The Nature of Leasing

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A longstanding dispute in comparative law concerns convergence and divergence among different legal systems. The proponents of convergence note that legal systems confront functionally similar problems, which require them to adopt similar solutions. The advocates of divergence counter that legal systems rest on distinct principles, which have an enduring influence that resists assimilation to a common form. This Article offers empirical evidence that sheds light on these rival positions. Leases are a very common form of holding assets in all legal systems and present functionally similar issues. However, as between common law and civil law legal systems, leases rest on fundamentally different legal principles. Leases at common law are regarded as a form of property, whereas leases in the civil law tradition are universally conceived as being a type of contract. Examining lease law in common law jurisdictions (primarily all U.S. jurisdictions, England, Canada, and Australia) and 86 civil law jurisdictions, this Article finds that on certain dimensions lease law has converged toward a hybrid form, with common law leases becoming increasingly "contractual" and civil law leases becoming "reified" and sharing attributes associated with property law. On other dimensions, however, starting points continue to matter, enough so that one cannot say that legal systems around the world have converged toward a unified conception of a lease. The evolution of lease laws is consistent with the complex systems theory of private law.

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For helpful comments, we thank Bram Akkermans, Maria Anaya-Torres, Mindy Chen-Wishart, Dawn Chutkow, Kevin Clermont, Debbie Dinner, Afroditi Giovanopoulou, Valerie Hans, Megumi Hara, Michael Heise, Bob Hillman, Sung-Mao Huang, Madhav Khosla, Jedidiah Kroncke, Alexi Lahav, Chien-Liang Lee, Yael Lifshitz, Kelvin Low, Poorna Mysoor, Jeff Rachlinski, David Reiss, Carol Rose, Henry Smith, Alving See, Emily Sherwin, Bing Shui, Fleur Stolker, Po-Jung Su, Nicole Summers, Zhongxing Tan, Carrie Ting, Kristen Underhill, Peng-Hsiang Wang, Tzung-Mou Wu, Eyal Zamir, Yiran Zhang, Yiang Zhu, and participants at the Cornell Law School's Summer Faculty Workshop; CPLC Private Law Seminar at Cambridge University; 4th Asia-Pacific Private Law Conference held at Seoul National University in July 2024; Faculty Workshop at Institutum Iurisprudentiae, Academia Sinica in 2024 July; and a workshop at Shanghai Jiao Tong University Law School in December 2024. Chang thanks research assistance by Madeleine Bel (Cornell LL.M. '24), Hana Chang, Kuan-ting Chen (Cornell LL.M. '25; J.S.D. '28), Ming-hsi Chu, Yongho Chun (Cornell J.D. '26), Peng-Che Huang, Jennifer Lin (Cornell LL.M. '24), Frank Yang, Danielle Zhang (Cornell LL.M. '25), Scarlett Zhong (Cornell J.D. '25), and Yiang Zhu (Cornell LL.M. '24; J.S.D. '27). Merrill thanks Shannon Frampton (J.D. Columbia '26).

Introduction

> "The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law."
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> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 n.13 (D.C. Cir. 1970)

Comparative law scholars have long debated whether legal systems tend to converge toward similar rules, or if differences in fundamental legal principles mean that divergence will persist over time.[1] Proponents of convergence tend to take a functional approach, arguing that as different societies confront similar problems, they will tend to devise similar legal solutions, either by borrowing legal ideas from other systems or through tinkering with legal doctrine by trial and error.[2] Advocates of divergence tend to emphasize the stickiness of legal rules, arguing that established legal principles generate extensive reliance interests that resist displacement.

Leases present a nearly ideal subject for testing these rival positions. Leases, under one name or another, are present in all mature legal systems. As a form of divided control over assets, they present common problems from a

1. For an overview, *see, e.g.* Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, *in* The Oxford Handbook of Comparative Law 390 (Mathias Reimann & Reinhard Zimmermann eds., 2019).

2. *Id.*; *See also* Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law (Tony Weir trans. 3d ed. 1998) (articulating such a functionalist position).

functional perspective: What are the duties of the lessor to the lessee and what are the duties of the lessee to the lessor? What rights do lessees have against third parties? Must some or all leases be in writing? Must they be recorded in a registry? May the interest of the lessor be transferred and, if so, what are the consequences for the lessee? May the interest of the lessee be transferred and, if so, what are the consequences for the lessor? And so forth.

What makes this universal institution an attractive target for comparative analysis is that jurisdictions that derive much of their law from the common law and those that derive their law from civil law regard leases from very different starting points. At common law, a lease was regarded as a conveyance of property — the transfer of the right to possess land for a defined term from the lessor to the lessee. Because the lease conveyed the right to possess to the lessee, the lessee exercised the right to exclude others during the term of the lease. This also gave the lessee the right to use the land in much the same way as an owner could use the land. And as a form of property, leases were generally presumed to be transferable.

In civil law countries, leases have long been regarded as a special form of contract. The conventional wisdom is that leases "are generally analyzed as mere personal rights in the civil law," in contrast to the common law, where "they are considered a true property right."[3] For example, a lease is defined in French law as "a contract by which one party binds himself to provide the enjoyment of a thing to the other for a certain time, in return for a certain price that this other party obliges himself to pay the former."[4] From this understanding, it is said to follow that leases "are only enforceable between the parties to the lease agreement" and lessees "cannot transfer their right."[5]

This Article investigates the understanding of leases in the common law, including Australia, Canada, England, and the U.S., with emphasis on the lease law in the 50 states (minus Louisiana plus D.C.). The civil law treatment of leases is developed by coding lease law in 86 civil-law jurisdictions (see Figure 1).[6]

We find significant evidence of convergence on some dimensions, such as whether lessees are protected against interference by non-contracting third parties and whether a transfer of the lessor's interest in the property is regarded as breaking the lease. On other dimensions, however, civil law countries continue to treat leases in ways that differ, often in surprising ways, from the understanding of leases in the common law.

As elaborated below, this finding is consistent with the complex systems theory of private law[7] in general and the convergence and divergence predictions

3. Yaëll Emerich, Conceptualising Property Law : Integrating Common Law and Civil Law Traditions 206 (2018).

4. *Id.* at 207 (quoting French Civil Code art. 1709, translated by the author).

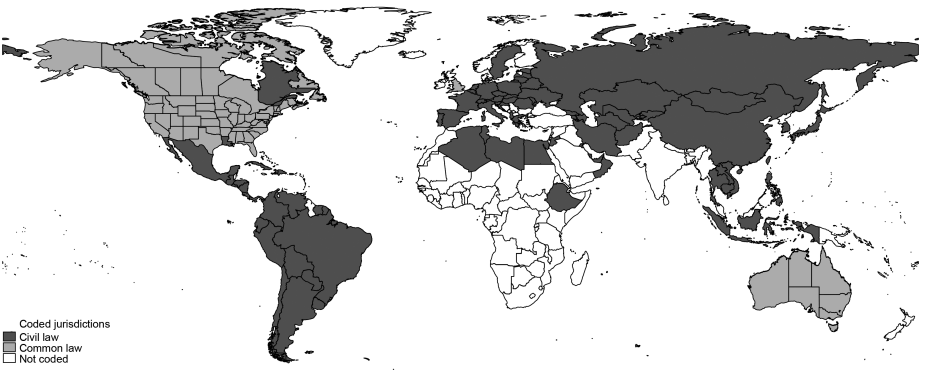
5. *Id.* at 208.

6. North Korean civil code was included in the coding project, but it does not contain any rule regarding lease law, so it was dropped in the following analysis.

7. In Henry Smith's words, "[a] system is a collection of elements and the connections between and among them; complex systems are ones in which the properties of the system as a whole are difficult to infer from the properties of the parts. Private law is a complex system." Henry E. Smith, *Systems Theory: Emergent Private Law*, *in* The Oxford Handbook of the New Private Law 143, 143 (Andrew S. Goldet al. eds., 2020).

(deriving from the complex systems theory) that one of us (Chang) co-developed.[8] This theory predicts that insofar as the property system makes a widely distributed control over assets important, the law will gravitate toward an exclusion strategy.[9] On this structural aspect, the property system will tend to be convergent. With respect to less central dimensions, which can be regarded as matters of "style," property law will either converge or diverge, depending on the system cost (driven by the interconnectivity of the doctrine in the system) and the benefit of legal reform.[10] Our findings about the nature of the law of leasing as between common-law and civil-law jurisdictions are broadly consistent with the complex systems theory.

Figure 1. Jurisdictions Discussed in This Article



The rest of this Article is structured as follows. Part I lays out our conceptual framework for defining property versus contract. Part II delineates the starting points of lease law in Roman law, common law, and civil law. Part III argues that lease law in civil-law jurisdictions has moved toward the property model in the common law, in terms of the external relationship with non-contracting third parties, but, at the same time, lease law in common-law jurisdictions has moved toward the contract model of the civil law, in terms of the internal relationship as between the parties to the lease themselves. Part IV analyzes aspects of lease law that are still divergent. Part V explains how our comparative and empirical exercises support the complex systems theory of convergence versus divergence.

I. Property v. Contact

To make judgments about whether particular lease doctrines are "property-like" or "contract-like" it is necessary to clarify how this Article understands the distinction.

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8. Yun-chien Chang & Henry E. Smith, *Convergence and Divergence in Systems of Property Law: Theoretical and Empirical Analyses*, 92 S. Cal. L. Rev. 785 (2019); Yun-chien Chang, Property Law: Comparative, Empirical, and Economic Analyses 6–11 (2023).

9. Chang & Smith, *supra* note 8, at 791.

10. *Id.* at 795–96; Chang, *supra* note 8, at 352–354.

