun. Ct. 1943). The court admitted that hearing the practicing may have been "nerve racking." *Id.* at 97, 46 N.Y.S.2d at 953.

274. *Douglas L. Elliman & Co. v. Karlsen*, 59 Misc. 2d 243, 298 N.Y.S.2d 594 (N.Y. City

noise must be of such a character as to produce actual physical discomfort to persons of ordinary sensibilities.²⁷⁵ What that may mean, short of convulsions or worse, is left (like most of the law of nuisance) to judicial discretion.

As may be deduced from the foregoing, the inherent practical problems of proof and advocacy must substantially diminish the likelihood that anyone would bring a nuisance action, much less win it. This alone would motivate landlords to provide for restrictions on nuisance-like conduct which are better defined than the relativistic rules which the law supplies. But it is the facilitation of *out-of-court* resolutions of tenant conduct disputes which is probably the greatest contribution made by objectively worded, lease-contained supplements to the law of nuisance.

By having in the lease a set of clearly delineated standards, which can be pointed to in the event of controversy, many or most tenant conduct disputes can probably be resolved simply by negotiation with the offending tenant.²⁷⁶ This may be especially true where the violation occurs as a result of a mistake or a misunderstanding. Moreover, if the objective wording of a restriction on nuisance-like conduct makes obtaining judicial enforcement easier and more certain, the mere prospect of judicial enforcement may well exert a back-pressure on the compliance negotiations with the offending tenant, and it may thereby make actual resort to the courts unnecessary. By contrast, a flexible conduct standard (*e.g.*, nuisance), offers the offending tenant greater promise of opportunities to delay or frustrate enforcement, or to escape it entirely. The harder and more uncertain the judicial enforcement, the less credible is its threat. On the other hand, if it is easy to show (to the tenant or, eventually, to the court) that the tenant has not complied with a specifically worded rule, the offending tenant should have little incentive to actually force a showdown in the court before agreeing to comply.

Civ. Ct. 1969) (wall-piercing drum beats). For a further discussion and a more complete catalogue of cases, see 1 F. Harper & F. James, *Torts* § 1.25, at 74-77 (1956).

275. *Meadowbrook Swimming Club, Inc. v. Albert*, 173 Md. 641, 197 A. 146 (1938). As a more objective test of whether the conduct complained of affects persons of ordinary sensibilities, one might suppose that the effect of the conduct on the market value of the premises might control: the predilections of the fastidious few should hardly have a significant market impact, whereas a substantial depressive effect on value would signify that, in objective contemplation, the conduct oversteps the bounds of what is bearable. Some courts have indicated the relevance of impact on market value (*Tortorella v. H. Traiser & Co.*, 284 Mass. 497, 188 N.E. 254 (1933); *Weakley v. Page*, 102 Tenn. 178, 53 S.W. 551 (1899)) but it has also been said that the diminution of market value of adjacent property does not itself make objectionable conduct a nuisance (*Stotler v. Rochelle*, 83 Kan. 86, 89, 109 P. 788, 789 (1910)).

276. See Note, *Restrictive Regulations in Wisconsin Summer Colony Land Conveyances*, 1950 Wis. L. Rev. 709.

Thus, even if lease-contained conduct restrictions do nothing more than supply objective content to the norms of nuisance, they may be valuable or even practically indispensable to administrative efficiency in controlling offensive tenant conduct.

D. *Protection of "Special" Concerns*

The discussion thus far has focused on improving upon the protections supplied by law through agreements that provide for standing, remedies and better defined conduct norms but without (theoretically at least) imposing any greater restrictions on tenant activities than are already implicit in the law. However, the activity restrictions already implicit in tort law may themselves be inadequate to serve the landlord's purpose of protecting himself and his tenants from possible objectionable conduct on the part of other tenants.²⁷⁷ People may wish to live in a building where no one practices musical instruments, or where no one operates a television or stereo so it is audible by others, or where there are no dogs, or no children or no residents less than forty years of age. Indeed, every case in nuisance which is lost on the grounds that there was no nuisance may be considered to represent a case of "special" concern.

Merely because such concerns are not protected by law, it does not follow that they are not real, and are not sought after. Thus, for his *particular* case, the landlord may seek to improve upon the generalized balance and protections of tort law by obtaining agreements from tenants to observe even *stricter* standards, involving even greater restrictions on activities, than the law would otherwise impose. That is, the landlord may seek to protect special concerns of his own or of the greater number of his tenants, for which the law of torts, with its generalized assumptions concerning "normal" factual contexts and values, provides no protection. It is a normal function of contracts to provide a legal basis for such additional protections.²⁷⁸ And it is a normal function of leases²⁷⁹ to serve as the vehicle for gaining special

277. As previously observed (see text accompanying notes 26-33 *supra*), tort law may leave special concerns unprotected because (i) tort rules necessarily can reflect only a generalized balance between protecting activities on one hand and protecting others from the impact of activities on the other, and (ii) the balance subsumed in tort law as desirable is a societally determined function of the relative values placed by society, not by specific individuals, on the interests (freedom, protection from activities) which are involved.

278. As one court has said: "Sensitive persons who would shield themselves from contact with disagreeable neighbors should either move out, or protect themselves by covenant." *Miles v. Lauraine*, 99 Ga. 402, 405, 27 S.E. 739, 740 (1896); accord, *Lyon v. Bethlehem Eng'r Corp.*, 253 N.Y. 111, 170 N.E. 512 (1930).

279. In addition to provisions for stricter conduct standards contained in leases themselves, landlords often adopt "rules and regulations" for tenants, *dehors* the lease, but pursuant to a

protections desired by a landlord for himself and for the greater number of his tenants.

Attempts by landlords to impose conduct (or similar) standards which are stricter than the law raises a potential for emotionally felt objection and controversy not present where the landlord has merely bargained for standing, remedies or better defined conduct standards. Stricter-than-law standards imposed in a lease will expand the scope of what is wrongful and thereby diminish legal freedom; such standards do *not*, unlike standing, remedies and better definitions, merely increase the chances or consequences of the "come-uppances" which may accrue to the tenant for transgressing traditionally recognized law-imposed freedom limitations.²⁸⁰

Moreover, stricter-than-law conduct norms in a lease are suspect as a sort of private legislation. If freely consented to by all concerned, private lawmaking for private relations should usually be unobjectionable;²⁸¹ but if behavioral norms are de facto unilaterally imposed—by landlord on tenant—the effect is antagonistic to the aims and assumptions of an egalitarian society. When personal freedom to act is curtailed by adhesion contracts, the call for intensive scrutiny seems even more compelling.

In considering whether the law should lend its support to landlords' attempts to improve on the protections which the law itself provides, two questions must be faced squarely. Why should landlords be permitted at all to prescribe tenant conduct standards which are stricter than those imposed by the law itself? Secondly, assuming that landlords should be afforded some power to prescribe tenant conduct standards, what limitations should be placed on that power; that is, what kinds of conduct standards should be legally impermissible and hence invalid?

provision therein. See *Luna Park Housing Corp. v. Besser*, 38 App. Div. 2d 713, 329 N.Y.S.2d 332 (2d Dep't 1972); Bentley, *An Alternative Residential Lease*, 74 Colum. L. Rev. 836, 846-51 (1974); Berger, *supra* note 22, at 833. The former Article is especially critical of such rules.

280. Perhaps the chief virtue of making this distinction is to make clear that the concern of protecting freedoms which may weigh against recognition of stricter standards should have no relevance to the question of whether recognition should be accorded to contract-provided standing, remedies or better defined standards. Admittedly, by making for more effective enforcement, these tend to cause a diminution of freedom just as realistically as stricter standards do. But contractions of actual freedom due to more efficient enforcement of existing legal limitations should hardly be a cause for complaint—unless the non-redress of wrongs because of administrative inefficiency is a value to be preserved.

281. "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites." C. Civ. art. 1134(1) (75e ed. Petits Codes Dalloz 1975).

1. Justifications for Norm Prescription by Landlords

In justifying stricter-than-law norm prescription by the landlord, it is the starting assumption that most people would like to live in an agreeable surrounding.²⁸² At the same time, the precise characteristics and prerequisites which make living surroundings agreeable will, to different people, vary as widely as the variations in the tastes, habits and tolerance of the people themselves. Also to be taken into account is the fact that perfection, in leasehold premises or anything else, is seldom achievable or really expected. But incompatible factors can coexist with overall agreeableness only to a limited (and, unfortunately, subjectively defined) extent. To what extent they can so coexist is a function, in part, of the nature of the incompatible factors themselves and, in part, of the sensitivity of the people in question.

People tend, in their day-to-day lives, to separate themselves from disagreeable things and, one must assume, to separate themselves from disagreeable people.²⁸³ Thus, in renting an apartment, most people will probably try to find a residential setting which they hope to be as

282. The focus of this Article is on residential leasehold tenancies; hence the following discussion will be in terms of "living" in an agreeable surrounding. However, there is apparently no authoritative basis for concluding that courts purport (for purposes presently discussed) to apply any different set of standards when the tenant's contemplated purpose in leasing is commercial rather than residential. Cf. Note, *Commercial Versus Residential Leases: A New Double Standard?*, 35 U. Pitt. L. Rev. 901 (1974). The purpose of the tenancy seems to be at most one of a number of relevant factors, and for this reason cases involving commercial tenancies have been freely cited in this Article wherever believed to be relevant.

However, two factors present in commercial tenancies probably make the resolution of the issues under discussion less difficult in the case of such tenancies than in the case of residential tenancies.

First of all, when entering a commercial lease, the parties are probably more likely to consciously try to anticipate how the intended use of the premises may affect the legitimate interests of others. Thus, the terms of the lease (and, indeed, the decision to enter into it in the first place) can reflect and forestall later controversies arising out of the tenant's activities on the premises. Moreover, the greater likelihood that the commercial lease will be preceded by real give-and-take negotiations between the parties not only helps to assure against the possibility of surprise, it also justifies a more rigorous application of the standards of conduct finally agreed to.

Secondly, to a far greater extent than with commercial leaseholds, the imposition of conduct standards in residential leases involves an impairment of *personal* freedom as distinguished from commercial freedom. The burden of restrictions on a residential tenant does not lead to merely a moderation of profit or a business inconvenience. Rather, it may impinge on the tenant's very freedom in expressing and acting out his own personality. Since the impact of the burden is personal and not merely monetary—since the tenant's personal freedom is at stake—it is perhaps more difficult, psychologically if not logically, to countenance the imposition of the burden, even when the competing interests (which also may be "personal") are clear.

283. It is not anticipated that anyone will contend that people generally seek out unpleasantness in preference to agreeableness, or that indifference is generally shown in this regard.

compatible as possible with their psychic needs. In any event, it does not seem farfetched to assume such tendencies exist as people deliberately avoid what they do not like, whether it be dogs, swinging singles, the elderly, children or piano players. Moreover, it is probably likewise true that people whose activities will have unavoidable spill-over effects will tend to seek settings for their activities where the neighbors will be more tolerant and less likely to cause trouble for them. The result is a sort of self-segregation in which people having different characteristics, activity objectives, sensibilities and tolerances adjust their patterns of mutual proximity to maximize the environmental agreeableness (or minimize the disagreeableness) to all.²⁸⁴

Assuming that such a tendency to self-segregate does exist generally, a heavy burden should lie on the person who would contend that the values being sought in such self-segregation are not legitimate, or that seeking these values should be condemned.²⁸⁵ For example, some people like dogs and some do not. Some people who have no dog do not mind that their neighbors do have one. But it does not follow that every apartment building should permit dogs.²⁸⁶ Similarly, some

284. In a recent report financed by the Law Enforcement Assistance Administration, housing shared by tenants of various ages and lifestyles was blamed for much of the increased vandalism, muggings and burglaries in apartment complexes. N.Y. Times, July 19, 1976, at 42, col. 7. As a partial solution to the crime problems, the author of the report, Oscar Newman, advocates that multi-tenant buildings should be occupied by families that are as alike as possible. Furthermore, "buildings should be designed to meet the needs of the particular types of occupants," (id.) and presumably selection and control of the type of occupant should be legally permissible. See generally O. Newman, *Design Guidelines for Creative Defensible Space* (1975).

285. At the outset it should be emphasized, lest the thrust be misunderstood, that particular types of self-segregation (e.g., based upon race or religion) must not and presumably will not be condoned or supported. See section III(D)(2)(d) *infra*. To suggest that there are legitimate and commonly sought after values in self-segregation is obviously not to suggest that these are the only values to be sought or protected. It is not even to suggest that such values, relative to some others, rank particularly high. See note 374 *infra*. On the other hand, just because the interest in self-segregation may at times clash with other important policies, even the most paramount policies (e.g., preservation of human dignity irrespective of race), it does not follow that seeking the values inherent in self-segregation should be condemned even when *no* such clash is involved.