Property has long been understood to refer to the right to exclude all the world (*in rem*,[11] or alternatively, *erga omnes*) from some thing or resource. As used herein, this exclusion right is created automatically, by operation of law, and establishes a claim-duty legal relationship between the owner of property and everyone else in the relevant legal community. Exclusion in property thus means that all others have a negative duty not to interfere with the Hohfeldian "entitlements"[12] of an owner of property, who has a correlative claim-right to enforce this duty.

In contrast, contract is understood to create a duty on the part of the promisor and a "claim-right" on the part of the promisee based on the voluntary assumption of an obligation on the part of the promisor running to the promisee. Contract rights are *in personam*, meaning they rest on the contingent creation of a claim-duty relationship (and other Hohfeldian jural relationships) between named persons or entities, based most typically on their undertaking but also at times by judicial judgment. By definition, *in personam* relationships do not entail any right to exclude, absent a specific understanding by the promisor to desist from interference or intrusion with a thing. An *in personam* duty can be either a positive one (a duty to water the lawn) or a negative one (a duty not to block the view of another).

Stipulating our terminology enables us to further identify the aspects of lease law that can be said to follow from the concepts of either property or contract. When a person, through the operation of law, is in a claim-duty relationship with all others in the world, we may say, following German usage, that such a person has an "absolute right." Moreover, if the claim-duty relationship is mediated by things, this absolute right is the property right with which we are familiar. There are other types of absolute rights (such as rights against intentional infliction of bodily injury, reputation, and privacy),[13] but we focus here on property rights, as our main focus is whether leases are a form of property or contract. By contrast, when a person is in an *in personam* relationship, meaning there is no automatic claim-duty relationship created with others, and thus there is no automatic right of exclusion, such a person may be described as having a "relative right." Traditionally, a contractual party is said to have only a relative right, not an absolute right.

Under this framework, the key to determining whether a lease between a lessor and a lessee is property or contract — or to put it differently whether

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11. "In rem" literally means with respect to a res or thing. The academic literature regarding in rem builds on this literal meaning. Our usage of *in rem* is arguably beyond (though still consistent with) Hohfeld's own characterization of the term. For Hohfeld's view, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 718 (1917). For another critique of Hohfeld's definition of *in rem*, see Christopher M. Newman, *Hohfeld and the Theory of in Rem Rights: An Attempted Mediation*, *in* The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries 273 (Shyam Balganeshet al. eds., 2022).

12. Hohfeld himself did not use this umbrella term, nor any other umbrella term. Pierre Schlag used "entitlement" to refer to Hohfeldian claim-right, privilege, power, and immunity and used "disablement" as the umbrella term for duty, no-right, disability, and liability. *See* Pierre Schlag, *How to Do Things with Hohfeld*, 78 Law & Contemp. Probs. 185, 188 (2015). For an overview of the various Hohfeldian umbrella terms, see David Frydrych, *Hohfeld vs. the Legal Realists*, 24 Legal Theory 291 (2018).

13. *See* Thomas W. Merrill et al., Property: Principles and Policies 20 (4th ed. 2022).

lessees have an absolute or relative right — lies in whether legal relations in the nature of a right to exclude are automatically created between lessees and all others in the relevant legal community. To use the lease context as the example: what makes a lease property is that lessees have the right to exclude third-party intruders and transferees from lessors, not that lessees have the right to exclude lessors. (Of course, typically lessees do have the right to exclude lessors, but this feature is not the reason for characterizing leases as property.)

Our two prototypes – property and contract (as defined) — can be found in all known legal systems, but in many instances in both common law and civil law legal systems these structural elements are mixed or combined to one degree or another.

A good example of a mixed institution is the servitude, recognized in Roman law and through the influence of Roman law in common law and civil law alike.[14] The core example of a servitude is an easement. An easement is a bilateral arrangement between two landowners in which the owner of one tract (the dominant tract) is allowed to engage in some use or compel a particular use on the other land (the servient tract). A right-of-way allowing the owner of the dominant tract to cross the servient tract or an agreement on the part of the servient tract not to block the view of the dominant tract would be examples. The bilateral nature of the arrangement suggests that the servitude originates in an *in personam* contract, and indeed this is the most common point of departure. Nevertheless, servitudes are said to "run with the land," meaning they continue to bind the dominant and servient tracts even as they are transferred to other owners. Since no one knows who the future owners will be when the servitude is created, in this respect a servitude is *in rem* — it is binding on whoever in the world happens to become the future owner of either the dominant or servient tracts. Thus, we have an entitlement that originates in, and takes the form of, an *in personam* claim-duty relationship — but functionally speaking and as a matter of law, such an entitlement is binding on all members of the relevant legal community like that of an *in rem* claim-duty relationship.

Another example is the action for tortious interference with contract, recognized in the U.S. and in some other countries. Under this doctrine, a contractual party is entitled to sue a third party for interference with performance by the other contractual party. To the extent a jurisdiction recognizes tortious interference with contract, its law of contract is not purely *in personam*. That is, contractual rights are not wholly contingent and relative to the undertaking of the contractual parties. Using Hohfeldian terms, third parties bear a certain primary duty not to interfere with a given contract, so that when a third party violates this negative duty, a secondary duty to compensate arises. The question is: how does such a primary duty arise? It arises automatically by operation of law. To be sure, not all third parties under all circumstances have such a duty. This analysis shows that the two prototypes — *in rem* including an automatic right to exclude all others and *in personam* creating no automatic right to exclude third parties — are insufficient to describe many of the basic institutions in private law, and suggests that an expanded framework is called for.

14. *See* CHANG, *supra* note 8, at 93.

One of us has argued that legal institutions intermediate between property and contract may include standardized elements or standardized lists of options to account for information costs created by large numbers of contracting parties or uncertainty about the identity of third-party transferees.[15]

The other has argued that intermediate types between the two prototypes can be created along three dimensions. First, in between all third parties (*in rem*) and no third parties (*in personam*), there are *some* third parties. This can be called semi-*in rem*. A prime example is the famous case of *International News Service v. Associated Press*,[16] where only competitors are subject to a duty not to appropriate hot news generated by another. Second, the level of exclusion may vary. Exclusion is stronger in the law of personal injury torts than that in the context of physical violations of property (there is, for instance, no functional equivalent of public-use takings in the former), which is further stronger than that in intellectual property (there is no functional equivalent of fair use or compulsory licensing in the former two). Third, the right to exclude may not arise immediately. An example would be a legal principle that a prior possessor can bring an action to recover possession only after being in possession for one year.[17]

We do not pursue either conceptual framework of analysis here. Rather, our concern is comparative, empirical, and theoretical. We first seek to determine whether the different starting point in developing the law of leases as between the common law and the civil law – property or contract – can be said to have had a lasting influence on the evolved legal doctrine, or whether and to what extent the law has converged toward a single unified conception of lease law.

II. Starting Points

In this Part, we discuss how the lease law in the common law and the civil law starts out from property and contract, respectively. In later parts, we describe how they have moved closer together and yet remain distinct.

A. Roman Law

Since both the common law and, to a greater extent, the civil law have been influenced by Roman law, we begin with a brief overview of the actions recognized in Roman law that governed what we would today call leases.[18] The most closely analogous Roman legal form was called *locatio conductio*, which

15. *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 Colum. L. Rev. 773 (2001). For an updated and more comprehensive treatment, centered on leases, see Thomas W. Merrill, *The Property/Contract Interface: Hybrid Leases*, *in* The Property/Contract Interface (James Penner and Henry Smith eds. forthcoming).

16. 248 U.S. 215 (1918).

17. *See* Yun-chien Chang, *Theory of Relativity of Title*, Am. J. Comp. L. (forthcoming 2026).

18. For the Roman law, *see generally* Barry Nicholas, An Introduction to Roman Law 182-85; 229-31 (2d Ed. 1975); Paul Du Plessis & Andrew Borkowski, Borkowski's Textbook on Roman Law 281-84 (5th ed. 2015) [these pages are from the 2d edition]. For more on the Roman law on leases and its comparison with French and German lease law, see Eyal Zamir, *Toward a General Concept of Conformity in the Performance of Contracts*, 52 La. L. Rev. 1, 6–17 (1991).

applied not only to the hire of both real and personal property, but also the hire of personal services. The hire of a thing (*locatio conductio rei*) entailed the transfer of the thing to the conductor [the lessee] for a period of time in return for the payment of rent to the locator [the lessor]. The Romans recognized that the conductor had custody of the thing during the term of the transfer but insisted the conductor did not have possession; hence the conductor could not use the possessory writs (the possessory interdicts) in the event of interference by a third party. The sole remedy was against the locator under the *actio conducti*. The conductor was required to return the thing to the locator at the end of the term without significant alteration, ordinary wear and tear excepted.

Two other interests came to be recognized in the context of land originally belonging to the state or a city. An *emphyteusis* was in effect a long term or perpetual lease of government land. These came to be protected by the remedies available to owners of land and were often sublet using the *locatio conductio*.[19] *Superficies* were grants of land by the government for building purposes.[20] Again, the structures were often sublet.

Another interest, which bears a resemblance to the common law life estate, was the *usufruct*. These were commonly created by will or gift, allowing the holder to harvest the crops or fruits of land for a defined period up to the life of the holder. The Romans classified the *usufruct* as a form of property, but insisted that it did not confer possession, meaning, effectively, that the holder could not invoke the possessory interdicts in the event of interference by a third party.[21] In conceptual terms, usufructs were regarded as a kind of servitude, analogous to an easement or *profit à prendre*. *Emphyteusis, superficies*, and *usufruct* are still recognized property forms in many civil-law countries.[22]

B. Common Law

The origin of the common-law of leases has been described as a "strange history."[23] The conception of a lease at common law applied only to land and structures. As it emerged, the common law lease had a kind of home-grown quality that did not draw directly on Roman law sources. For reasons that are not clear, leaseholders were never regarded as having a "freehold estate." Perhaps this was because leases were not used as part of the transmission of family property in land, as was the case with the fee simple, the life estate and the other interests later characterized as "estates in land." As Theodore Plunkett has conjectured, the original function of leases was to evade the church's prohibition on usury. A cash-poor lord would convey land to a lessee for a term in exchange for what we would today characterize as a lump-sum payment of rent; the lessee would then recoup the payment out of the profits secured from the use of the land.[24]

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19. *See* Du Plessis & Borkowski, *supra* note 18, at 175, 182.
20. *See id.* at 176.
21. *See id.* at 174–79.
22. *See* Chang, *supra* note 8, at 93.
23. A.W.B. Simpson, A History of the Land Law 71 (2d ed. 1986).
24. Theodore Frank Thomas Plucknett, A Concise History of the Common Law 572–73 (5th ed. 1956).

Whatever its original purpose, leases were originally regarded as "a purely contractual relationship, and not a tenurial one."[25] As such, the lessee's sole remedy was by the writ of covenant, in effect suing the lessor for breach of contract.[26] In the middle of the 13th century, a new writ, *ejectione firmae*, was devised, which allowed a lessee to sue either the lessor or a third party for interfering with the lessee's possession. The original remedy was damages. But by the fifteenth century, courts held that this writ could be used to recover possession as well as damages. "So it was that by the close of the Middle Ages the leaseholder came to have a fully protected interest in the land leased to him."[27]

The understanding that leases are a form of property was strengthened as an unintended consequence of King Henry VIII's confiscation of church properties between 1536 and 1541. Many of these religious properties were leased in order to provide revenue for the religious order. Once Henry confiscated the properties, some of the lessees refused to acknowledge that they owed rent to the new owners. Henry prevailed upon Parliament to enact a statute, the preamble of which read in part:

> Whereas sundry leases have been made containing covenants both by the lessors and lessees and whereas by the common law no stranger to any such covenant shall take advantage of it and whereas grantees of reversion and patentees of the king have been denied any right of action against such lessees now therefore. . .[28]

The broadly drafted statute effectively enshrined the principle that a transfer of either the lessee's interest in a lease or the lessor's interest in the land subject to a lease does not "break the lease." A lease was a property right, the terms of which endured notwithstanding a change in the identity of either the lessee or the lessor.

Although leases of land came to be regarded as a form of property at common law, it bears emphasis that the standard mechanism for creating a lease and for vindicating the failure of either the lessee or the lessor to perform the obligations set forth in the lease remained grounded in the principles of contract. Leases were regarded as a bundle of promises or covenants. Other than the lessor's promise not to interfere with the lessee's possession during the term of the lease (the covenant of quiet enjoyment), these covenants were regarded as being independent of each other.[29] The sole remedy for a breach of any other

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25. Simpson, *supra* note 23, at 74.

26. *See* 2 Frederick Pollock & Frederic William Maitland, The History of English Law: Before the Time of Edward I 226 (1898).

27. Simpson, *supra* note 23, at 75. *Ejectione firmae* was superior in many respects to the writ of right, with the result that those who claimed land as a freehold estate eventually succeeded in being allowed to assert the new writ devised for the benefit of lessees. This became what is today called the action in ejectment. "And so by a curious twist of history, the freeholder was glad in the end to avail himself of remedies originally designed for the protection of the humble termor." Plucknett, *supra* note 24, at 574.

28. 32 Henry VIII ch. 34 (1540) (spelling has been modernized).

29. Mary Ann Glendon notes that although the contract doctrine of mutual dependence of promises had been "developed by Lord Mansfield in the late eighteenth century," it "was not imported into the law of leases." Mary Ann Glendon, *The Tranformation of American Landlord-Tenant Law*, 23 B.C. L. Rev. 503, 511 (1981). The most plausible explanation is that leases were primarily regarded as conveyances of property "to which covenants are merely

promise running either to the lessor or the lessee was an action for damages. Thus, a breach by the lessor of a covenant to repair the leased premises did not excuse the lessee from paying rent; nor did the lessee's failure to pay rent excuse the lessor from honoring the lessee's right to undisturbed possession for the term. In other words, notwithstanding the common law's treatment of leases as a form of property, from the beginning, leases were regarded as a hybrid of both property and contractual elements.[30]

In the 1960s, a reform movement in the United States emerged concerned with the condition of low-income residential tenants living in substandard housing.[31] The reformers argued that the plight of these tenants could be traced to the conception of leases as a conveyance of property, with the associated assumption of caveat lessee — that the tenant was responsible for inspecting the property before entering into a lease, and for undertaking any needed repairs during the term of the lease. The property conception was said to be a relic of feudalism, and the remedy was to conceptualize leases (at least leases of residential property) as a type of bilateral services contract.[32]

This perspective was influential with courts, and led to a number of reforms, said to be drawn from the law of contracts. Perhaps most importantly, courts began to conceive of the "covenants" in leases as mutually dependent, in the manner of a bilateral contract, such that a material breach by one party would allow the other party to terminate further performance.[33] The Restatement of the Law (Second) of Property—Landlord and Tenant, published in 1977, partially embraced the view that lease law should assimilate many of the principles associated with contract law.[34] In England, the lease has been described as "a hybrid, part contract, part property."[35]

More recently, commentary about the nature of leases in common law systems has partially retreated from the view that leases can (or should) be regarded as simply a species of contract. To the extent the issue is considered, the consensus appears to be that leases are a hybrid institution, encompassing both property and contractual elements.[36]

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incidental." Hiram H. Lesar, *The Landlord-Tenant Relation in Perspective: From Statutes to Contract and Back in 900 Years?*, 9 U. Kan. L. Rev. 369, 374 (1961).

30. On the leasehold being "contractized," *See, e.g.,* Merrill & Smith, *supra* note 15, at 811–20; Merrill, *supra* note 15; Thomas J. Miceli et al., *The Property-Contract Boundary: An Economic Analysis of Leases*, 3 Am. L. & Econ. Rev. 165, 166–67 (2001); Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil versus Common Law Property*, 88 Notre Dame L. Rev. 1, 44–45 (2012).

31. For an analysis of the roots of the reform movement, see generally Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences* 69 Cornell l. Rev. 517 (1984).

32. See the quotation from the influential decision in Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 n.13 (D.C. Cir. 1970), quoted above on page 102.

33. *See* Merrill & Smith, *supra* note 30, at 824–25.

34. *See* Restatement of the Law (Second) of Property—Landlord and Tenant (Am. L. Inst. 1977) (see especially Chapter 7).

35. Linden Gardens Trust Ltd v. Lenesta Sludge Disposal Ltd (1994), 1 AC 85 (HL) 108 (Lord Browne-Wilkinson), cited in Natalie Mrockova & Luke Rostill, *Leases and the Nature of Co-ownership*, *in* Modern Studies in Property Law: Volume 12 129, 130 (Natalie Mrockova et al. eds., 2023).

36. *See* Restatement of the Law (Fourth) of Property, Volume 4, Division 3, Chapter 1, at 9, Tentative Ed.) (Am. L. Inst. 2024); Glendon, *supra* note 29, at 504; John V. Orth, *Leases:*

C. Civil Law

In contrast to the common law, the civil law as it emerged on the continent of Europe drew more directly on the Roman law, especially the *locatio conductio*. Among his other works, the esteemed French jurist Robert Joseph Pothier published an influential treatise on the *Contract of Letting and Hiring* (*Contrat de Louage*) in 1764.[37] Drawing on both Roman law and customary French law, Pothier presented a rigorous conception of lease law as being purely contractual in nature. He defined a lease as "a contract whereby one of the two contracting parties undertakes to give to the other the enjoyment or use of a thing, during the period of time agreed upon, in consideration of a certain price which the other, on his part, agrees to pay."[38] Following the Roman view, Pothier insisted a lease merely conveyed use and enjoyment to the lessee, not possession. Possession, Pothier argued, remained with the lessor.[39]

Pothier explained that certain consequences follow from the conception of a lease as a contract for the use and enjoyment of a thing that would not follow from the conception of a lease as the conveyance of a property right. For example, if the lessee is deprived of use and enjoyment because of an eviction by a third party having superior title, the lessee's only action would be against the lessor, either for damages or remission of rent. This was because the lessee's rights are purely contractual, and the only contract was with the lessor. Pothier acknowledged that if the lessee is deprived of use and enjoyment by a third party having no claim of right, such as a neighbor pasturing animals on the leased land, or stealing crops, or poisoning a pond, the lessee would have an action against the offending third party in tort (*actionem injuriarum*).[40] But if such an action was "unavailing" for any reason, the lessee "can only ask [the lessor] for a remission of rent, wholly or in part, just as he can in all cases when he has been prevented by a force *majeure*. . ."[41]

Similarly, if the lessor transfers the landownership to another, either by sale or will, the lease is terminated, unless the lessee had negotiated for a "warranty" in the lease that it would run to successors. As Pothier explained:

> From the principles we have just laid down, there emerges a very great difference between a lessee's right and that of a usufructuary, an *emphyteuta*, etc. Their right is a right in the property itself, and they retain this right into whatsoever hands the property may pass. On the other hand, if the lessor sells or bequeaths the property by way of legacy to anyone without imposing the condition that the

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Like Any Other Contract?, 12 Green Bag 53, 55 (2008); Hanjo Hamann, *Property, Psyche, and the Theory of Tenancy: Independent and Interdependent Lease Law Covenants Through the Lens of Cultural Psychology*, 9 Texas A&M J. Prop. L. 223, 226–39 (2023).