At the same time, only the utterly oblivious could ignore the potential of self-segregation, if not subject to proper constraints, to defeat quite directly the national policy of promoting *certain* types of integration (particularly racial), as developed during the last two decades. The matter is reconsidered in greater detail in section III(D)(2)(d) *infra*. Suffice it to say for now, that (1) whatever may be the heuristic function and effectiveness of law, the law must also deal with and regulate existing behavioral patterns or else abandon some areas of human interchange to self-help and random injustice pending the prospective utopia, and (2) supporting *some types* of self-segregation while prohibiting and even punishing others should be no more difficult than, say, limiting recoveries for mental distress to those who are entitled to such recoveries.

286. *Blakely v. Housing Authority*, 8 Wash. App. 204, 505 P.2d 151 (1973). See also *Triangle Management Corp. v. Inniss*, 62 Misc. 2d 1095, 312 N.Y.S.2d 745 (N.Y. City Civ. Ct. 1970). Nor, most emphatically, does it follow that dog-owners who dislike other people's dogs ought to

people like big parties, children, or hard rock music occasionally played loudly; others do not. And some (perhaps most) who do not like these things can nonetheless tolerate them. But even if these things are not legal nuisances, it does not follow that they should be permissible in every apartment building; it does not follow that those who find these things intolerable should be permitted no escape.

Essentially, the protection of special concerns is the protection of those who have particular sensitivities which others, in general, may not share. It is, if you will, providing a home for the hypersensitive, a place of resort for those who are ignored by the law of nuisance.²⁸⁷ In permitting and enforcing stricter-than-law conduct restrictions, we are allowing even the hypersensitive to get away from what they do not like. And because there are probably few who are not hypersensitive to at least *some* acts of others, and given that attitudes as to what is ordinarily tolerable changes with the times,²⁸⁸ we cannot underestimate the importance of the values sought in self-segregation simply because we do not always share the sensitivity of those seeking escape from particular annoyances.

Although the values sought in self-segregation may be very important to those who seek them, the ease of protecting those values may vary radically depending upon the circumstances. Compared with patterns of residential housing, the seating arrangement on, say, a bus is trivial and uninteresting. The physical mobility of all concerned (coupled with the transitory nature of the whole affair) permits readjustment without much constraint on freedom or dislocation to any. And so it is with most instances where the characteristics and conduct of those in physical proximity play a role in an individual's internal tranquility. But translated to congested rental housing or other more or less permanent neighbor relationships, the interest in avoiding freedom constraints or dislocation becomes so large as to offer serious competition to the interest in agreeable surroundings. In resolving this competition, there may inevitably have to be losers who lose much.

In the absence of prior agreements to resolve the competition, it will

have claim to a special privilege of keeping a dog. Still, it may be quite rational for an individual to *wish* that such double-standards could apply for his own benefit; hence, it seems not unreasonably cynical to assume that in many objectionable tenant cases, even the objectionable tenant would desire the protection of the restriction were he on the *receiving* end of the annoying activities.

287. As had been noted earlier, the law of nuisance seeks to protect only the interests of persons having ordinary sensitivities (see text accompanying notes 265-75 *supra*) and does not protect the hypersensitive or idiosyncratic.

288. The tolerability of smoking is a notable recent example of changing attitudes toward what is ordinarily tolerable. The once prevalent attitude that smokers had to be tolerated seems rapidly giving way to exactly the opposite view.

probably be resolved according to the law of private nuisance. The inability of nuisance law, geared to the generality of cases,²⁸⁹ to respond satisfactorily to many specific situations, coupled with the pressure to accommodate the environmental concerns of all land users, form the core of justification for land use restrictions ranging from zoning to rules and regulations in leases. The legality and enforceability of the freedom constraints which all of these involve are based either upon the police power, in the case of publicly imposed restrictions,²⁹⁰ or upon individually created property or contract rights in the case of private restrictions.

Since the privately created restrictions are based on contract or property rights, and since such rights are normally enforced, cases only rarely mention whether a landlord should have the power to prescribe special conduct norms for tenants.²⁹¹ If the restrictions are not simply enforced,²⁹² the grounds for nonenforcement are at least consistent with (though perhaps hostile to) the landlord's basic power to prescribe.²⁹³ However, as was true in the case of standing,²⁹⁴ there may easily be doubt as to whether landlords should have such power; therefore, it may be useful to review some of the justifications for conceding such power to them.

Assuming that stricter-than-law conduct standards are necessary to protect special concerns, perhaps the most compelling reason for allowing the *landlord* to prescribe such standards is that, compared with the tenants themselves, the landlord is in the better position to do so. First of all, the landlord, on the basis of his (or his attorney's) experience, is more likely to be able to anticipate the sorts of restrictions which may be desirable given his building's other characteristics, location, intended quality, and so forth. Furthermore, assuming that the landlord enters into a formal lease agreement with every tenant anyway, it is logical and convenient to make conduct restrictions a part of that agreement. But perhaps most importantly, the landlord is in a uniquely favorable position to obtain agreement to the conduct restrictions from every tenant by making such agreement a precondition to getting an apartment in the building. In a way, this last

289. See note 260 and text accompanying notes 259-75 *supra*.

290. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

291. One case which did mention the issue was *Moss v. Hirshtritt*, 60 Misc. 2d 402, 405, 303 N.Y.S.2d 447, 450 (N.Y. City Civ. Ct. 1969). See note 15 *supra* and accompanying text.

292. See note 140 *supra* and accompanying text.

293. Such grounds for nonenforcement include strict construction against restrictions on property use (see notes 23 & 25 *supra*), interpretation so as to avoid forfeiture results (see notes 148-68 *supra* and accompanying text) and relative hardship or harshness of enforcement (see text accompanying notes 177-240 *supra* and section III(D)(2)(a) *infra*).

294. See note 36 *supra*.

argument cuts two ways, for it concedes that the landlord has de facto a heavy power to prescribe and one might well worry that such power can be abused to create unreasonable restrictions. However, the problem of unreasonable rules can be handled directly, without questioning the general power of the landlord to prescribe any rules at all.²⁹⁵ On the other hand, as a practical matter, it is only through the landlord that a pattern of uniform buildingwide conduct restrictions can be achieved. Because a single tenant's objectionable activities can cause substantial unpleasantness for many, uniformity of restrictions (and hence of protection) may be necessary to achieve the protection which stricter-than-law freedom constraints are intended to provide. Therefore, permitting the landlord to require tenants to agree to conduct restrictions as a precondition to entry may be the only way to make stricter-than-law conduct restrictions serve their desired purposes.

Another reason for recognizing a power to prescribe in the landlord is that such a power is consistent with the usual pattern of "gross" leasing arrangements,²⁹⁶ and it is therefore probably consonant with the expectations of most tenants. When leasing an apartment in a building of a given character, most tenants probably expect that the landlord and not the tenants themselves will be responsible for maintaining that character, not only as it is affected by the building's physical attributes, but as it is affected by the nonphysical attributes as well. Such expectations may only recently be receiving the reinforcement of law,²⁹⁷ but they are real nonetheless. Tenants neither desire nor expect that they must negotiate among themselves to create an environment suitable for their special concerns which the law may not otherwise protect. If the building seems "right" in the beginning, they assume that it will stay that way, and that the landlord will see to it that it does.²⁹⁸

Lastly, the landlord himself has an interest in the character of his building and tenant conduct can affect that interest.²⁹⁹ The landlord may wish to establish a building catering to the elderly, or to singles, or he may wish to assure his tenants that no neighboring apartments will be used for the practice of musical instruments. The protection of this interest from injury—even injury which may be *damnum sine injuria* at law—is a further justification for giving the landlord the

295. See section III(D)(2).

296. See note 44 *supra*.

297. See section III(A)(3) *supra*.

298. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970) ("Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term.").

299. See text accompanying notes 60, 73-78 *supra*.

power to prescribe conduct standards which prospective tenants must agree to observe as a precondition to leasing. The landlord-tenant relation is (outside of marriage) the most enduring legal relationship that most people are likely to enter, and it is one involving a valuable asset of the landlord. Should not the law allow the landlord the power to prescribe reasonable ground rules for the protection of that asset, even if the protection sought may be more than the law itself would otherwise provide?

It has already been observed³⁰⁰ that denying effective enforcement of conduct restrictions will prevent the landlord from giving his tenants legal protection for environmental benefits which were among the factors which induced them to enter into their leases. The same may be said, with perhaps even greater force, of denying the validity of the restrictions entirely. Denying such validity will not prevent prospective tenants from selecting residences in buildings appearing to have environmental conditions and character appropriate to their psychic needs. Such denial will only prevent the landlord from assuring that such conditions or character will continue throughout the term and renewals of the tenant's lease.³⁰¹ Unless the law forces noncomplying tenants to keep their promises, it will likewise prevent the landlord from keeping his promises, implicit or otherwise, to the majority of his tenants. The losers, ultimately, will be the complying tenants themselves.³⁰²

a. *The Contract of Adhesion Problem*

Whatever the benefits derivable from landlord prescription of conduct standards, allowing such a power to prescribe to landlords may nonetheless be objected to because of the adhesive character of the leases which give the standards their legal force. The difficulty is that the basic enforceability of the landlord's prescriptions is grounded in contract, and to the extent that the tenant has not undertaken to accept their burden "willingly," the very rationale for enforcing the standards is undermined.

It is true that residential tenants usually have at best only a limited

300. See text following note 234 *supra*.

301. See note 298 *supra*. Even if the landlord has made no explicit, legally enforceable promises to the other tenants concerning the tenant-affected environmental conditions or character of the building, the impact of the implied warranty of habitability may force such promises on him nonetheless. See section III(A)(3) *supra*. If the objectives of this implied warranty are not to be frustrated, it may be indispensable to concede to the landlord the power to prescribe and enforce conduct restrictions applicable to his tenants.

302. "To have removed the pet clause would have been as unfair to tenants who were opposed to pets as the retention of the pet clause is claimed to be to tenants who favor pets." *Blakely v. Housing Authority*, 8 Wash. App. 204, 212, 505 P.2d 151, 156 (1973).

opportunity to negotiate the conduct or use restrictions to be contained in their leases. The tenant may have no choice but to either accept all of the freedom curtailments which the lease prescribes or to reject the lease entirely. And if the housing market is tight, or if most landlords use more or less standardized forms, the latter choice may be unrealistic. Hence, the conduct restrictions which the landlord prescribes may well seem to have more the character of unilaterally imposed obligations rather than the freely undertaken duties presupposed in the ordinary enforcement of contracts.³⁰³

However, even though the conduct or use restrictions in the usual residential lease are largely nonnegotiable, it is probably also true that any reasonable restrictions would be agreeable to most tenants anyway. At least, most tenants would like to have *their neighbors* bound by such restrictions, and it is hard to sympathize with anyone who would seek exemption only for himself.³⁰⁴ Indeed, if most tenants were not willing to comply with the usually enforced restrictions on tenant conduct, one would expect that attempts to evict tenants for objectionable activities would be more frequent than the unusual occurrences which they are.

In order to denominate lease-contained conduct restrictions as adhesive, it is necessary of course to assume that, due to the widespread use of standardized forms or whatever, the prospective tenant has no realistic choice but to accept them as part of his lease. On the other hand, if the usually enforced conduct restrictions are so pervasively required as to deprive the tenant of any realistic choice, this very pervasiveness tends to underline the restrictions' desirability and general acceptability. For example, if no landlords permitted nighttime piano practice, and if this restriction were unacceptable to many, it would likely be in the interest of some landlords to break the pattern—for no better reason than to obtain the higher rent which insistent home practitioners would pay for the freedom. If no landlord were willing to relent and permit a particular activity, the indication would be that the activity is so intolerable (to other tenants, or perhaps to the landlord directly) that no one wants to put up with it in exchange for the available trade-offs.³⁰⁵ Of course, a local housing shortage, especially if coupled with rent controls, may reduce or

303. Cf. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943); Shuchman, *Consumer Credit by Adhesion Contracts*, 35 Temp. L.Q. 125, 130 (1962).