37. *See* Robert Joseph Pothier, Pothier's Treatise on the Contract of Letting and Hiring (G.A. Mulligan trans. 1764 [1953]). On Pothier's extraordinary productivity and influence, see Oliver Descamps, *Robert-Joseph Pothier*, *in* Great Christian Jurists in French History 245 (Olivier Descamps & Rafael Domingo eds., 2019).

38. *See* Pothier, *supra* note 37, at 2.

39. Similarly, in Louisiana law, possessors must have *animus domini*, or "intend to possess [something] as owner." Because lessee are not deemed to be in possession as a matter of law, the lessor is regarded as being in possession "through his lessee.". *See* La. Civ. Code §§ 3424, 3429.

40. *See* Pothier, *supra* note 37, at 35.

41. *See id.* at 36.

> purchaser or legatee shall recognize the lease, then, in as much as the lessee has no right in the property itself, the purchaser or legatee will not be compelled to recognize the lease, unless he has, at least tacitly, adopted it. . .In such cases the lessee has merely an action against the lessor, or against the lessor's heirs, for damages suffered through the non-fulfillment of the lessor's obligations.[42]

Pothier's treatise is an interesting object lesson in what a purely contractual model of leases would look like. Many of his prescriptions would have been attractive to the American reformers of the 1960s. Because the lessor was conveying the right of use and enjoyment, the lessor impliedly warranted that the asset would be fit for the lessee's purposes. Thus, the lessor, as the "owner" of the leased asset, had a duty to repair.[43]

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42. *See id.* at 109–10. The distinction between legatees and heirs is that the heirs of the estate of the deceased inherit unfulfilled contractual obligations, whereas legatees do not. Pothier described detailed rules for how the lessee is to recover damages from the estate in the event of early termination of a lease upon the death of the lessor. *See id.* at 164–71.

43. *Id.* at 84. This was subject to an exception for "small repairs," especially if damages were caused by the lessee's fault. *Id.* at 84–85. In the 86 studied civil-law jurisdictions, 52 jurisdictions assign major repair tasks to lessors and minor repair tasks to lessees. (Unless otherwise noted, the cited statutes from the civil-law jurisdictions in this Article are their civil codes. All the cited statutes in the following footnotes refer to the same statutes in this footnote, so only the country name and pin-cited section numbers will be noted.) See CIVIL CODE OF THE REPUBLIC OF AFGHANISTAN [CIV. CODE] art. 1351 & art. 1369 (translated in CIVIL CODE OF THE REPUBLIC OF AFGHANISTAN 295 (Afg. Legal Educ. Project trans., 2014)(Afg.); KODI CIVIL I REPUBLIKËS SË SHQIPËRISË [CIVIL CODE OF THE REPUBLIC OF ALBANIA] [Civ. Code] art. 805 (Alb. 1994); CODE CIVIL ALGERIENNE [CIVIL CODE OF ALGERIA] [CIV. CODE] art. 479 (Alg.); CÓDIGO CIVIL [CÓD. CIV.] [CIV. CODE] art. 1187 & art. 1207 (Arg.); CIVIL CODE OF THE REPUBLIC OF ARMENIA [Civ. Code] art. 618; AZƏRBAYCAN RESPUBLIKASININ MÜLKI MƏCƏLLƏSI [CIVIL CODE OF THE REPUBLIC OF AZERBAIJAN] art. 708 & § 748-1.7 (Azer.); BI'IISDAR ALQANUN ALMADANII [CIVIL LAW] No. 19 of 2001, art. 515 & art. 533 (Bahr.); RAMADZIANSKI KODEKS RESPUBLIKI BIELRUŚ (Грамадзянскі Кодэкс Рэспублікі Беларусь) [CIVIL CODE OF THE REPUBLIC OF BELARUS] No. 218-Z, art. 587 (Belarus); C.CIV. (Belg.) art. 1720 & art. 1754; CÓDIGO CIVIL [CÓD. CIV.] [CIV. CODE] art.690 (Bol.); CÓDIGO CIVIL [CÓD. CIV.] [CIV. CODE] art. 1924 & art.1927 & art. 1935 & art. 1940; CÓDIGO CIVIL [C.C.] [CIV. CODE] art. 1982,1985,1993 & 1998 (Colom.); *Zakona O Obveznim Odnosima* [LAW ON OBLIGATIONS ACT] art. 522 (Croat.); CÓDIGO CIVIL [CÓD. CIV.] [CIV. CODE] arts.393–394 (Cuba); OBČANSKÝ ZÁKONÍK [CIV. CODE] 89/2012 Sb. (Czech) art. 2257; CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] art. 1865,1868,1876 & 1881 (Ecuador); LAW NO. 131 OF 1948 [Civ. Code] art. 567 & art. 582 (Egypt); CÓDIGO CIVIL [CÓD. CIV.] [CIV. CODE] arts. 1712,1715,1723,1728 (E. Sal.); LAW OF OBLIGATIONS ACT OF ESTONIA §§ 279–280; ETHIOPIAN CIVIL CODE [CIV. CODE] art. 2916 & art.2953 & art. 2954; THE CIVIL CODE OF GEORGIA [CIV. CODE] art. 532 & art. 548(Georg.); CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] art. 1901 & arts. 1909–1910 (Guat.); CÓDIGO CIVIL [CÓD. CIV.] [CIV. CODE] art. 1690,1693,1701,1706 (Hond.); POLGÁRI TÖRVÉNYKÖNYV [PTK.][CIV. CODE] art. VI-335 (Hung.); CODICE CIVILE [C.C.][CIV. CODE] art. 1576 (It.); QAZAQSTAN RESPWBLĪKASINI AZAMATTIQ KODESKI (Қазақстан _Республикасының _Азаматтық _кодексі) [CIVIL CODE OF THE REPUBLIC OF KAZAKHSTAN][CIV. CODE] NO. 241-VI, arts. 552–553 (Kazak.); KIRGIZ RESPUBLIKASININ GRAJDANDIK KODEKSI (Кыргыз _Республикасынын _Граждандык _Кодекси) [CIVIL CODE OF THE KYRGYZ REPUBLIC][CIV. CODE] arts. 554–555 (Kyrg.); CIVIL CODE OF LAO PEOPLE'S DEMOCRATIC REPUBLIC [CIV. CODE] art. 436 (Laos); LYBIAN CODE CIVIL [CIV. CODE]; Jarida al-Rasmiyah, art. 566 & art. 581 (Libya); LIETUVOS RESPUBLIKOS CIVILINIS KODEKSAS [CIVIL CODE OF THE REPUBLIC OF LITHUANIA] [CIV. CODE] arts. 6.492–6.493 (Lith.); CÓDIGO CIVIL FEDERAL [CC][CIV. CODE]art.2412 & art. 2444 (Mex.); CIVIL CODE OF MOLDOVA [CIV. CODE] art. 888 & art. 898 (Moldova); BURGERLIJK WETBOEK [BW][CIV. CODE] (established in 1992) art. VII-206 & art. VII-217 (Neth.); CODIGO CIVIL DE LA REPUBLICA DEL PARAGUAY [CIV. CODE] art. 812 & art. 825 (Para.); CÓDIGO CIVIL [CÓD. CIV.] [CIV. CODE] art. 1680 & art. 1682 (Peru); KODEKS CYWILNY [CIV. CODE] art. 663 & art. 681 (Pol.); Qanun raqm (22) lisanat 2004 bi'iisdar alqanun almadanii [Law no. (22) of 2004 Regarding Promulgating the Civil Code] [CIV. CODE] art.593 & art. 615 (Qat.); Civil Code of Québec, S.Q. 1991, c 64, art.1864 (Can.); CODUL CIVIL AL ROMÂNIEI [CIVIL CODE OF ROMANIA]

Likewise, the lessor bore the risk of loss of the leased asset in the event of destruction by fire or force *majeure*.[44]

In other respects, Pothier's contractual model seemed to fit awkwardly with the conventional understanding of leases. The right of lessees to sue for

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No. 287/2009, art. 1788 & art. 1802 (Romania); Grazhdanskiĭ Kodeks Rossiĭskoĭ Federatsii [GK RF] [Civ. Code] art. 616 (Russ.); Civil Code of Seychelles Act (1st January, 1976) art.1720 & art.1754, Civil Code of Slovakia [Civ. Code] Act No. 40/1964 art. 664 & art. 668 (Slovak.), Obligacijski Zakonik [Civil Obligations Act of Slovenia] art. 589, [Obligationenrecht][Code des obligations][Swiss Code of Obligations] Jan 1, 1912, SR/RS 22 arts. 259–259b (Switz.); Pramwl Kḍĥmāyphæng Læa Phāṇichy̒ (ประมวลกฎหมายแพ่งและพาณิชย์) [Civil And Commercial Code] [CCC] bk. 3 art. 550 & art. 553 (Thai.); Código Civil [Civ. Code] art. 973 (Timor-Leste); Grazhdanskiy Kodeks Turkmenistana [Civil Code Of Turkmenistan][Civ. Code] art. 556 & art. 572) (1998); (Turkm.), Tsyvilnyi Kodeks Ukrayiny (Цивільний кодекс) [Civil Code Of Ukraine][Civ. Code] art. 776 (Ukr.); Qanun almueamalat almadaniat lidawlat al'iimarat alearabiat almutahida (قانون المعاملات المدنية لدولة الامارات العربية المتحدة [Federal Law No. 5 of 1985 On the Civil Transactions Law of the United Arab Emirates State] art. 767 & art. 779, O'zbekiston Respublikasining Fuqarolik kodeksi [Civil Code of the Republic of Uzbekistan][Civ. Code] arts. 547–548 (UAE); Código Civil [Cód. Civ.] [Civ. Code] art.1586 (Venez.); and Civil Code of Vietnam [The Law No. 91/2015/QH13] [Civ. Code] art. 477 & art. 479 (Viet.).