304. See note 286 *supra*.

305. In the landlord's case, the most likely available trade-off would be a higher rent which would be paid in exchange for deletion of the restriction. In the case of neighboring tenants, the most likely available trade-off would be the reduction in rents which would be required in order to induce them to endure the annoying activity.

eliminate landlords' incentive to "bid" for tenants through offers of relaxed conduct restrictions. At the same time though, the presence of a housing shortage makes it all the more oppressive to arbitrarily subject the hapless neighboring tenants to the annoying activities from which most in the building are willing to refrain. Thus, "adhesive" conduct restrictions may be the only way to protect the preponderance of tenants from the random discomforts caused by the nonconforming few. However, even if a particular tenant were unwilling to accept certain conduct restrictions, there are still other good reasons to enforce them if he nonetheless signed the lease which contains them.

First of all, there is the argument of convenience which, in the economic context, boils down to one of cost. The tenant knows (or should realize) that when entering a lease he is getting a unified package of benefits and detriments. It is much as the buyer of a car knows that the car is put together as a package, some aspects being desirable (e.g., a motor size he likes), others, perhaps, undesirable (e.g., wrong color seats). Of course, the package constituting the lease theoretically can be taken apart by negotiation, with benefits and detriments added or removed, tailoring it to the tenant's exact desires. So can the car; e.g., by taking out the wrong color seats and installing others. However, the landlord (like the automobile dealer) may quite reasonably have only a limited willingness to rearrange the basic package which is offered. The costs, in time and perhaps also legal services, may militate against such rearrangement, especially in the case of residential leases. And a landlord who has paid for a carefully thought out, lawyer-drawn lease would be understandably reluctant to tinker with a document whose significance he does not fully comprehend. Hence, a landlord may allow minor modifications of the form (e.g., to permit limited subletting), but it should not be surprising that even an understanding landlord would insist that all leases either be on his basic routinized form or not at all.

In any event, it begs the question to say that a tenant is unwilling to accept certain lease provisions just because, in the abstract, he would prefer not to agree to them. The tenant faced with the landlord's usual package has the choice of accepting or rejecting it. If he accepts, despite undesired provisions, there is no reason to assume that he did so for any reason other than that he perceived the benefits to outweigh the detriments. Having made this determination, and having contracted on this basis, it is hard to see what claim the tenant has to relief from certain of the detriments, especially insofar as the detriments were accepted as part of the *quid pro quo* for the benefits. Thus, though the tenant may have been unwilling in some abstract sense to accept certain conduct restrictions, if the tenant was willing on balance

to accept them as part of a package which he deemed to be desirable overall, the restrictions are not properly considered nonconsensual.³⁰⁶ In fact, to relieve the tenant of the restrictions, while holding the landlord otherwise to the lease, would be to force the *landlord* to contract on terms which the landlord found unacceptable.³⁰⁷ Thus, to refuse to enforce restrictions on grounds of unwillingness will not avoid the enforcement of a nonconsensual contract; it will merely shift the unwilling adherence from the tenant's side to the landlord's.³⁰⁸

Finally, though, so far as conduct restrictions are concerned, there is an even more important reason for the landlord to refuse to negotiate. Differences in restriction patterns would defeat the buildingwide uniformity of protection and the value of self-segregation that the conduct restrictions are supposed to provide. Hence, unless the law is to withdraw from protecting special concerns which people strive to preserve, there may be no alternative to allowing landlords the power to prescribe stricter-than-law conduct standards and to enforce the

306. It should be observed that, in the real world, all benefits have costs, if only opportunity costs. Thus, in order to maximize benefit, people are forced to make trade-offs, accepting certain detriments in order to get associated benefits. However, it makes no sense at all (absent circumstances of duress or the like) to say that such acceptance of detriment is nonconsensual. Likewise, it makes no sense to say the tenant's agreement to observe conduct restrictions or, for that matter, to pay rent is nonconsensual—and hence adhesive—just because he could not have gotten possession unless he made such agreements.

307. The result would be, in effect, a form of duress against the landlord. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. Law & Econ. 293, 297 (1975).

308. It is assumed in the foregoing discussion that the tenant, in entering the lease, is aware of at least the general tenor of the conduct restrictions contained therein. This awareness may be the result of reading the lease or, it would reasonably seem, by observing the character of the building which is affected by or consistent with the observance of the restrictions. Cf. *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925). It would appear to be a weak excuse that the tenant was unaware of the restrictions if such unawareness was due to a refusal to read the lease (unless, of course, the landlord encouraged him to sign without reading). Yet, the question arises, should the tenant's lack of notice (actual or constructive) of the restrictions relieve him of their burden?

Indicating that lack of notice is not a ground for relief, one court has held that the landlord has no duty to call the restrictions to the tenant's attention. *Southbridge Towers, Inc. v. Rovics*, 76 Misc. 2d 396, 350 N.Y.S.2d 62 (App. T. 1973). However, the landlord who fails to do so would seem to be opening himself to claims of mistake, implied agreement, estoppel or even fraud in the inducement. On the other hand, it does not very well serve the purpose of the restrictions if tenants do not know their content. Hence, there is some incentive to landlords to encourage tenants to read their leases. Whether anyone very often acts on this incentive is, however, problematical.

The question of lease provisions empowering the landlord to promulgate rules and regulations outside the lease (see note 279 *supra*) presents a different problem. Courts sometimes have said that, to be valid, such restrictions must be "reasonable." See text accompanying notes 310-11 *infra*. What reasonable may or should mean in this context will be described *infra*. However, for present purposes, the question arises whether this limitation on extra-lease restrictions is sufficient to save such restrictions from invalidity due to their overly "private legislative" character.

standards prescribed even against tenants who would not find the standards agreeable.

For the law to withdraw from protecting these special concerns would simply be bad policy. The necessary inadequacy of generalized law prescribed norms has already been described, and it is doubtful that the law could ever offer standards which are sufficiently finely tuned to particular cases to replace the functioning of privately agreed norms. If the law refuses to enforce the privately agreed norms, the result will not be the elimination of special concerns themselves or the values perceived in protecting them. It will mean merely that this entire area of human interchange and potential conflict will be left to the pressures and self-help of *laissez-faire*. As a consequence, the protection will be arbitrarily uneven, depending upon how well these extra-legal protection mechanisms work in particular cases. Worse, the extra-legal attempts at protections will be unscrutinized for abusive motivation, unreasonableness of regulation and other grounds for protection of the regulated party.

It is hard to see how a limited amount of private legislative authority (if that is what it is) could be more detrimental to the general welfare than the law's abdication which the complete rejection thereof entails. Especially, this is true where the "private legislation" is agreed to—albeit perhaps as the "bad part" of an overall good deal—by all who are subject to it.

* * * *

Thus, the prescription by landlords of stricter-than-law conduct standards performs an important, perhaps irreplaceable, social function. And the law's enforcement of such standards is, broadly speaking, justified even though the contractual basis for the enforcement is to a degree undermined by the adhesive character of the leases which give them their force. This is not to say, however, that the law should not place some limits on the *de facto* norm-creating authority which is conceded to landlords. It is only that the general welfare may be best served if such limits are not applied with a presumption of invalidity where stricter-than-law norms are prescribed.

2. Appropriate Legal Limitations on the Conduct Standards Which Landlords May Prescribe

Assuming that landlords are to have the power to prescribe conduct standards to be agreed to and observed by tenants, the question arises as to what limitations should be placed on that power. That is, what kinds of landlord-prescribed conduct standards should be legally impermissible and hence invalid?

It may be helpful to note that lease-contained conduct restrictions are, like zoning laws, a response to the inability of nuisance law, geared to the generality of cases, to adequately protect special concerns which may exist in many specific situations. However, the substantial body of judicial expression delineating the permissible types and extent of regulation via zoning has not been reproduced in the area of private land use restrictions. Although litigation has produced a rather well developed body of rules concerning the possible *mechanisms and procedures* for effecting private land use restrictions (*viz.*, negative easements, implied reciprocal equitable servitudes, covenants and the like), little judicial attention has been drawn (explicitly at least) to the appropriate limits on the permissible *character* of private restrictions. In the landlord-tenant context, courts have traditionally been content to observe that a landlord "has a legal right to control the uses to which his building may be put and may do so by appropriate provisions in a lease."³⁰⁹ Use restrictions, if contained in the lease, as opposed to collateral regulations made pursuant to the lease,³¹⁰ may not even have to be reasonable,³¹¹ and in any event specific guidance as to possible criteria for reasonableness seems virtually nonexistent. About all that may be concluded from the existing case law is that (i) lease-imposed restrictions do not necessarily lose their validity simply because they limit freedom more strictly than the substantive norms of tort (especially nuisance) law,³¹² and (ii) regulations made pursuant to a lease for purposes of restraining trade or violating some other recognized public policy may be impermissible.³¹³

What is needed is to develop a somewhat more concrete definition of reasonableness, to suggest those considerations which ought (and ought not) to be taken into account in applying a reasonableness test of validity. Perhaps the term reasonable is itself an unfortunate one, echoing as it does the relativistic analysis of nuisance determinations.³¹⁴ Clearly, it would not be desirable to test lease-prescribed

309. *Lyon v. Bethlehem Eng'r Corp.*, 253 N.Y. 111, 113-14, 170 N.E. 512, 513 (1930); see *Luna Park Housing Corp. v. Besser*, 38 App. Div. 2d 713, 329 N.Y.S.2d 332 (2d Dep't 1972) (rules and regulations); 30-88 *Steinway St., Inc. v. H.C. Bohack Co.*, 65 Misc. 2d 1076, 319 N.Y.S.2d 679 (N.Y. City Civ. Ct. 1971), *aff'd*, 42 App. Div. 2d 577, 344 N.Y.S.2d 205 (2d Dep't 1973); 1 Am. L. Prop., *supra* note 3, § 3.40; M. Friedman, *Preparation of Leases* 105-07 (1962 ed.).

310. See note 279 *supra*; *Southland Dev. Corp. v. Ehrler's Dairy, Inc.*, 468 S.W.2d 284 (Ky. 1971); *Modern Amusements, Inc. v. New Orleans Pub. Serv., Inc.*, 183 La. 898, 165 So. 137 (1935); *Thousand Island Park Ass'n v. Tucker*, 173 N.Y. 203, 211-12, 65 N.E. 975, 977 (1903).

311. *Irving Inv. Corp. v. Gordon*, 3 N.J. Super. 385, 401, 66 A.2d 54, 61 (Super. Ct.), *aff'd*, 3 N.J. 217, 69 A.2d 725 (1949); *Lamont Bldg. Co. v. Court*, 147 Ohio St. 183, 70 N.E.2d 447 (1946); *American Legion Holding Corp. v. Hurowitz*, 72 S.D. 89, 30 N.W.2d 9 (1947).

312. See notes 26-32 *supra* and accompanying text.

313. See 20 Am. Jur. 2d *Covenants, Conditions and Restrictions* §§ 182-84 (1965).

314. See note 260 *supra* and text accompanying notes 264-75 *supra*.

conduct restrictions by the same objective balancing that applies in private nuisance litigation; to do so would render it legally impossible to protect special concerns and needs of the hypersensitive which the general law itself does not protect.

However, even given the legitimacy of protecting special concerns, it is obvious that some stricter-than-law conduct restrictions will be appropriate for judicial enforcement while others will not. The problem is to find a principled basis for distinguishing one from the other. The following is a discussion of several possible bases.

a. Relative Hardship

Among the factors possibly relevant to the reasonableness of a conduct restriction, one might suggest relative hardship, in this case, the relative hardship of observing the conduct restriction compared with the benefits which accrue to others as a result of its being observed.³¹⁵ The equitable methodology of "balancing the equities," taking into account the relative hardships involved in granting or denying relief,³¹⁶ is commonly employed in cases involving use restrictions on fees.³¹⁷ The relatively greater hardship involved in enforcing a restriction has likewise been relied upon by courts in cases involving leaseholds.³¹⁸

315. The relative hardship discussed here must be carefully distinguished from the comparison of relative hardship discussed earlier in section III(B)(2)(c)(iv). The focus here is upon relative hardship as it bears on the "reasonableness" of the restriction per se. Accordingly, the appropriate comparison is between the hardship of compliance versus the hardship to others resulting from noncompliance. The relative hardship of enforcing a forfeiture for noncompliance (which was discussed earlier) is a wholly different matter, and it involves a wholly different balancing (the hardship to others resulting from noncompliance vs. the hardship of eviction).

It is quite conceivable that, in a particular case, noncompliance with a restriction will result in hardship to others which is sufficiently great to justify enforcement of the restriction (e.g., by injunction) but which is insufficient to justify a forfeiture. See, e.g., *Howard D. Johnson Co. v. Madigan*, 361 Mass. 454, 280 N.E.2d 689 (1972); *Feist & Feist v. Long Island Studios, Inc.*, 29 App. Div. 2d 186, 190, 287 N.Y.S.2d 257, 261 (2d Dep't 1968) (dissenting opinion); 930 Fifth Corp. v. King, 71 Misc. 2d 359, 336 N.Y.S.2d 22 (App. T.), rev'd, 40 App. Div. 2d 140, 338 N.Y.S.2d 773 (1st Dep't 1972); *Fly Hi Music Corp. v. 645 Restaurant Corp.*, 64 Misc. 2d 302, 314 N.Y.S.2d 735 (N.Y. City Civ. Ct. 1970), aff'd mem., 71 Misc. 2d 302, 335 N.Y.S.2d 822 (App. T. 1972); *Madison 52nd Corp. v. Ogust*, 49 Misc. 2d 663, 268 N.Y.S.2d 126 (N.Y. City Civ. Ct.), aff'd, 52 Misc. 2d 935, 277 N.Y.S.2d 42 (App. T. 1966). It is only when the relative hardship to the violator justifies neither forfeiture nor any other form of redress that the restriction can be said to be itself unreasonable and hence, invalid, on the grounds of relative hardship.

316. H. McClintock, *Equity* §§ 144-45 (2d ed. 1948).

317. *Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101 (1927). The balancing methodology is sometimes a statutory requirement as well. E.g., N.Y. Real Prop. Actions Law §§ 1951-53 (McKinney 1963).

318. *Piankay Realities, Inc. v. Romano*, 271 App. Div. 104, 62 N.Y.S.2d 533 (1st Dep't

Invalidating conduct restrictions on the basis of relative hardship appears at first to be quite defensible. Indeed, if reasonableness is a test of the validity of such restrictions, it seems to be highly unreasonable to enforce a restriction if observing it causes considerable inconvenience but offers little benefit to those supposedly protected thereby. However, several objections may be posed against using relative hardship as a basis for determining the reasonableness and validity of lease-prescribed conduct restrictions.

The first objection is that any attempt to treat relative hardship as a criterion of unreasonableness would tend to defeat the substantive objective of protecting the special concerns which law-imposed behavioral norms ignore. For resorting to the sort of relativistic analysis which a relative hardship theory entails is to convert every conduct restriction case into something of a case of nuisance.

The appropriateness of relativistic analysis may be clear enough when the gist of the landlord's action is tort; for in tort analysis, the relativism of circumstances lies at the heart of the fundamental question of whether the defendant's conduct constituted a tort at all.³¹⁹ It is certainly less clear why relativistic analysis should have any role in deciding whether to enforce the terms of a contract. For contract methodology is essentially the application of positive standards established by the parties themselves.³²⁰ The primary task in contract is not to weigh competing interests, policy objectives and the like for the purpose of deciding whether the duty to observe a particular behavioral standard is one that the law should create. The behavioral standard has already been created by the undertaking of the promisor. The duty to observe the standard is imposed by law on the basis of

1946), *aff'd*, 296 N.Y. 920, 73 N.E.2d 39 (1947); *Jerome Realty Co. v. Yankovich*, 37 Misc. 2d 433, 235 N.Y.S.2d 498 (Sup. Ct. 1962). See also *930 Fifth Corp. v. King*, 71 Misc. 2d 359, 336 N.Y.S.2d 22 (App. T.), *rev'd*, 40 App. Div. 2d 140, 338 N.Y.S.2d 773 (1st Dep't 1972).

Unfortunately, since a preponderance of lease restriction cases arise as actions to enforce a forfeiture, it is often hard to tell, where the court grants relief from forfeiture, whether the relative hardship of the restriction itself or merely of the remedy was the reason for the court's holding.

319. See notes 260-62 *supra* and accompanying text.

320. The contract may of course define the duty in relativistic terms (e.g., "tenant shall not use the demised premises in any objectionable manner" or "tenant shall make only such use of the included utilities as is consistent with residential use"), and if the contract does establish a relativistic standard, then relativistic analysis will of course be necessary in deciding whether, in each instance, particular acts or conduct are prohibited or mandated by the standard. This still does not mean that the tort standards automatically apply, for the objective of contract interpretation should remain primarily the ascertainment and effectuation of the parties' intentions. Nonetheless, a reference to a tort concept in the contract (e.g., "tenant shall not suffer any nuisance on the demised premises") should indicate that the ordinary tort standard would *prima facie* apply.

policies (concerning the social utility of enforcing agreements) which are independent of the substantive content of the standard itself. Thus, the question of whether, on balance, it was desirable to create the standard has no bearing on the issue of whether to enforce it. The question is solely: Did the promisor do what he has undertaken?

The determination of whether or not the contractual duty was breached may perhaps require interpretation of intention (and therein a certain amount of subjectivity³²¹), but essentially the process is one of simple comparison—comparing the behavioral requirements of the contract with the provable conduct of the promisor. This process should not require or even admit of any sort of balancing of interests of the kind characteristic in defining torts; this is especially true if avoiding uncertainty—of standards and of proof—was a reason for creating particularized conduct standards in the first place.³²²

Of course, comparing agreed behavioral requirements with provable conduct is not the only function performed by courts in contract cases, even though it is the primary one. The court must be satisfied that enforcement of the agreed behavioral requirement is not inconsistent with some policy more important than the policy of enforcing contracts.³²³ This does require some balancing by the court,³²⁴ though in most traditional cases of nonenforcement (*e.g.*, on grounds of illegality or fraud) the outcome of the balancing is so obvious as not to be open to dispute. While historical precedent does not strictly speaking support nonenforcement of contracts on the grounds of relative hardship³²⁵ (not at law, at least³²⁶), the more recent trend—particularly through the expanded application of “unconscionability” notions—seems to be to legitimize relative hardship (in its more extreme manifestations) as a ground for contract invalidity. That is, the policy

321. The subjectivity involved in the interpretation process may not be limited to subjective conclusions concerning what is, purely speaking, intent. As has been earlier noted (see notes 162 & 190 *supra* and accompanying text), courts sometimes make conscious modifications of the substantive meaning of contracts under the guise of “strict interpretation.”

322. See text accompanying notes 257-63 *supra*.

323. For example, courts will not enforce a contract calling for illegal acts by the breaching party. 6A A. Corbin, Contracts § 1375 (1962).

324. See section III(D)(2)(d) *infra*, especially note 374 and text accompanying notes 383-88 *infra*.

325. See J. Calamari & J. Perillo, Contracts §§ 55, 56 (1970); 1 A. Corbin, Contracts § 127 (1963). See also *Blakeley v. W. T. Rabon*, 266 S.C. 681, 221 S.E.2d 767 (1976); 3 J. Pomeroy, Equity Jurisprudence § 928 (5th ed. 1941); 1 J. Story, Commentaries on Equity Jurisprudence § 245 (13th ed. 1886).

326. *Id.*; cf. 5A A. Corbin, Contracts §§ 1164-65 (1964).

of avoiding relative hardship is perhaps becoming a policy which outweighs the general policy of enforcing contracts.³²⁷

If avoidance of relative hardship in contract enforcement is indeed a transcendent policy, its inclusion as a criterion of unreasonableness for conduct restrictions would seem appropriate as would the relativistic analysis which it entails.

However, although compliance with lease conduct restrictions can result in relative hardship, it turns out on analysis to be most unlikely that, consistently with protecting special concerns, relative hardship can serve as a basis for holding particular restrictions invalid.

In order for compliance with a conduct restriction to cause relative hardship, such compliance must result in burdens to the obligor which are out of proportion to the benefits to the beneficiaries of the restriction. However, this disproportionality would not occur, in an objective sense, where the obligor's duty to comply was knowingly and willingly assumed in exchange for corresponding duties assumed by other obligor-beneficiaries of the restriction.³²⁸ Suppose, for example, that one of two knowledgeable bargaining neighbors willingly relinquishes something (*e.g.*, the right to practice a trombone at home) in exchange for, say, \$100 paid by the other. The fact of exchange is objective evidence that the trombone player considered the benefit of practicing at home to have a value of less than \$100 and the other neighbor considered the burden of such home practice to have a negative "value" of more than \$100.³²⁹ Although the absolute values of the benefit and burden are unknown, the relative burden and benefit of the restriction agreement are demonstrated by the exchange transaction, *viz.*, the fact of the exchange shows that both parties bargained to reap a net benefit from the restriction agreement and, hence, the agreement results in no relative hardship to either. Similarly, if each of two neighbors willingly relinquishes a right (*e.g.*, to hold large parties at home) in exchange for a corresponding relinquishment by the other, we have objective evidence that, for both, the right relinquished was considered less valuable than the right (restraint in party-giving by the other) which was received. Again, we do not know the absolute values which either neighbor placed on the rights relinquished or received.

327. For a discussion of this trend, stressing the myopia of its assumptions, see Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. Law & Econ. 293 (1975).

328. Cf. the language quoted in note 302 *supra*.

329. One or both of the two values might also be equal to \$100. In that case the exchange would result in no net benefit or burden to either or both of the two parties; but still, there would be no relative hardship, since each party would be getting a value which was at least the equivalent of that which he had given up.

But we do have objective evidence to show that each placed a higher value on the other's restraint than the other placed on freedom from the restraint. Otherwise, they would never have willingly made the exchange.³³⁰

By parity of reasoning, if every tenant willingly and knowledgeably agrees with the landlord to observe certain conduct restrictions, with the substantial expectation that compliance with like restrictions will be required of all other tenants, we have objective evidence to show that each tenant places a higher value on conferring upon the landlord the power to limit certain freedoms of others than he (or any of the others) places on having those freedoms himself.³³¹ Hence, the universal agreement for restrictions is—objectively—of net benefit to all, and it may be concluded that the agreement would not result in net hardship to anyone.³³² Objectively, there is no relative hardship which could constitute an appropriate basis for holding such restrictions either unreasonable or unenforceable; where the restrictions apply universally³³³ to all tenants by virtue of their willing and

330. Once again, any two or more of the values (on restraint or freedom from restraint) might have been equal and the voluntary exchange might still have occurred. However, just as in the case in note 329 *supra*, the presence of equality of values would mean, at worst, that the transaction resulted in neither net benefit nor net burden (and, hence, no relative hardship) to either party.

331. Landlord-imposed conduct restrictions do pose a case distinctive from the previous two hypotheticals set forth in the text insofar as tenants are disabled by the lease or the law from enforcing conduct restrictions contained in other leases. See note 39 *supra* and accompanying text. The difference is that, in exchange for the assumption of conduct restrictions, the tenant gets, not a right to enforce like restrictions on other tenants, but rather an expectation that the landlord will provide such enforcement. However, this difference does not *ipso facto* deprive the restrictions of their reciprocal character since the benefit which each tenant gets as his *quid pro quo* for assuming the restrictions is still identical to that received by the other tenants for their assumptions. If all willingly agree to the restrictions in exchange for such expectation, we can still conclude that there is no net burden, and no relative hardship, in enforcing the restrictions.

332. Obviously, enforcement of the exchange causes some "disadvantage" to the party against which it is enforced, because such enforcement prevents him from having the performance of the other party while he himself does not perform. But the "disadvantage" of not being able to breach a contract and still have the *quid pro quo* is hardly the kind of hardship which kindles fires in the heart of equity.

333. For convenience of exposition, it has been assumed that the conduct restrictions in question are uniformly applicable to all tenants. However, the result is the same even if the restrictions are nonuniform. Of course, if the restrictions are not uniform, it cannot be said that the restricted tenant receives the expectation of comparable restrictions on others as his *quid pro quo*. But if the tenant willingly and knowingly entered the lease, it may be assumed that there were other offsetting counterbenefits to the tenant which induced the tenant's overall satisfaction. See the discussion of "willingness" in note 336 *infra* and section III(D)(1)(a) *supra*. An obvious example is a lease to a pharmacy restricting use to drug sales. The pharmacist would hardly desire like restrictions to apply throughout the building, but he might like the other tenants to be restricted to, say, the practice of medicine. Cf. *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942).

knowing agreements, there is objectively no hardship at all.³³⁴

But even though agreement-based universally applicable conduct restrictions cannot result in any relative *objective* hardship, the potential for relative *subjective* hardship, which is the "real" relative hardship, remains. Consider, for example, a prohibition on large parties at home. Whatever may be the burden of such a prohibition and whatever may be its benefit to others, if every tenant gets both the benefit and the burden, then compliance with the prohibition gives no tenant an advantage or disadvantage which is greater or less, in an objective sense, than that of the others. Subjectively, however, the differences in advantage may be considerable. A gregarious party-giver may find the prohibition a great burden with little special benefit, and his introverted neighbor may find it a tremendous boon causing no inconvenience whatsoever. As a result of these subjective differences, which are based on the different values and special concerns of different people, the "real" hardship of compliance could, in many cases, exceed the hardship to others resulting from a breach. There could, in other words, be real subjective relative hardship in complying.