One (Civil Code of Indonesia, [Civ. Code] art. 723 (Indo.)) assigns the duty to repair to lessees. 33 jurisdictions put the duty to repair on the lessor. See Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civ. Code] §§ 1096-1097 (Austria); Código Civil [C.C] [Civ. Code] art. 566 (Braz.); Code Civil [C. Civ.] [Civ. Code] art. 1720 (Burk. Faso); [Code Civil][C. Civil][Civ. Code] art. 377 (Burundi); Kramr Dth Bb Venei (ក្រមរ ឌីធ ប៊ីប៊ី វេណេយ) [Civ. Code] art. 602 (Cambodia); Mínfǎ (民法) [Civil Law] (promulgated by Nat'l People's Cong., May 28, 2020), art.750 (China), Code Civ. [C. Civ.] [Civ. Code] art. 1720 (Comoros); Código Civil [Cód. Civ.] [Civ. Code] art. 1130 (Costa Rica); [Code Civil][C. Civil][Civ. Code] art. 377 (Democratic Republic of Congo); Código Civil [Cód. Civ.] [Civil Code] art. 1720 (Domin. Repub.); Code Civil [C. Civ.] [Civ. Code] art. 1720 (Fr.).; Bürgerliches Gesetzbuch [BGB] [Civ. Code] §§ 535-536 (Ger.); Astikos Kodikas [A.K.] [Civ. Code] 15:575 (Greece); Code Civil [C. Civ.] [Civ. Code] art. 1491 (Haiti); Qanuni Madani [Civ. Code] 1314 [1935], arts. 485–486 (Iran); MINPŌ [MINPŌ] [Civ. Code] art. 162 (Jap-an); [Jordan Civ. Code] art. 681; Alqanun Almadaniu Alkuaytiu (القانون المدني الكويتي) [Civil Law] No. 67 of 1980, art. 572 (Kuwait); Civilikums [Civil Law] art. 2172 (Lat.); Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code] § 1096 (Liech.); LA. Civ. Code art. 2691; Code Civil [C. Civ.] [Civ. Code] art. 1720 (Lux.); Civ. Code art. 1540 (Malta); Code Civil [C. Civ.] [Civ. Code] art. 1560 (Monaco); ИРГЭНИЙ ХУУЛЬ [Civ. Code] art. 288 (Mongolia); Código Civil De La República De Nicaragua [Civil Code Of The Republic Of Nicaragua] tit. XIV ch. II art. 2826, La Gaceta, Diario Oficial [L.G.] 11 Dec. 2019 (Nicar.); Oman Civil Transactions Law, Sultani Decree 29/2013 [Civil Law] art. 535; Código Civil [Cód. Civ.] [Civil Code] art. 1306 (Pan.); Civil Code, art. 1654, as amended (Phil.); Código Civil [Cód. Civ.] [Civil Code] art. 1031 (Port.); P.R. Laws Ann. tit. 31, § 1345, Minbeob [Civil Act] art. 633 (S. Kor.); Código Civil [Cód. Civ.] [Civ. Code] art. 1554 (Spain); Burgerlijk Wetboek [Civ. Code] art. 1572 (Surin.); Jordabalk [Jb] [Land Code] 12:15 (Swed.); MÍNFǍ (民法) [Civ. Code] art. 429 (Taiwan); [Code des Obligations et des Contrats][Code of Obligations and Contracts] art. 742 (Tunisia); and Código Civil [Cód. Civ.] [Civil Code] arts. 1797-8 (Uruguay). In some of these jurisdictions, the default rule as applied to residential leases is that major repair tasks are the responsibility of lessors and minor repair tasks, lessees.

44. *See* Pothier, *supra* note 37, at 76. This was said to be a default rule, but a contract shifting the risk of destruction of the leased property to the lessee "is not readily presumed." *Id.* In the 86 studied civil-law jurisdictions, 22 rebuttably presumes that lessees are liable in the case of fire. *See* Alg. art. 496; Arg. art. 1206; Bahr. art. 53; Belg. art. 1733; Bol. art. 703; Domin. Repub. art. 1733; Egypt art. 584; Ethiopian art. 2970; Fr. art.1733; Guat. art.1912; Haiti art. 1504; It.art.1588; Libya art. 583; Malta art. 1562; Mex. arts. 2435–2436; Monaco art.1573; Nicar. arts. 2875–2876; Para. art. 828; Peru art. 1683; Phil. art. 1667; Romania art. 1822; and Seychelles art. 1733.

torts to the leased property committed by third parties is hard to square with the purely contractual model in which the lessee had no right of possession. Under the civil law model, the lessor as the owner of the leased asset was what we would call the "residual claimant," bearing upside and downside changes in its value over time. But this was subject to an ill-defined exception for changes in the value of the "fruits" produced by the leased asset during the term of the lease.[45] The limitation of remedies for both lessors and lessees to monetary relief seemed to provide inadequate protection of either side. Lessors had no right to enjoin lessees from committing waste, and lessees had no right to demand specific performance of a lease when the lessor died, or transferred the landownership to a third party. Subleases were permissible — because they were based on a different contract between lessee and sublessee[46] — but evidently assignments were not — because (absent an assumption) there would be no contract between the lessor and the assignee.

Pothier's treatise was highly influential during the enactment of the French and German Civil Codes.[47] The French Civil Code, from its inception, clearly treats the lease as a form of contract.[48] Not until the 1975 reform did lessees, which are called "detentors" in French law rather than possessors, become entitled to claim the return of property removed from their control.[49]

In Germany, the debate regarding whether a lease is a form of property or contract started before the enactment of the German Civil Codes. In Prussian law, a lease was a type of property. The first draft of the German Civil Code, however, mainly based on Roman law, considered the lease a purely personal right (i.e. a contract). Despite pushback from legal practitioners and the fact that a lease had been a property form in Prussia, the second draft of the German Civil Code preserved the contract characterization, changing it only in § 566, which provided that a sale of the lessor's property does not break a lease (see discussion *infra* Part IIII.A.2). Nevertheless, lessees *qua* possessors were entitled under § 861 to bring possessory claims against third parties to protect their right to possession.[50] Overall, Roman law significantly shapes the starting point

45. *See* Pothier, *supra* note 37, at 61–65.

46. *See id.* at 107–09.

47. *See* Simon Whittaker & John Cartwright, *Introduction*, *in* The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms 1, 2 (John Cartwright & Simon Whittaker eds., 2017) (observing that the French obligation law is Romanist and Pothier and Domat's scholarship influenced many of the provisions); Ciara Kennefick, *Violence in the Reformed Napoleonic Code: the Surprising Survival of Third Parties*, *in* The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms 109, 117–18 (John Cartwright & Simon Whittaker eds., 2017) (also noting Pothier's influence on the French Civil Code); Sofia Stefanelli, *A Comparative Study of the German and French Paths to Codification of Private Law* (2023), at 6, 8, https://doi.org/10.13140/RG.2.2.24171.92965 (pointing out that Pothier's scholarship affected the French Civil Code).

48. *See* Bram Akkermans, The Principle of Numerus Clausus in European Property Law 160 (doctoral thesis, Maastricht Univ. 2008).

49. *See id.* at 161. Note that this Article takes into account and compares possession in the common law and all possession-like notions (such as detention) in the civil law. For the possession-like civil-law concepts, *see* Yun-chien Chang, *The Economy of Concept and Possession*, *in* Law and Economics of Possession 103 (Yun-chien Chang ed., 2015); Yun-chien Chang, *The Problematic Concept of Possession in DCFR: Lessons from Law and Economics of Possession*, 5 Eur. J. Prop. L. 4 (2016).

50. *See* Akkermans, *supra* note 48, at 241–42.

of lease law in France and Germany, and through their influential civil codes,[51] serves as the starting point in other civil law countries as well.

III. Evidence of Convergence

In comparing the common law and civil law, we find significant evidence of convergence, at least in functional terms, in two important respects. On the civil law side, we find strong movement toward the property conception of leases in the lessee's protection against interference by third parties and in the understanding that a sale of the lessor's interest in the property does not break the lease. In these respects, the law has moved toward the common law. In other respects, however, we find that leases in common law countries are increasingly being interpreted and enforced using principles associated with the law of contracts. In particular, we find that the *numerus clausus* principle – requiring that leases must conform to legally established forms of leases – is of increasingly reduced significance in common law countries, moving the common law closer to the principles established by civil law. In this respect, leases are becoming substantively more "contract-like."

A. Convergence Toward Property

In the context of lease law, two features stand out as indicating leases have converged toward the common-law understanding that leases are a form of property. First, leases in civil law systems have adopted significant legal protection for lessees against intrusions upon the leased asset by third parties. Second, most civil law jurisdictions have expressly amended their codes to provide that a sale of the lessor's interest to a third party does not terminate a lease that remains unexpired, or put differently, a sale of the lessor's reversion does not break a lease. These two issues are discussed in turn below.

1. Protection Against Interference by Third Parties

a. Common Law

Under the common law, lessees have long been understood to have standing to sue third parties for torts like trespass and nuisance. This was recognized by the development of the writ *ejectione firmae,*[52] which allowed the lessee to sue either the lessor or a third party for wrongful dispossession of the leased property. The writ was eventually assimilated into the trespass family of writs, and from this point on it followed that the lessee could sue third parties for trespass or nuisance.