There are several possible explanations for this disparity between "real" or subjective relative hardship and the relative hardships which are evidenced objectively by the fact of agreement. One of these is that the agreement may not have been entered into "knowingly."³³⁵ Another is that it may not have been entered into "willingly."³³⁶ A third

The point, which may be generalized, is that in determining the relative hardship of agreements, the relative burdens and benefits of the entire agreement must be considered, and the focus cannot properly be limited only to particular terms while ignoring the rest.

334. To reiterate from notes 329 & 330 *supra*, for some tenants the values placed upon some lost freedom and getting corresponding protection may be equal, in which case there would be neither net burden nor benefit. Still, however, there would be no relative hardship in enforcement.

335. That the restrictions were not assented to "knowingly" suggests such standard excuses for contract nonperformance as fraud, mistake and the "unfair surprise" aspect of unconscionability. See R. Nordstrom, Sales § 44, at 127-28 (1970). The common feature of these excuses for nonperformance is that they offer relief from enforcement of an apparent agreement where the objective manifestation of assent is belied by evidence of facts sufficiently compelling to justify resort to the subjective or "real" mental state of the parties involved. However, lack of knowledge in this sense, though it may lead to real (subjective) relative hardship, is irrelevant to the reasonableness of particular restrictions *per se*. Such lack of knowledge goes at most to the appropriateness of enforcing the restriction in a particular case. But cf. *Southbridge Towers, Inc. v. Rovics*, 76 Misc. 2d 396, 350 N.Y.S.2d 62 (App. T. 1973) (no duty on landlord to notify tenant of clear language of lease). And, if relief from enforcement is appropriate in a particular case, the relief should be conferred without invalidating the restriction *per se*. Rather, recourse should be had to one of the legal doctrines mentioned above pursuant to which enforcement may be refused despite the restriction's basic validity.

336. That the restrictions were not assented to "willingly" also suggests several standard

reason is that, in making their agreements, tenants do not necessarily act "rationally."³³⁷

None of these reasons for the objective-subjective disparity offers any grounds for questioning the "reasonableness" of particular restrictions per se; they go, not to the substance of the restrictions themselves, but only to the agreement process which gives the restrictions their legal force. Obviously, defects in the agreement process may

contractual defenses based on lack of "real" consent, including duress, overreaching and the "oppression" aspect of unconscionability. See R. Nordstrom, *Sales* § 44, at 128-30 (1970). The whole problem of willingness may be viewed broadly as a consequence of the fact that many leases, especially residential leases, tend to be contracts of adhesion, offered on a take-it-or-leave-it basis by the landlord. Whether lease-contained conduct restrictions ought not to be enforced because they constitute contracts of adhesion has been discussed in greater detail under section III(D)(1)(a) *supra*. Suffice it to say here that, for purposes of determining reasonableness by reference to relative hardship, it can be assumed that the conduct restrictions were "willingly" entered into if the lease as a whole was satisfactory to the tenant and "willingly" entered into despite the undesired term. More particularly, even though a tenant may not have desired a particular nonnegotiable conduct restriction in his lease (e.g., because the freedom constraints on others were not worth the freedom restraints on himself), if the tenant accepted the lease anyway—deciding to take the good with the bad—it may be assumed (given knowledge and rationality) that there was some other benefit in having the lease which made the overall exchange beneficial to the tenant. See note 333 *supra*. Thus, even though the burden of complying with the restriction is not outweighed by the benefits of compliance with it by others, there would be no overall or net hardship when one takes into account the other benefits which the tenant gets under the same lease.

337. That the restrictions were not assented to "rationally" suggests perhaps the traditional excuse of incapacity or incompetence. But the traditional notion of incapacity would have to be extended almost beyond recognition in order to make all "irrational" undertakings voidable by the promisor.

There is, to be sure, a tendency among contracting parties to not think about all of the consequences of an agreement, to trade off values which may be very important in exchange for countervalues which are not, subjectively speaking, comparable. Thus, the tenant may give up a particular freedom (e.g., to keep a dog) not realizing that it may be more important to him or his family to have a dog than it is to live in a building where the neighbors have no dogs. Or circumstances may change unpredictably, after agreement, modifying the tenant's relative values. In these sorts of cases, the apparent values which the tenant placed on elements of his exchange, as demonstrated by the willingness to enter the exchange, do not correspond to the real subjective values which he placed, or now places, upon them. Thus, the enforcement of the tenant's agreement may cause a real net burden to the tenant, one which is out of proportion to the benefit to the other tenants. However, such relative hardship would not indicate unreasonableness of the conduct restriction per se, nor, it may be added, would it seem to be the sort of case where the application of ordinary contract rules would prevent enforcement of the tenant's agreement.

The policy of enforcing agreements based upon objective manifestations of assent would be undermined entirely if a promisor could avoid enforcement on the grounds that he, without fault of the promisee or anyone else, miscalculated the appropriateness of the bargain for his own purposes and did not really intend its effect. Moreover, as will be shown presently in the text, there is no way to accurately estimate the real subjective values in any event. Thus, lack of "rationality" should not, short of incompetence, vitiate the tenant's agreement to observe conduct restrictions.

suggest any of several traditional bases for excusing performance,³³⁸ but none of the bases are related to the character of the restrictions themselves (and none, it may be added, depends on the presence of "relative hardship" for its applicability). Nevertheless, given this potential disparity between subjective relative hardships and the apparent relative hardships shown by objectively manifested intentions, it would be clearly preferable, if it were possible, to measure the relative hardship of restrictions according to subjectively held values rather than their objectively manifested counterparts.³³⁹ Unfortunately, however, it is not possible.

It is impossible accurately to compare subjective benefit against subjective burden because to do so would require an interpersonal comparison of utility which simply cannot be accurately achieved. There is no way to tell whether a prohibition (*e.g.*, on large parties, piano playing or dogs) causes a greater burden on a person who wants these things than it does a benefit for another who does not. Sometimes the courts are required to make such interpersonal comparisons, for example, in cases brought in nuisance. Recognizing the futility of attempting to compare subjective or "real" values, the law of nuisance is content to proceed with only approximate comparisons, making its determinations on an objective basis, looking at the benefits and burdens as experienced by ordinary persons, and excluding the idiosyncratic concerns of the hypersensitive.³⁴⁰ But it would not be appropriate to follow the example of the law of nuisance in testing the reasonableness and enforceability of stricter-than-law conduct standards. For if such standards were tested on the objective basis applied in nuisance cases, then the only enforceable standards would be those which are no more restrictive than the law of nuisance itself. The protection of special concerns (of the hypersensitive or for special situations) would be left—despite the possibility of resolution by agreement—in a legal vacuum, protectable only by one or another method of self-help.

Thus, unless the law is to abandon the protection of special concerns, the only acceptable method for comparing relative subjective

338. *E.g.*, fraud, mistake, duress, incompetence, procedural unconscionability. See notes 335-37 *supra*.

339. It should be noted that measuring the subjective relative hardship necessarily implies a case-by-case approach (since different people have different values), and such casuistry means that no generalizations about the "reasonableness" of particular types of restrictions (as based on relative hardship) would be possible. Still, inasmuch as subjective relative hardship may appear to be a proper basis for nonenforcement, it seems suitable (if not entirely logical) to discuss it at this point.

340. See text accompanying notes 264-75 *supra*.

benefits and burdens is to observe an exchange or exchanges between the persons in question. As an indicator of relative subjective values, an exchange agreement is admittedly not perfect. The possible disparity between the parties' real subjective values and those objectively shown by the fact of the exchange means that the agreement, the objective showing of subjective values, may mis-indicate. Nonetheless, reliance on agreement-shown comparative values is better than resort to the objective standards of nuisance. For to rely on the latter would be necessarily³⁴¹ to disregard the differing values and special concerns which different people have. It would be to invalidate any agreements that "ordinary" persons would not make.

b. *Lack of Potential for Injury to Any Legitimate Interests*

Another factor bearing quite directly on the "reasonableness" and appropriateness for judicial enforcement of landlord-prescribed restrictions is the extent to which such restrictions protect some legitimate interest of the landlord or neighboring tenants. For if there is no legitimate interest being protected by a stricter-than-law restriction, or if there is no potential for injury to any such interests, the freedom constraints involved in the restriction have no countervailing justification.

One type of restriction which would normally seem to be unreasonable on this basis is a restriction on off-premises activities. The legitimate interest of the landlord and neighboring tenants is in the building, its internal environment and what goes on there. Off-premises activities generally have no bearing on this. Thus, if a landlord attempted to regulate, say, off-premises drinking or sexual activities, chances are good that his motivation would not be the protection of building-related interests but rather would be goals of a somewhat more general social or paternalistic nature. Were it not that residential leases are almost inevitably "adhesive" in character,³⁴² there might be no objection to such paternalism or social crusades on the part of landlords, however misguided they may be. But given the somewhat special leverage which landlords do have in imposing their philosophies of life and lifestyle on others, courts should be wary that

341. "Necessarily" because, as previously stated, interpersonal comparisons of (actual) utility are impossible. Relativistic analysis (as characterized in nuisance) could not possibly adapt itself to take into account special concerns—of the hypersensitive or for special situations. The specter of testimony such as "I like big parties more than the neighbors dislike the noise from them" is enough to dissuade one from even considering an attempt at such adaptation. Yet, other than looking at people's exchanges, there is no better way to probe the subjective values which people "really" have.

342. See section III(D)(1)(a) *supra*.

this leverage is not abused in promoting objectives which have nothing to do with the subject matter of the lease.

An argument might be made that a few types of off-premises activity (e.g., drug-abuse or prostitution) have such a potential of leading to on-premises trouble that they are, by extension, building-related and hence appropriate for lease-prescribed restriction.³⁴³ However, for the most part, the off-premises activities of a tenant would seem to be beyond the scope of proper concern of a landlord or neighboring tenants. Accordingly, lease restrictions concerning such activities would be "unreasonable."

Similarly, activities on-premises but having no spill-over effects into others' apartments or common areas would seem to be inappropriate subjects for landlord restrictions. Such activities, if they have no effect on anyone outside the apartment where carried on, present no threat to psychic tranquility or any other interest of neighboring tenants or (absent waste) the landlord. The same may be said of activities which do have some spill-over effects but which result in no injury.³⁴⁴ However, if special concerns are to be protectable by agreement, care must be taken in determining whether in fact there is a spill-over effect and whether such effect causes injury.³⁴⁵ Does prostitution carried on (silently) in an apartment have a spill-over effect if the neighbors are aware of and bothered by the reason for the comings and goings in the corridor? Should such activities be prohibitible by agreement?³⁴⁶

One can easily conceive of many other special concerns as to which it is difficult to determine whether there are spill-over effects, or whether such effects cause injury. Among these might be listed type of vocation, age, sexual orientation, current marital status, and school background.³⁴⁷ Each of these cases, though somewhat "close," might

343. See, e.g., *Campbell v. Henry Phipps Plaza S., Inc.*, 45 App. Div. 2d 684, 356 N.Y.S.2d 326 (1st Dep't 1974).

344. Compare text accompanying notes 192-99 *supra*.

345. For example, is a sign in the window within the landlord's "legitimate" concerns? See *Cooley v. Bettigole*, 301 N.E.2d 872 (Mass. App. 1973) (prohibition upheld). How about the fact that a tenant cohabits with a member of the opposite sex? See *Atkisson v. Kern County Housing Authority*, — Cal. App. 3d —, 130 Cal. Rptr. 375 (Dist. Ct. App. 1976).