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51. *See* Chang, *supra* note 8, at 42 (calculating the similarities between property law in France and Germany and the rest of the world); Anu Bradford et al., *Do Legal Origins Predict Legal Substance?*, 64 J. L. & Econ. 207 (2021) (examining the effect of legal and colonial origins related to France and Germany on other countries in property and antitrust law); Yun-chien Chang et al., *Colonial Experiences and Contemporary Laws*, 1 J. L. & Empirical Analysis 203 (2024) (examining the effect of legal and colonial origins related to France and Germany on other countries in eight legal fields).

52. *See* Part II.B.

The common law's embrace of the lessee's right to sue third parties for interference with possession and use and enjoyment of the leased property follows logically from the common law's conception of a lease as a property interest. Property rights generally entail the right to possession,[53] and the right to possession entails the right to exclude others who would interfere with either possession or use of the owner.

Under our framework, lessees in common law jurisdictions are entitled to fend off third-party intruders unconditionally and immediately. In this respect, therefore, leases exhibit features of full-blown property rights.

b. Civil Law

Significantly, civil law countries have also largely recognized the lessee's right to bring legal actions against third parties that interfere with their lease. How is this possible, given that civil lawyers insist that a lease is a contract?[54] By definition, the lessee has no contractual rights against third parties, whether they are holders of undisclosed easements, intruding neighbors, or squatters. The answer is that although the civil law does not conceive of a lease as *conferring* a right to possession on the lessee, a lessee will often *be* in possession of the leased property, and with certain qualifications, civil law systems often give persons in possession legal rights against interferences by third parties.[55] In this respect, therefore, leases in civil law systems exhibit features characteristic of property.

This particular feature of civil law is a direct descendent of Roman law. The Roman law insisted that the institution most closely analogous to the modern lease – the *locatio conductio* – did not confer possession on the conductor (the lessee). Nevertheless, Roman law created possessory interdicts which

53. Mortgage (or its civil-law counterpart, hypothec) is a famous exception. Thus, mortgage/hypothec is another example for different conceptions. Some countries consider it as a property interest, while some countries consider it as a contract — and some consider it as neither. *See* Yun-chien Chang & Henry E. Smith, *Structure and Style in Comparative Property Law*, *in* Research Handbook on Comparative Law and Economics 131, 133, 139, 150-51 (Theodore Eisenberg & Giovanni B. Ramello eds., 2016).

54. All studied civil codes characterize lease as a contract, not a property form. *See* Afg. art. 1322; Alb. art. 801; Alg. art. 467; Arg. art.1187; Armenia art. 606; Austria art. 1090; Azer. art. 675; Bahr. art. 505; Belarus art. 577; Belg. art. 1709; Bol. art. 685; Braz. art. 566; Cambodia art. 59; Chile art. 1915; China art. 703; Colom. art. 1973; Costa Rica art. 1127; Croatia Act art. 519; Cuba § 389; Czech art. 2201; Domin. Repub. art. 1708; Ecuador art. 1856; Egypt art. 558; El Salvador § 1703; Estonia art. 271; Ethiopia art. 2727; Fr. art.1709; Georg. art. 531; Ger. art. 535; Greece art. 574; Guat. art. 1880; Haiti art. 1480; Hond. art. 1681; Hung. VI:331; Indo. Art. 1548; Iran art. 466; It. art. 1571; Japan art. 601; Jordan art. 658; Kazak. art. 540; Kuwait art. 561; Kyrg. art. 542; Laos art. 434; Lat. art. 2112; Libya art. 557; Liech. art. 1090; Lith. art. 6.447; LA. art. 2668; Malta art. 1526; Mex. art. 2398; Moldova art. 875; Monaco art. 1549; Mongolia art. 287.1; Neth. Civ Code art. VII:201; Nicar. art. 2810; Oman Civil Law art. 516; Pan. art. 1294; Para. Civ Code art. 803; Peru arts.1529 & 1673; Phil. art.1642; Pol. art. 659; Port. 1022; P.R. Laws Ann. tit. 31; § 1335; Qat. art. 582; Quebec art. 1851; Romania art. 1777; Russ. art. 606; Seychelles art. 1709; Slovak. art. 663; Slovenia art. 587; S. Kor. art. 618; Spain art.1542; Surin. art. 1596; Swed. XII:1; Switz. art. 253; Taiwan § 421, Thailand § 537, Timor-Leste § 953, Tunisia *Code des Obligations et des Contrats* (Code of Obligations and Contracts) § 727, Turkmenistan § 555, Ukraine § 759, United Arab Emirates § 742, Uruguay § 1776, Uzbekistan § 535, Venezuela § 1579, and Vietnam § 472.

55. *See* Chang, *supra* note 17.

gave persons in possession of things rights of action (analogous to tort rights) against persons who interfered with their possession. The possessory interdicts were qualified. As Nicholas explains,

> [I]f A, who is in occupation of land, is evicted by B, he can compel B to restore the land to him provided he can satisfy two requirements: his occupation must have amounted to possession in law. . .; and that possession must not have been obtained *vi* (by force), *clam* (secretly), or *precario* (by grant at will) from B.[56]

A conductor in possession would not be disqualified under any of the limitations, and thus could bring a possessory interdict if evicted by a third party.

Pothier, who as we have seen followed Roman law in these respects, insisted that a lease is a contract and confers no rights against third parties. But he also recognized that lessees could bring actions for interference by third parties based on the lessee's actual possession of land or some other thing. Although Pothier did not ground these propositions explicitly in Roman law, he was clearly channeling the structure of Roman law in differentiating the lessee's rights as lessee from the lessee's rights as possessor.

Most contemporary civil law systems continue to follow this distinction.[57] Leases are regarded as contracts, but insofar as lessees are in possession of the leased property, they are generally regarded as having rights against third parties. The rights are often qualified by the requirement that the possession must be "licit" rather than "illicit,"[58] but the possession of a lessee under a valid lease easily satisfies this requirement. In many civil-law jurisdictions,[59] the claims by possessors arise only in certain dispossession contexts (by force, in secret, etc. — recall the Roman law principle discussed above[60]). At least in the real property context, such conditions are not a hurdle to lessees asserting claims for tortious interference by third parties. One genuine hurdle is that in a number of countries, a claim against dispossession does not arise until the lessee has been in occupation for a certain amount of time (usually one year).[61] Hence, short-term lessees or those who have recently come into occupation can only implore their lessor to file a claim against an interfering third party. Another hurdle is that some countries such as France consider lessees as having only *detention*, but not possession;[62] thus, lessees are not entitled to bring a possessory action. Yet, overall, the possession doctrine in civil law enables lessees to have rights of action against interferences by third parties substantially like the rights of owners of property.

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56. *See* Nicholas, *supra* note 18, at 108.

57. It is also worth noting that from Roman law to modern civil law, other use rights to land, such as *superficies* and *usufructs* (see Part II.A), are available. In some (but not all) scenarios, parties who prefer the rights that come with having a form of property can opt into such alternatives forms which are regarded as property interests.

58. *See* Chang, *supra* note 17.

59. *See id.*

60. *See* texts accompanying note 56.

61. *See* Chang, *supra* note 17.

62. *See* Laurent Aynès, *Property Law*, *in* Introduction to French Law 147, 156 (George A. Bermann & Etienne Picard eds., 2008).

In sum, both the common law and the civil law (for the most part) recognize that leases include features characteristic of property — that is, rights of *in rem* exclusion. They reach this position by very different pathways. The common law gives lessees *in rem* exclusion by characterizing leases as a form of property. The civil law gives lessees *in rem* exclusion by recognizing that lessees are licit possessors. At least on this dimension, we see significant convergence in functional terms toward the property conception of leases.

2. A Sale Does Not Break a Lease

a. Common Law

At common law, the conception of a lease as a form of property gave rise to a straightforward understanding of the effect of a sale of the lessor's interest (the reversion) to a third party. That understanding derived from the principle of *nemo dat* – one cannot convey what one does not have. Thus, if a lessor enters into a lease, the lessor has conveyed to the lessee a portion of the lessor's property, the portion represented by the "leasehold estate." Accordingly, when the lessor sells or otherwise transfers its ownership rights to a third party, the third party takes the property of the owner subject to existing leases. The sale does not break the lease. Insofar as the lessee has "paramount title," the lessee's rights under the lease are superior to the rights the third party who acquires the interest of the lessor.

The matter is complicated by the enactment of recording acts (in the U.S.) and Torrens Acts for registration (in England, Canada, and Australia). Recording acts provide constructive notice to subsequent third-party transferees including subsequent lenders, thereby protecting holders of recorded rights against claims by later transactors that they are good-faith purchasers.[63] Registration laws go further and provide holders of registered rights with *in rem* effect. All common law jurisdictions surveyed require that long-term leases be recorded or registered.[64] Does this mean that leases in these countries have *in rem* effect in only a qualified sense, that is, if they are recorded?