346. See *Remedco Corp. v. Bryn Mawr Hotel Corp.*, 45 Misc. 2d 586, 257 N.Y.S.2d 525 (N.Y. City Civ. Ct. 1965).

347. The listed items, and several others which will be cited in this section, do not of course involve "activities" as such, but rather involve "status." However, the potential concerns which people may have about others' status (e.g., a neighbor who has been twice convicted of child-molesting) are basically the same as potential concerns about activities as such. The activities which a person is likely to engage in are very often a function of status, especially in the types of cases listed here. Furthermore, in terms of the impact on the psychic character of the intrabuilding environment, the presence of, e.g., a drug addict, may be the same whether or not he actually shoots up on the premises. But cf. *190 Stanton Inc. v. Santiago*, 60 Misc. 2d 224, 302

under certain circumstances, conceivably represent cases of legitimate concern even in the landlord-tenant context: school background in a building for Princeton alumni, type of vocation in a building for doctors and dentists, age in a building for senior citizens, current marital status in a building for singles, and sexual orientation in a building inhabited by persons who are revolted by such things. One may scoff at those who would want this sort of social inbreeding for themselves, but a self-righteous narrowness of sensitivity is required to say that all such desires are incomprehensible. Certainly they are building-related in the sense that they reflect concerns about matters affecting the intrabuilding environment.

A number of even closer cases could be mentioned: style of dress, identity of guests (though not necessarily their behavior as such) and political leanings. In other contexts such concerns may be very understandable and appropriate for agreement-provided protection, *e.g.*, dress codes in employment, or identity of friends or political leanings where sensitive security problems are involved. If they do not seem to be legitimate concerns in the landlord-tenant context, it is only because it is hard to see, in that context, why anyone should possibly care about such things, even if they may be "building-related." But if the objectionable political leanings are neo-Nazi, and friends are fellow sympathizers who show up in their neo-SS regalia, it is easy to see that many might understandably be quite uncomfortable and concerned. Where do we draw the line on understandability—Nazis, Communists, socialists, hippies?

What develops is a definition of legitimacy or reasonableness of special concerns which is based on whether or not such special concerns are building-related and, secondly, whether such concerns (be they subscribed to by the observer or not), are at least understandable. If understandable (in the landlord-tenant context) they should be eligible for protection by agreement (in that context) because their understandability gives countervailing justification for the freedom constraints which protection of the concerns entails. If not understandable, there is nothing at all to be gained by the freedom constraint and hence no justification for it at all.³⁴⁸ Unfortunately, the spectrum of

N.Y.S.2d 693 (N.Y. City Civ. Ct. 1969). Accordingly, conduct restrictions and those related to status are considered comparable and have not been distinguished.

348. Note that no mention is made of whether the benefits of protecting special concerns are understandable enough to outweigh the burden of freedom constraints. That is a question of relative hardship which was treated in the preceding section.

It should be observed that arguments raised in the preceding section against using supposed relative hardship as a ground for invalidity would have no application if compliance results in no subjective benefit at all to the "protected" class. Hence, restrictions may be invalidated on the

understandable concerns runs all the way from desiderata having a near consensus to the paranoid yearnings of a schizophrenic. A line probably has to be drawn somewhere, and one would hope that the line between sane and insane would be the recourse of very last resort. The trouble is that drawing any line at all would inevitably involve a subjective process, and that in turn means judicial intervention in the norm-creation process—an invitation to the courts to substitute objective standards for those agreed to by the parties. And this would tend to defeat the protection of “real” special concerns.³⁴⁹

In this state of affairs, perhaps the only practicable test of the “understandability” of a concern is the fact that someone has gone to the trouble of getting a protective agreement and proceeding in the courts to enforce it. That is at least an indication that somebody believes that a valuable interest is at stake, be it an economic asset or psychic tranquility. Accordingly, there should be a strong presumption that the concern sought to be protected is at least *prima facie* “legitimate.” Any lingering doubts on legitimacy would be more appropriately directed towards the legitimacy (or abusiveness) of the motives for seeking enforcement in the particular case, *i.e.*, to whether such motives are building-related or, more particularly, related to the intrabuilding environmental character which the restriction is supposed to protect.³⁵⁰ There will still be some tendency to limit “understandability” to that which ordinary persons would understand—for the court to say (perhaps implicitly), “no one could possibly be concerned about that,” as with off-premises activities, lack of spill-over effect or paranoid concerns of the mentally ill. However, with a presumption of validity, these tendencies to substitute objective values for the real values of those directly concerned will at least be kept in check, and such tendencies will thus interfere minimally with protecting the special concerns of the perfectly sane.

c. *Excessive Strictness of Standards*

The freedom constraints attendant to lease-prescribed conduct restrictions tend to be very personal. Their focus is upon the private lives of tenants and therefore, compared with other contracts, such restrictions can have an unusually extensive or “oppressive” impact on the overall life activities of those whose freedoms they limit. This is

grounds that they benefit nobody even though, when they do offer some benefit, the supposed “relative hardship” required to achieve such benefit is an inappropriate basis for invalidating them.

349. See text accompanying notes 334-41 *supra*.

350. See discussion of abusive motivation as a grounds for nonenforcement at notes 50 & 55 *supra* and accompanying text.

because such restrictions limit what may be done at home, and home is, in the densely interactive daily lives of many, perhaps the only resort of comparatively uninhibited freedom. For most, probably, it is the place of maximum freedom.

Of course, lease-prescribed conduct restrictions should not be held *ipso facto* "unreasonable" (and hence inappropriate for enforcement) simply because they impose stricter-than-law limitations on tenant freedom. All contracts restrict freedom. The protection of special concerns requires this. Still, because lease-prescribed conduct restrictions do limit freedom at home, constituting the perhaps ultimate barrier to the acting out of personality itself, particular scrutiny may be drawn to the character and strictness of the constraints which such restrictions impose. One is tempted to assume that there is a point of strictness beyond which stricter-than-law conduct norms should not be permitted to go.

Yet, just because home may be the last resort of comparative uninhibitedness, it does not follow that it, any more than the job, the streets or business relations, should be entirely without "rules" or norms of behavior. For in order to enjoy "freedom" at home it is necessary to have at least some degree of cooperation from the neighbors. It is important to keep in mind the familiar paradox that rules are just as necessary to protect freedom as they are usable to destroy it; to protect some freedoms, other freedoms must inevitably be constrained.³⁵¹ The freedom to enjoy a book, listen to quiet music or merely relax may require that the neighbors *not* be free to enjoy loud music. Conversely, the freedom to enjoy loud music may require that the neighbors *not* be free to relax. Thus the fact that the home is the last resort where people can be maximally free to act out their desires may argue as much *for* freedom constraints as it argues against them.

Unhappily, trying to limit the strictness of lease-prescribed freedom constraints appears at once to be incompatible with permitting the protection of the special concerns which may be preconditions to the enjoyment of freedom. For in order to apply "excessive strictness" as a criterion of "unreasonableness" (and hence nonenforceability), the level or degree of freedom constraint must be measured, at least implicitly, against some sort of external objective standards. But measuring the parties' agreement against any such external standards is at odds with the agreement-autonomy which the protection of special concerns requires.³⁵²

351. Cf. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1090-93 (1972).

352. The level or degree of constraint is in any event highly subjective and hence not measurable. Compare the discussion accompanying notes 334-41 *supra*. Which has the greater

In fact, though, the protection of special concerns can be achieved even if unqualified autonomy is not conceded with respect to agreements imposing restraints on conduct. For example, the protection of special concerns does not require the enforcement of restrictions on conduct where the restricted conduct would cause no injury (or virtually no injury) to others.³⁵³ Restrictions on such conduct would be excessively strict, and hence, "unreasonable," in the sense that their enforcement would result in a pointless constraint upon freedom.³⁵⁴ The refusal to concede agreement-autonomy with respect to such restrictions prevents excessive strictness without interfering at all with the protection of special concerns.

There is also no incompatibility between preventing excessive strictness and protecting special concerns where restrictions are struck down because they cannot, as legal mechanisms, serve their intended purpose. Consider for example a rule which provides: "Tenant shall make no noises which are audible in neighboring apartments." It is probable that almost everybody would like to have the protection of such a rule. No more shoes crashing, one after the other, on the ceiling above, no more shouts of interspousal discord, no more children's cartoons at seven o'clock on Sunday morning. But given the architectural characteristics of modern construction, few could really comply with such a

impact on freedom, a prohibition on dogs or a prohibition on piano playing? The answer depends on the desires with respect to either of these on the part of the persons constrained, the intensity of such desires, the convenience and availability of alternatives (e.g., off-premises practice studios) and the like. Thus, without resort to objective notions about what "ordinary" persons desire, the level or degree of constraint cannot be estimated at all. And measuring levels of constraint against such objective standards gives no realistic estimate because the differences in people mean that any such objectively based estimates will be almost inevitably wrong. Neither piano playing prohibitions nor prohibitions on keeping dogs, for example, would be likely to involve any freedom constraint on "ordinary" apartment dwellers if the majority of apartment dwellers do not do these things anyway. For a pianist or dog-lover, however, such constraints may be almost intolerable.

Comparative estimates of level or degree of constraint may sometimes appear possible. For example, a rule which prohibits practice of music instruments after 7:30 p.m. appears more constraining than one which prohibits such practice after 9:00 p.m. But applied to particular cases, when the subjectively held values of a real person are involved, the two rules may be practically identical in their oppression (for example, if the person in question only really wants to play the piano after midnight).

353. It has previously been observed that lack of resulting injury should be proper grounds for refusing to allow forfeiture for breach of a restriction (see section III(B)(2)(c)(ii) *supra*) and that lack of injurious consequences also argues for the invalidity of the restriction itself (see text accompanying notes 344-46 *supra*). However, as was also observed in both earlier discussions, care must be taken in supposing that the restricted conduct causes no injury if the possibility of protecting special concerns is to be preserved.

354. In this sense, the "lack of potential for injury to any legitimate interests," discussed in the preceding section, may be considered a subdivision of "excessive strictness."

rule without almost impossible inconvenience. When padding to the refrigerator during T.V. commercials or "the tread of a woman's bare foot" can become a contributing cause of litigation,³⁵⁵ the inability of legal mechanisms to surmount certain physical problems becomes obvious. If landlords were permitted to enforce a rule as strict as the "no spill-over noise" rule above, the potential for random injustice would be as great as or greater than if stricter-than-law conduct restrictions were prohibited altogether.

The problem with such a rule is not the degree to which it constrains freedom (though such constraint is considerable indeed). The problem is that it attempts to confer a protection which legal mechanisms, the regulation of human behavior, simply cannot provide. Occasionally, but seldom, this may occur because the state of technology or physical laws themselves prevents alleviation of the annoyance. Mostly though, it will occur merely because it is uneconomical (albeit theoretically feasible) to provide the protection. In any event, however, even though we may wish to permit the hypersensitive to contract away from annoyance whenever possible, some things nonetheless simply must be endured. And the ordinary life sounds of neighboring tenants, like sirens in the streets and sour glances from passersby, are examples of these.

Similarly, there are annoyances which are not "ordinary" in the sense that they are generally omnipresent in multi-tenant buildings but which, nevertheless, are practically unavoidable. These are the isolated, temporary occurrences which inevitably cause bother, sometimes considerable bother, to those in close proximity, but which hardly can be anticipated or prevented, let alone effectively regulated by contracts. Most such annoyances, such as a guest or party that becomes unexpectedly raucous, a family quarrel at 3:00 a.m. or a pervasive odor from burnt bacon, sound trivial at their mention, however great an upset they may cause others at the time. Nonetheless, as has been previously argued,³⁵⁶ *objective* notions about what is a trivial annoyance would be a dangerous basis for judging what is subjectively important to others. And in any event, if objectionable conduct is isolated and temporary in character, that fact alone should supply a sufficient basis for holding the conduct inappropriate for restriction.³⁵⁷ The same may be said for acts which are accidental or

355. *Pool v. Higginson*, 8 Daly 113, 117 (N.Y.C.P. 1878); see *Louisiana Leasing Co. v. Sokolow*, 48 Misc. 2d 1014, 266 N.Y.S.2d 447 (N.Y. City Civ. Ct. 1966).

356. See text accompanying notes 339-41 *supra*.

357. Cf. rules applicable to evictions for illegal uses of premises. E.g., *Murphy v. Traynor*, 110 Colo. 466, 135 P.2d 230 (1943). See also *Lituchy v. Lathers*, 35 Misc. 2d 556, 232 N.Y.S.2d 627 (App. T. 1962); *Di Lella v. O'Brien*, 187 Misc. 922, 68 N.Y.S.2d 374 (Albany City Ct. 1946).

occur by mistake.³⁵⁸ The occasional annoyances which are inevitable (even if not routine) in multi-tenant buildings simply cannot be regulated or prevented by contracts. And lease restrictions which attempt to do so go beyond their possibilities of establishing an overall intrabuilding environmental "character." Such restrictions are, therefore, pointlessly (and hence, excessively) strict.

Thus, in cases where stricter-than-law restrictions attempt to alleviate that which cannot be avoided, such restrictions can be invalidated on grounds of excessive strictness without jeopardizing the protection of special concerns. In nuisance cases, courts sometimes express this as the "price" or "penalty" of urban life,³⁵⁹ the suggestion apparently being that those whose hypersensitivities do not permit them to suffer these things should not live in cities.³⁶⁰ The same sort of idea, that enduring certain annoyances is the price or penalty of urban living, can also be found in cases refusing to enforce lease conduct restrictions.³⁶¹ The language of the nuisance cases can perhaps, in its abstractness, be applied with equal aptness in cases of excessively strict lease conduct norms. However, the price or penalty of city living exacted by the law of nuisance must be considerably higher than the rock bottom price or penalty which cannot be avoided even by contracting. For in nuisance law, which protects only the ordinarily sensitive, references to the price or penalty of urban life serves mainly to admonish the hypersensitive that the law of torts will not protect their needs.³⁶² To apply that same test to lease conduct restrictions would mean that special concerns could not be protected even by contract.³⁶³

What then *is* the price or penalty which cannot be avoided even by contract? Minimally, we have seen, it is endurance of the annoyances against which the legal mechanisms of contracting cannot protect. But what of spill-over annoyances which are *not* always associated with multi-tenant buildings of the type in question and which are *not* isolated, unexpected or the result of accident, mistake or the like?

358. Cf. relief against forfeitures given in cases of accident, fraud, mistake or surprise. See text accompanying notes 226-27 *supra*. See also Note, Equitable Relief from Forfeiture of a Lease Incurred by Breach of Covenant, 20 Harv. L. Rev. 640 (1907).

359. Ryan v. Steele, 6 Misc. 2d 370, 371, 163 N.Y.S.2d 471, 472 (Sup. Ct. 1957); Thornburg v. Port of Portland, 233 Ore. 178, 184, 376 P.2d 100, 103 (1962).

360. "[P]eople [who] indulge their inclination to be gregarious . . . must not expect the quiet that belongs to solitude." Pool v. Higginson, 8 Daly 113, 118 (N.Y.C.P. 1878).

361. See, e.g., Douglas L. Elliman & Co. v. Karlsen, 59 Misc. 2d 243, 245, 298 N.Y.S.2d 594, 597 (N.Y. City Civ. Ct. 1969). See also Louisiana Leasing Co. v. Sokolow, 48 Misc. 2d 1014, 266 N.Y.S.2d 447 (N.Y. City Civ. Ct. 1966).

362. See note 260 and text accompanying notes 264-75 *supra*.

363. Cf. text accompanying notes 339-41 *supra*.

Examples of these might include constant dog barking, recurrent foul odors from "exotic" cooking, loud music played every evening or frequent noisy parties. Are these things (or some of them) also part of the price or penalty of urban life? The legal mechanism of contracting is capable of protecting against them. The question remains whether it should always be available for this purpose, whether making restrictions on these things can ever be "excessive."

The question is one of public policy and will be examined in the next section.

d. *Public Policy Conflicts*

Those who choose to live where population density is high (suburbs, cities, or multi-tenant buildings) must expect to have more encounters, including personally unpleasant encounters, than those who live in a "sylvan glen."³⁶⁴ However, it has been herein suggested that, at least as to the home environment, the frequency of unpleasant encounters to a very considerable extent can and ought to be reducible by agreements, that patterns of lease restrictions can offer city dwellers considerable insulation from subjectively perceived unpleasantness. But even though agreements *can* provide protection from neighbor annoyances somewhat comparable to rural isolation, the question remains whether agreements which attempt to do so *should* in all instances be legally permitted. The question is whether the price or penalty of urban living does not include the enduring of certain types of annoyances which, though excludable by agreements, should as a policy matter be borne nonetheless.

Clearly, there are some public policies which will always outweigh any possible interest of individuals to enforce isolation from that which they do not like. The policy against discrimination based upon race, color or national origin³⁶⁵ is an obvious example. A racial bigot may be described as a person whose special concern is to live in a building which excludes members of certain racial groups. Yet, for reasons unrelated to the policies in favor of contract enforcement, freedom of association (or disassociation), autonomy in the disposition of property and the like, there is a public policy against countenancing the sort of self-segregation which such bigots may desire.

In a different vein, the public policy against monopolization and restraints on trade may outweigh the interest in protecting a special

364. *Louisiana Leasing Co. v. Sokolow*, 48 Misc. 2d 1014, 1015-16, 266 N.Y.S.2d 447, 449 (N.Y. City Civ. Ct. 1966), citing *Twin Elm Management Corp. v. Banks*, 181 Misc. 96, 97, 46 N.Y.S.2d 952, 953 (N.Y. City Mun. Ct. 1943); see cases cited in notes 360-61 *supra*.

365. See, e.g., 42 U.S.C. § 3604 (1970), as amended, 42 U.S.C. § 3604 (Supp. IV, 1974); N.Y. Exec. Law § 296 (McKinney Supp. 1975).

concern such as, say, keeping salesmen out of the premises.³⁶⁶ Conceivably, the policies favoring freedom of expression,³⁶⁷ of association or of political leanings³⁶⁸ may outweigh any concerns which underlie lease-contained conduct restrictions limiting the exercise of these freedoms.³⁶⁹

Other potential public policy conflicts are more problematical. Consider, for example, restrictions on having children, on changing marital status or on age. A restriction against children living in a building has been upheld,³⁷⁰ and it is realistic to assume that people who are not interested in children may wish to self-segregate into buildings where no children are allowed. On the other hand, several states have statutes prohibiting restrictions on children.³⁷¹ And as a policy matter, allowing landlords to "penalize" tenants or prospective tenants with children seems, to say the least, hard. Similar are restrictions on changing one's marital status. To allow lease provisions discouraging marriage is to permit a fairly drastic interference with a very personal matter, and it incidently is also inconsistent with a longstanding (though perhaps waning) common law policy.³⁷² On the other hand, should singles not be permitted to self-segregate into buildings catering to singles? Or the elderly into buildings reserved exclusively for the elderly?

Even the clearly transcendent policies can present doubts. Prohibitions on religious discrimination can make it impossible for reclusive sects to isolate themselves and their children from the perhaps much despised ways and temptations of nonbelievers.³⁷³ Immigrants of like

366. See *Southland Dev. Co. v. Ehrler's Dairy, Inc.*, 468 S.W.2d 284 (Ky. 1971) (regulation under lease); *Thousand Island Park Ass'n v. Tucker*, 173 N.Y. 203, 65 N.E. 975 (1903); *Eagle Spring Water Co. v. Webb & Knapp, Inc.*, 236 N.Y.S.2d 266 (Sup. Ct. 1962).

367. But cf. *Aluli v. Trusdell*, 54 Hawaii 417, 508 P.2d 1217, cert. denied, 414 U.S. 1040 (1973), indicating that a landlord's interference with a tenant's free expression would not constitute an unconstitutional deprivation, even if the landlord resorted to the courts to effectuate an eviction for such purpose.

368. Cf. *Elrod v. Burns*, 96 S. Ct. 2673 (1976) (non-civil service public employee cannot be discriminated against on basis of political leanings).

369. But cf. *Ginsberg v. Yeshiva of Far Rockaway*, 45 App. Div. 2d 334, 339, 358 N.Y.S.2d 477, 483 (2d Dep't 1974), aff'd mem., 36 N.Y.2d 706, 325 N.E.2d 876, 366 N.Y.S.2d 418 (1975) ("Should the plaintiffs and others who bought in reliance on the restrictive covenant be helpless to protect themselves?").

370. *Lamont Bldg. Co. v. Court*, 147 Ohio St. 183, 70 N.E.2d 447 (1946).

371. E.g., *Ariz. Rev. Stat. Ann.*, § 33-303 (1956); *Del. Code Ann. tit. 25, § 6503* (1974); *Ill. Ann. Stat. ch. 80, §§ 37, 38* (Smith-Hurd 1966); *id.* § 38 (Smith-Hurd Cum. Supp. 1976); *N.Y. Real Prop. Law § 237* (McKinney 1968).

372. See 6 Am. L. Prop., *supra* note 3, §§ 27.12-.17; 6 Powell, *supra* note 24, ¶ 853.

373. A transcendent policy such as "right of privacy" may make it impossible for families to isolate their children from conduct which is (in traditional terms) apparently immoral. See

national origin may prefer to congregate where they will be among people who share their customs, language and heritage. Laws prohibiting discrimination based on national origin prevent this, and perhaps self-segregation of this type is bad. But in any case, the anti-ghettoization laws which promote assimilation (and, in one sense, equality) do so at the expense of immigrant ethnic heritages and with the implication that such heritages are subequal to the prevailing American lifestyle which supplants them.

It is not the point to reargue the desirability or undesirability of policies which may or do exist in relation to any of these. The public policies against racial or religious discrimination have been established after taking into account, hopefully, all of the considerations mentioned above and many others. Living with them is part of the price or penalty of urban life. The point is that courts should be chary about creating new public policies, ad hoc, as a basis for invalidating lease restrictions which they happen not to like. In particular, the creation of policies, however formulated, prohibiting discrimination on the basis of lifestyle are questionable since the protection of special concerns is, by and large, the protection from the offensiveness which others' lifestyles can entail. As already stated, such concerns are matters of importance to many, and people do act upon and try to achieve protection for them. Accordingly, in the absence of some clearly more compelling contravening interest, the law should intervene supportively to harmonize the interchanges in which such protection is sought rather than leaving the entire area to the vagaries of self-help.³⁷⁴

Atkisson v. Kern County Housing Authority, — Cal. App. 3d —, 130 Cal. Rptr. 375 (Dist. Ct. App. 1976) (invalidated landlord prohibition on cohabitation by unmarried members of the opposite sex).

374. The implication of the textual discussion is that some forms of discrimination are proper subjects of public policy prohibitions (e.g., discrimination on the basis of race or religion) while others (e.g., discrimination on the basis of activities or lifestyle) are not. The difficult question may be posed as to whether there exists any principle for distinguishing improper kinds of discrimination from "legitimate" discrimination and, indeed, as to whether the law should permit any discrimination at all in association or proximity relations.

The very fact that people perceive definite psychic benefits in being able to select whom they will be near (as discussed in text accompanying notes 283-84 *supra*) suggests the inappropriateness of a policy which prohibits all discrimination in association. Basic notions of freedom would seem to require at least an official attitude of *laissez-faire* in this regard. The further step of actually lending the state's assistance to exercises of this freedom may also be necessary if the freedom is to have any meaning. It is probably true that informal pressures, self-help and the like, are usually adequate to preserve the proximity groupings into which people voluntarily distribute themselves. But even given the usual efficacy of extra-legal measures to preserve voluntary proximity patterns, the further step of state assistance may be nonetheless desirable to (i) reduce the possibility of breaches of the peace which can result from informal pressures or self-help, and (ii) protect against aberrational and randomly "unfair" intrusions which will inevitably occur.

Lastly, attention is turned to the question left open in the preceding section; namely, how should the law deal with recurring or continuous annoyances which are *not* inevitable concomitants of urban or multi-tenant building life. These are, broadly speaking, the lifestyle or life activities annoyances which are bottomed in basic personality or interests incompatibilities and which, it is argued, ought usually to be avoidable by agreements aimed at the protection of special concerns. Already mentioned examples include constant dog barking, recurrent foul cooking odors, loud music played regularly or frequent noisy parties. Other examples could be named, such as nightly piano or horn practice or mischievous, uncontrolled children, until the entire range of noncontainable activities and life variations were exhausted.

If lease restrictions aimed at these kinds of annoyances are to be limited, it must be on the basis of some public policy which outweighs the enforcement of the agreement-based protections which are involved. Unlike the cases of, say, racially discriminatory or monopolizing lease restrictions, the annoyances considered here are not protected by any specific, articulable public policies; there is, for example, no known public policy which specially favors the keeping of dogs.³⁷⁵ And, as already indicated, the law should be careful about

The real question is when should the state *refuse* to assist in the private selection of neighbors, associates and the like, even to the point of imposing certain associations or proximity relationships. A general answer which accounts for all cases may be impossible, even within the comparatively narrow context of lease restrictions. One possibility, however, is that discrimination should be unlawful (and hence opposed by the state) when based on immutable personal characteristics such as race, color or national origin. Religion is not immutable in the same sense as race, but the policy of permitting free religious exercise may support treating religion on the same basis as race (whereas, for example, sexual orientation, which may be immutable only in the sense that religion is, would not necessarily receive the same policy protection). But cf. *Ginsberg v. Yeshiva of Far Rockaway*, 45 App. Div. 2d 334, 339, 358 N.Y.S.2d 477, 483 (2d Dep't 1974), *aff'd mem.*, 36 N.Y.2d 706, 325 N.E.2d 876, 366 N.Y.S.2d 418 (1975). On the other hand, characteristics such as lifestyle, which are not immutable, and which at least can be accommodated to the sensitivities of others, would not be indicated for special protection as a matter of policy. People whose lifestyle or activities are annoying to others should expect either to accommodate themselves to others' sensitivities or to be discriminated against by others who wish to keep their distance.