We think not. All four of the common law countries surveyed continue to enforce pre-existing leases against third parties who have actual or inquiry notice of the existence of the lease – even if it has not been recorded or registered.[65]

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63. *See, e.g.*, Alaska Stat. Ann. § 40.17.080 (2022); Cal. Civ. Code § 1214 (2023); Haw. Rev. Stat. Ann. § 502-83 (2021); Idaho Code Ann. § 55-812 (2022); Mich. Comp. Laws Ann. § 565.29 (2022); Minn. Stat. Ann. § 507.34 (2023); Mont. Code Ann. § 70-21-304 (2022); Neb. Rev. Stat. Ann. § 76-238 (2024); N.M. Stat. Ann. § 14-9-3 (2021); N.Y. Real Prop. Law § 291 (McKinney 2022); N.D. Cent. Code Ann. §47-19-41 (2022); Or. Rev. Stat. Ann. § 93.640 (2021); S.D. Codified Laws § 43-28-17 (2022); Wash. Rev. Code Ann. § 65.08.070 (2022); Wis. Stat. Ann. § 706.08 (2022); Wyo. Stat. Ann. § 34-1-120 (2022). For a comprehensive state-by-state survey, see Yiang Zhu & Yun-chien Chang, *Comparative Legal Methods: Mapping*, *in* Edward Elgar Handbook: Research Methods in Property Law (Björn Hoops ed. 2026 forthcoming).

64. In 32 states in the U.S., leases longer than one year must be recorded to bind good-faith third parties. Several states use two, three, five, or seven years as the cutoff. La. art. 3338 and Miss. Code Ann. § 89-5-3 (2024) require all leases to be recorded to be opposable.

65. In the U.S., recording acts in many states (see those cited in footnote 63, *supra*) stipulate that unrecorded (long-term) leases are void against subsequent good-faith purchasers for a valuable consideration. That is, purchasers with actual notice (i.e., bad

England, Canada, and Australia refer to these as "equitable leases," which will be enforced (in equity) against subsequent purchasers who know or should have known of the existence of the lease.[66] A primary form of imputed knowledge in this context is that someone else appears to be in possession of all or part of the property.[67] This will commonly be the case, especially with respect

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faith) of unrecorded leases are still bound. *But see* Bourne v. Lay & Co., 264 N.C. 33, 35–36, 140 S.E.2d 769, 771 (1965) ("Actual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel").

66. For the U.K., see Emily Walsh, A Guide to Landlord and Tenant Law 24–25 (2018). For Canada, see United Trust Co. v. Dominion Stores Ltd., 1976 Carswell Ont 383 (S.C.C.). For Australia, see Samantha Hepburn, Australian Property Law 854–56 (5th ed. 2021).

67. A majority of states in the U.S. consider lessees' possession giving inquiry notice to subsequent purchasers. *See, e.g.,* Cohen v. Thomas & Son Transfer Line, Inc., 196 Colo. 386, 388 (1978) (holding that lessee's possession puts purchasers on constructive notice of terms of lessee's tenancy, and, having such notice, purchasers take title subject to any rights of lessee which reasonable inquiry would have revealed); In re Henshaw, 585 B.R. 605 (Bankr. D. Haw. 2018) (holding that under Hawai'i law, purchaser of real property takes title subject to the claims of parties in possession when he buys); Townsend v. Blanchard, 117 Iowa 36, 43 (1902) (holding that the possession of the tenant of real estate is constructive notice, as to third parties, of the title of the landlord); In re Fletcher Oil Co., Inc., 124 B.R. 501, 504 (Bankr. E.D. Mich. 1990) (holding that open possession may put subsequent purchaser on notice regarding unrecorded rights of someone other than possessor); Wardell v. Older, 418 N.Y.S.2d 196, 198 (App. Div. 2d. Dep't 1979) (holding that generally, actual possession of realty is notice to all the world of the existence of any right which the person in possession is able to establish).

A few states, however, hold that lessees' possession, in itself, is insufficient to constitute inquiry notice. *See, e.g.*, Betts v. Letcher, 46 N.W.193,194 (1890) (holding that possession, in order to constitute notice, must be open and notorious, and prima facie is, of itself, sufficient notice; but this presumption, like that arising from any other fact putting one upon inquiry, is subject to rebuttal by proof showing that an inquiry, duly and reasonably made, failed to disclose any legal or equitable title in the occupant); Hopkins v McCarthy, 121 Me. 27, 29 (1921) (ruling that having possession of portion of building does not require a purchaser thereof to make inquiry and is not alone implied notice to purchaser of the premises of the existence of an unrecorded lease for a period of more than 7 years).

Some other states go further and hold the position that lessees' possession does not give notice. *See* Savannah Timber Co. v. Deer Island Lumber Co., 258 F. 777, 782 (5th Cir.1919) (holding that notice of real estate sales is given only by actual record, and mere possession of the land is insufficient to charge subsequent purchasers with notice); In re Dlott, 43 B.R. 789, 793–94 (Bankr. D. Mass. 1983) ("Massachusetts law provides that a conveyance of an estate in land is not valid against any person unless the transfer is recorded or unless that person has 'actual notice' of the unrecorded conveyance. The statutory requirement of 'actual notice' has been strictly construed. Knowledge of facts which ordinarily would put a party upon inquiry is not enoughFalse Evidence of open occupation, possession and cultivation of land and enclosure by a party who has an unrecorded deed thereof, is not sufficient to warrant the inference that a third person had any notice of such deed"); Va. Code Ann. § 55.1-407 (2024) ("The mere possession of real estate shall not, of itself, be notice to purchasers for value of any interest or estate therein of the person in possession"); Kiser v. Clinchfield Coal Corp., 200 Va. 517, 522, 106 S.E.2d 601, 606 (1959) ("mere possession . . . constituted no notice"); N.M. Stat. Ann. § 14-9-3 (2024) ("No deed, mortgage or other instrument in writing not recorded in accordance with Section 14-9-1 NMSA 1978 shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith or judgment lien creditor, without knowledge of the existence of such unrecorded instruments. Possession alone based on an unrecorded executory real estate contract shall not be construed against any subsequent purchaser, mortgagee in good faith or judgment lien creditor either to impute knowledge of or to impose the duty to inquire about the possession or the provisions of the instruments"). *See* Zhu & Chang, *supra* note 63.

to short-term residential leases which may not be required to be recorded or registered. Thus, under the concept of the "equitable lease" (whether or not under that name), the common-law jurisdictions have retained the principle that leases are property rights that are paramount to subsequent transferees of the lessor's interest. Still, as explained above in Part III.A.1.b, a condition that the lessee be in possession can be regarded as qualifying the lessee's status as a holder of property, giving the equitable lessee in common-law jurisdictions something less than full-blown *in rem* rights.

We also find that in the modern commercial world, leases are subject to contractual modifications that qualify the lessee's automatic right to exclude third parties, including lenders. A simple form of such a contract is called a subordination agreement. Suppose a lessor has entered into a lease with a lessee and thereafter the lessor desires to enter into a financing agreement with a third party using the leased property as collateral in the form of a mortgage. The lessee, as the holder of a preexisting lease, which is regarded as a property right, has paramount title relative to any mortgage that the lessor executes with the financing company. The lessor and the financing company, in an effort to close the financing deal, may therefore seek to induce the lessee (presumably for consideration) to enter into a subordination agreement, in which the lessee agrees that its property interest in the lease will be subordinate to the interest of the financing company under the mortgage.

A lessee who agrees to such a subordination agreement has qualified its *in rem* rights under the lease, but only in a contingent sense. If the lessor faithfully performs its obligations under the financing agreement, the financing company will have no occasion to foreclose on the mortgage and force a sale of the property to satisfy the debt, including the now-subordinate interest of the lessee. If all goes well, the lessee can continue to exclude all the relevant members of the legal community (including the financing company) from the leased property, just as before.

Lessees holding valuable leases of commercial property will nevertheless not want to see their leasehold interest subject to possible foreclosure and sale, even if the risk is remote. Consequently, such lessees, when presented with a request for a subordination agreement, will commonly insist on what is called a non-disturbance agreement.[68] Such an agreement will typically provide that the financing institution will not disturb the possession of the lessee in the event of a default that requires the financing institution to foreclose on the interest of the lessor, provided the lessee is in full compliance with the terms of the original lease.[69] These contractual modifications of the priorities fixed by property law are very common with respect to commercial leases, though not so much with short-term residential leases. They are commonly called

68. *See, e.g.*, Thomas B. Mitchell et al., *SNDAs: Can't Live with 'em, Can Live without 'em*, 15 Prob. & Prop. 27 (2001).

69. The nondisturbance element of these agreements presumably reflects the fact that the financing institution wants the lessee to remain in possession because the lessee is a good tenant who regularly pays the rent and otherwise complies with the terms of the lease. It is also, at least with respect to SNDAs negotiated when the lessee's lease is already in effect, the consideration given to the lessee for agreeing to subordinate its interest to the rights associated with the security interest of the financing institution.

"subordination, non-disturbance, and attornment" agreements or SNDA's for short. Residential lessees, for their part, have recently received statutory protection against eviction by financing institutions foreclosing on mortgages executed by the lessor — even mortgages in existence before the lessee entered into the lease that technically have priority over the lessee's rights.[70] These statutes can also be seen as a partial modification of the hierarchy of property rights established by the principle of *nemo dat* and the conception of the lease as a form of property.