Finally, in passing, it should be noted that the "irrationality" of the discrimination is not mentioned as a basis for making it unlawful. This is on the assumption that it is always "rational" to discriminate against that which is not liked. However, even if rational, discrimination may be appropriately prohibited if the social cost—for example, the cost in dignity to those having certain immutable characteristics—is too high. See text accompanying notes 383-88 *infra*.

As hereinafter discussed, intolerably high social cost or detriment would seem itself to be an appropriate basis for invalidating restrictions, and invalidating restrictions based on immutable characteristics would thus only be a subdivision of the more general "social cost or detriment" basis. *Id.*

375. Apart from pure personal freedom considerations, the right to keep a dog for purposes of personal security may be argued. See *East River Housing Corp. v. Matonis*, 34 App. Div. 2d

creating new *specific* objects of favored policy protection. Hence the question is whether there are any *general* policies which argue for the invalidation of lease-prescribed restrictions on activities, conduct or the like. Two possible such general policies have already been discussed, *viz.*, the policy against enforcing adhesive contracts³⁷⁶ and the relative hardship grounds of not enforcing agreements;³⁷⁷ both have been seen to be unlikely as appropriate bases for nonenforcement.

Another general policy which is at least conceivable would be a policy which disfavors private constraints on freedom generally, or on the use of land in particular. A policy disfavoring constraints on freedom in general would effectively be, in this context, a policy against the enforcement of contracts, and as such it probably does not exist. On the other hand, a policy disfavoring transferor-imposed constraints on the free use of land has traditionally received recognition at common law.³⁷⁸ This is a special case where the general policy favoring the enforcement of contracts may be outweighed by other factors. As was pointed out at the beginning of this Article, the antagonism towards transferor-imposed land use controls arose at a time when such controls were usually for the benefit of the transferor only and when an abundance of under-used land made restrictions on development and use socially undesirable.³⁷⁹ The question which now arises is whether such disfavor would still be appropriate in cases where the direct beneficiaries of the controls are the restricted transferee-possessors themselves and at a time when use controls in general are regarded as almost essential to maximizing the overall usefulness of society's real property assets.

It has already been seen that utter freedom for any one possessor means restricted freedom for others; the spill-over effects of one possessor's activities place limits on the activities of others.³⁸⁰ Thus, if the law is hostile to positive constraints on the freedom of one possessor, it does not necessarily promote freedom thereby; it merely exalts the freedom of one over the freedom of his neighbors.³⁸¹ Nor

937, 312 N.Y.S.2d 461 (1st Dep't), *aff'd mem.*, 27 N.Y.2d 931, 266 N.E.2d 825, 318 N.Y.S.2d 146 (1970) (prohibition upheld).

376. See section III(D)(1)(a) *supra*.

377. See section III(D)(2)(a) *supra*.

378. See notes 23-25 *supra* and accompanying text.

379. See note 11 *supra*.

380. See notes 9, 10, 46 & 351 *supra* and accompanying text.

381. The result may be a net gain or a net loss in the overall freedom to benefit from the use of land or space. It is impossible to say which it is without comparing the subjectively held values of the persons involved. Cf. note 352 *supra*. However, because such interpersonal comparison is estimable only by looking at an exchange agreement among the parties in question (see text

does the fact that residential lease restrictions reduce behavioral freedom at home supply justification for their nonenforcement. Nonenforcement itself also may constrain activities at home, *viz.*, the activities of the neighbors in *their* homes.³⁸² Accordingly, in cases where use restrictions benefit the transferee-possessors, the reasons which may otherwise exist for treating such restrictions "specially" are not present. Hence, they should be treated like any other contractual undertakings; that is to say, they should usually be enforced.

There remains, however, one possible general policy basis upon which lease contained conduct restrictions may sometimes properly be questioned and invalidated. Such restrictions should not be enforced if their enforcement would exact an intolerable *social* cost or detriment.

Some very obvious instances of intolerable social cost or detriment have already been mentioned, *viz.*, the costs which would be involved in the enforcement of restrictions based on race or religion, where the public policy conflict is clear.³⁸³ In jurisdictions which prohibit restrictions on children,³⁸⁴ the social costs of discouraging people from bearing children or the social detriment of hindering families with children in their search for suitable housing may be considered to be intolerable. Other, more difficult, cases can be mentioned. For example, prohibitions on practicing musical instruments may involve an intolerable social detriment if the result is to make it difficult or impossible for the musically talented to attain proficiency. Courts have struck down such home practice prohibitions on just this basis.³⁸⁵

It should be noted that, in holding restrictions invalid because of their social cost or detriment, an analysis akin to that of relative hardship is required.³⁸⁶ The social cost or detriment of requiring compliance must, in effect, be measured against the personal (and perhaps social) benefits which would result from compliance. How-

accompanying notes 329-41, 352 *supra*), the existence of restrictions (i.e., such an exchange agreement) would itself usually indicate that the enforcement thereof will result in a net gain.

382. See text accompanying note 351 *supra*. See also notes 9, 10 & 46 *supra* and accompanying text.

383. See text accompanying note 365 *supra*.

384. See note 371 *supra* and accompanying text.

385. *Justice Court Mut. Housing Cooperative, Inc. v. Sandow*, 50 Misc. 2d 541, 270 N.Y.S.2d 829 (Sup. Ct. 1966); *Douglas E. Elliman & Co. v. Karlsen*, 59 Misc. 2d 243, 245, 298 N.Y.S.2d 594, 597 (N.Y. City Civ. Ct. 1969). Before it is decided that the social cost or detriment of a prohibition is intolerable, consideration ought to be given to all of the alternatives. For example, a prohibition on music practice at home may not involve intolerable social cost if practice studios, the use of which bothers no third parties, are realistically available. In the two cited cases, no mention of this rather obvious solution was made. But cf. *O'Connor v. Lahm* (N.Y. City Civ. Ct.), in 168 N.Y.L.J., Sept. 18, 1972, at 17, col. 5.

386. See section III(D)(2)(a) *supra*.

ever, the major objection to invalidating restrictions on relative hardship grounds (that subjective or "real" relative hardship is unknowable except as evidenced by the parties' exchange agreement³⁸⁷) is inappropriate here. For the social costs or detriments of compliance *are* "objectively" known, at least in the sense that it is the court's and legislature's function to make such determinations in formulating public policy. The court or legislature can quite properly conclude that such social costs or detriments outweigh any subjective personal benefits which particular restrictions may provide.³⁸⁸

In summary, contravention of public policy is an appropriate basis for invalidating restrictions whenever the restrictions are inimical to some recognized defined policy and, more generally, whenever the court concludes that the social costs or detriments (meaning usually the external costs) of enforcing the restriction are intolerably high. In such cases, the discomfitures which such restrictions are intended to protect against may be said to be a part of the price or penalty of choosing to live near others, even though they may theoretically be avoidable by agreements. However, in the absence of such defined public policies or high social costs or detriments, the parties' agreement-autonomy should be preserved, and the restrictions protective of special concerns should be enforced.³⁸⁹

387. See notes 329-41 *supra* and accompanying text.

388. Of course, the social costs or detriments will *include* the personal costs or detriments experienced by those subject to the particular restriction. For example, a prohibition on piano practice at home tends to deprive society of accomplished musicians (an external cost) but also deprives the potential pianist of the pleasure, acclaim, profits and other benefits of virtuosity. However, such personal costs or detriments should usually be irrelevant to the public policy validity of the restriction; as purely personal costs and detriments, they should be properly compared only against the personal benefits which the restriction provides to the persons protected by it (and such a comparison can be made, as previously shown, only by reference to exchange agreements among the parties (see section III(D)(2)(a) *supra*)). Thus, widespread prohibitions on loud recorded music may result in many unhappy listeners, and the sum of their personal detriments may be a considerable "social" detriment. However, the absence of such prohibitions may result in a lot of unhappy neighbors, also a considerable social detriment. For the courts to invalidate the restrictions in such cases would be subject to the objections posed in section III(D)(2)(a) since the "social" detriments and "social" benefits are really only the sums of the personal detriments and benefits which contracts cause to the contracting parties.

The one exceptional kind of case, where personal costs or detriments are properly taken into account, is that where the detriment is of a type or magnitude that the contract should not be countenanced even if no one but the contracting parties are adversely affected. Lease restrictions imposing such detriments are a little hard to imagine outside perhaps of restrictions based on race or religion or other well-known articulated public policies, usually involving (to borrow from fifth and fourteenth amendment nomenclature) "fundamental rights."

389. Cf. the several apparently frivolous conditions cited in Scott, *Control of Property by the Dead*, 65 U. Pa. L. Rev. 527, 535-37 (1917). It was observed that "[a]lthough conditions like these may be arbitrary, or even foolish, they are not contrary to any public policy." *Id.* at 537

IV. CONCLUSION

An attempt has been made to describe and evaluate justifications for allowing landlords the legal power to exert control over tenant behavior.

Not only does the landlord's direct interest in his property offer justification for such control powers. More importantly, the control may be justified by the interest which the preponderance of tenants have in the conditions or "character" of the buildings in which they live. Because such conditions or character may be significantly affected by the spill-over effects of tenant activities, landlord control of such activities is, essentially, a form of private environmental regulation. By permitting such intrabuilding environmental regulation to be effectuated privately, the law can promote (or at least not stifle) the variety of intrabuilding environments which corresponds to the varied tastes and needs of different people. It permits the protection of special concerns so that, in addition to protecting the preponderance of a building's tenants from aberrational acts, landlord control of tenant conduct can also protect the needs of idiosyncratic or hypersensitive individuals.

The landlord's law-conferred power to control tenant behavior (and the intrabuilding environmental characteristics) is comparatively slight. Accordingly, provisions in leases are generally necessary in order for landlords to have such power of control. Furthermore, lease provisions may also be desirable (and are frequently or even usually included) to give a remedy (forfeiture) which the law does not provide and to simplify the proof of "objectionability." The latter is achieved by setting out in the lease formulations of conduct norms which are more susceptible to proof than the relativistic standards of tort law. Both of these drafting objectives commend themselves to judicial support. The forfeiture remedy may well be, in the conduct restriction context, the only really effective remedy since only it offers any assurance of relief from long-term arrangements which have gone sour. In any case, powers of forfeiture should not (as applied to conduct restrictions) be regarded as merely a "security" or a penalty. Forfeiture is a bargained-for contract alternative, to put the parties back where they were when the lease was still prospective and its mutual desirability could still, at best, only be guessed at. It allows the landlord to rectify mistakes which the majority of his tenants may find intolerable to live with. Likewise, the goal of providing clearer formulations of conduct standards deserves judicial support not only because clearer standards simplify proof in litigation but, even more importantly, because reducing the doubt in litigation may eliminate the need for

resort to the courts entirely. Nonjudicial settlements would be thereby facilitated.

Finally, landlords may wish to prescribe stricter-than-law conduct standards in order to protect special concerns which are not so commonly shared as to justify the attention of the legislative or judicial lawmakers. Such special concerns—of the idiosyncratic or the hypersensitive—are not protected by the law of nuisance or other tort law; but since they are nonetheless real and presumably sought after, efforts to protect them by agreement should (like the subject matter of most contracts) receive the support of the courts. They should not be left, by an attitude of hostility, to extra-legal solutions, such as self-help. However, because the “contract of adhesion” nature of leases means the landlord is in a somewhat special position to impose his life philosophy on tenants, courts should exercise some supervision to assure that the power to protect special concerns is not abused. Although relative hardship is a specious basis for invalidating attempts to protect special concerns, other appropriate bases for invalidation (e.g., lack of legitimate concern, futility of the restriction or “public policy” conflict) may appear. Apart from these types of cases, however, landlords’ attempts to provide specially protected environments for their tenants should be valid and enforced. For it is only through such enforcement that the pluralistic rental market can provide the maximum contentment to the maximum number of residential tenants.