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In short, what we see today in the common law world adopts a baseline understanding about whether a sale or other transfer of rights by the lessor breaks a lease (it generally does not, but with minor conditions such as being in possession or recording and registration), modified in certain contexts by contractual arrangements that move lessees' rights in the direction of the relative right — but only in a contingent and highly qualified sense. Similarly, certain statutory reforms in the residential context have qualified the remedial rights of parties in such a way that strengthens the absolute rights of lessees as against financing institutions. But each of these contractual modifications are matters of detail that do not modify the established understanding that generally a sale (whether voluntary or forced by foreclosure) does not break a lease having paramount title.

b. Civil Law

Under the conventional civil-law understanding that a lease is a contract, and that a contract is an *in personam* obligation, the logical conclusion is that when a lessor sells its ownership interest to a third party, the third party is not bound by the lease. In effect, the original lessee becomes an illicit possessor vis-à-vis the new owner, who has not consented to the lease. Hence the lessee can be evicted by the latter. This standard legal reasoning understandably could induce strategic behavior on the part of lessors interested in early termination of a lease (or in forcing a renegotiation of the rent) and could create significant unfairness for lessees who have relied on the original lease terms. Civil codes that, as a starting point, treat leases as contracts have generally added elements that reverse the logical implication that a sale breaks a lease.[71]

To be sure, civil codes offer a variety of specific rules qualifying the implication that a sale (by the lessor) breaks a lease. To simplify the typology, we focus on fixed-term leases (the functional equivalent to a term of years in the common law). The other type of lease, periodic lease, usually could be terminated by new owners easily, especially those with a short period. Seventeen civil codes take the position that a sale never breaks a lease and this rule is

70. *See* Protecting Tenants at Foreclosure Act, 12 U.S.C. §5220 (2024).

71. *See* Hiroshi Oda, Japanese Law 164 (3d ed. 2009); Akkermans, *supra* note 48, at 160–61, 240–43; Christian Von Bar, Foundation of Property Law: Things as Objects of Property Rights 15 (Jason Grant Allen trans., 2023).

immutable.[72] Eight civil codes adopt an unconditional default rule that a sale does not break a lease.[73] Thirty-three civil codes impose the mandatory rule on the condition that the lease has been registered or recorded.[74] Three civil codes adopt the default rule on the condition that the lease has been registered or recorded.[75] Seven civil codes stipulate that the transferee to the lessor is bound if the lessee is in possession.[76] A mandatory rule has also been used when combined with other conditions, such as the lease being written, notarized, etc.,[77] whereas a default rule of a sale not breaking a lease has also been adopted along with, for instance, notarization.[78] Other than the first, and perhaps also the second, type, these provisions impose additional conditions that move civil-law leases only part way toward the status of leases are property, given the conditions, they still fall short.

3. Summary

The takeaway of this analysis is that leases in civil-law jurisdictions, while conceived as a form of contract, are at least with respect to two critical issues moving in the direction of treating leases as property. Sales continue to break leases in some jurisdictions, because when a lease is established, a lessee does not (through operation of law) always enter claim-duty relations with all others in the legal community. Thus, the lessee's right to possess is not always superior to a transferee *qua* new owner. Moreover, even in those civil-law jurisdictions that mandate that sales do not break leases, the lessee remains imperfectly protected, against interference by third parties,[79] because, depending on

72. Afg. art. 1390; Alg. art. 511; Azer. art. 718; Arg. art. 1189; Bahr. art. 549; Croatia art. 541; Cuba art. 391; Egypt art. 604; Jordan art. 691; Kuwait art. 607; Libya art. 603; Neth. art. VII:226; Port. art. 1057; Qat. art. 628; Slovak. art. 680; Slovenia art. 610; and Timor-Leste art. 988. For a visualization of these different rules on a world map, see Zhu & Chang, *supra* note 63.

73. Czech arts. 2221–2222; Domin. Repub. art.1743; Indo. art. 1576; Iran art. 498; Malta art. 1574; Surin. art. 1597; UAE art. 795 and Venez. art. 1604.

74. Austria art. 1120; Chile art. 1962; Colom. art. 2020; Costa Rica art.1153; El Salvador art. 1750; Hond. art. 1728; It. art. 1599; Japan arts. 605 & 605-2; Lat. art. 2174; Liech. art. 1120; Lith. art. 6.494; LA. Civ. Code art. 2712; Mold. Art. 900; Nicar. art. 2949; Pan. arts. 1301 & 1324; Para. art. 810; Peru art. 1708; Phil. art. 1676.; P.R. Laws Ann. tit. 31, § 1334; Quebec art. 1887; Romania art.1811; S. Kor. arts. 621–622; Spain arts. 1549 & 1571; and Tun. arts. 798–799.

In addition, Armenia arts. 610–611; Belarus art. 580; Kazak. art. 544; Kyrg. art. 545; Mex. art. 2448-G; Mongolia art. 318.3; Russ. art. 609; and Uzbekistan art. 539 require all real property leases to be registered, and Armenia art. 619; Belarus art. 588; Kazak. art. 559; Kyrg. art. 556; Mex. art. 2409; Mongolia art. 297.1; Russ. art. 617; and Uzbekistan art. 549 stipulate that a sale does not break a lease.

Finally, Thai. CCC art. 538 stipulates that parties to unregistered leases cannot petition courts for enforcement, while Thai. art. 569 stipulate that a sale does not break a lease.

75. Ethi. art. 2932; Greece arts. 614–615; and Uruguay art. 1792.

76. China art. 725; Est. art. 291, Georg. art. 572; Ger. Art. 566; Guat. art. 1645; Lao art. 437; and Turkm. art. 595 require that lessees have been given use, which essentially requires lessees to be in possession.

77. Alb. art. 822; Braz. art. 576; Cambodia art. 246 & art. 598; Ecuador art. 1903; Hung. art. VI:340; Pol. art. 678; Switz. arts. 261, 261b; and Taiwan art. 425.

78. Belg. art. 1743; Fr. art. 1743; Haiti art. 1514; Monaco art. 1583; and Seychelles 1743.

79. Among the studied civil-code jurisdictions, only Argentina and Cuba appear to functionally stipulate leases as full-blown property.

the substance of the possession doctrine, lessees may not always have a claim to exclude trespassers.[80] Lessees, however, can request that lessors evict any unauthorized occupants. The variations in the doctrines regarding possession, and the multiple conditions on the principle that a sale does not break a lease suggest that the status of leases in the studied civil law countries lies on a continuum between full-blown property and contract.

In addition, though leases in common-law jurisdictions are conceived as a form of property, longer-term leases are best conceived as being property only in a qualified sense, as recording or registration may be required to defeat the interests of purchasers of the lessor's interest – at least when the purchaser does not otherwise have notice of the lease. On the continuum between full-blown property and contract, leases in common-law jurisdictions are overall closer to the full-blown property than leases in civil-law jurisdictions, as the former requires fewer conditions and does not impose any maturity period.

Is this convergence? Yes, in a sense. The common-law conception of a lease as property is moving with respect to third party financing and notice requirements in a more *in personam* direction. Simultaneously, civil law jurisdictions through widely varying code modifications, have moved part way toward the understanding of the lease as a type of property.[81] But the starting points clearly continue to make a difference. Leases retain more of the *in rem* exclusion characterization in the common law relative to the understanding in the civil law, where the *in personam* characterization is likely to prevail in the absence of a code provision to the contrary.

B. Convergence Toward Contract

Both the civil law and the common law recognize the *numerus clausus* principle—the understanding that property exists in limited forms which cannot be modified by individual parties.[82] If anything, the principle is stronger in civil law systems. The requirement that parties limit themselves to established forms is often reflected in the code in civil law countries as a rule of law. In common-law jurisdictions, this requirement operates more like a rule of construction. Faced with an ambiguous grant of property, courts will strive to construe it as falling within an established form and will avoid suggesting that it reflects some novel interest in property.

The most plausible explanation for the *numerus clausus* is that it is designed to reduce the information costs associated with rights that create duties against all the world.[83] Hence one would predict that the *numerus clausus*

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80. *See* Chang, *supra* note 17 (observing that in many jurisdictions, possessors' recovery actions are often limited by various conditions).

81. *See* Chang & Smith, *supra* note 30, at 14, 44–47.

82. *See* Yun-Chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Custom, and the Emergence of New Property Forms*, 100 Iowa L. Rev. 2275 (2015); Akkermans, *supra* note 48.

83. The *numerus clausus* principle implicitly aims to reduce third-party information costs. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1 (2000); Henry E. Smith, *Standardization in Property Law*, *in* Research Handbook on the Economics of Property Law 148 (Kenneth Ayotte & Henry E. Smith eds., 2011); Yun-chien Chang & Henry E. Smith, *The Numerus Clausus*

principle would loom larger in common-law jurisdictions that regard leases as a form of property (creating rights against all), and would be correspondingly weaker in civil law jurisdictions that think of leases as a species of contract (creating only personal obligations).[84] To some extent, we see evidence of this divergence. But in practical terms, the law in common-law countries is moving closer to the civil law, which applies only a weak form of the *numerus clausus* to leases.

In one important respect, both the common law and the civil law reflect the *numerus clausus* principle, insofar as both recognize the "lease" as a distinctive form of holding assets. Leases are governed by their own set of legal rules, relative to full ownership, or, say, bailments or security interests. When we look more closely at the law governing leases, however, we find implicit convergence toward the understanding that leases are permitted a large degree of freedom in specifying the rights and obligations of the parties, consistent with the contract prototype.

1. Types of Leases

Starting with the understanding that leases are a form of property, we find evidence of legally required standardization in the common law of leases, consistent with the *numerus clausus*. The common law restricts leases to three primary types: the term of years, the periodic lease, and the lease at will.[85] If the intent of the parties as to the type of lease is unclear, courts will construe the lease as adopting one of these three forms.

The significance of the three common-law types is limited, however, to the duration of the lease and the notice required to terminate it. Otherwise, the parties are free to specify their rights and obligations with respect to the amount of rent, which party has the duty to repair, and so forth, as if they are entering into an *in personam* contract. In practice, virtually all commercial leases are of the term of years variety, and the term of years simply requires that the lease set forth a "fixed or computable period of time" on which the lease ends (it need not be at the end of a year).[86] Within this infinite range of possibilities, the parties are free to designate any length of term they desire. So, outside the realm of informal and often oral leases, even the length of the lease term is a matter of freedom of contract. Famously, a lease that lasts "for the duration of war" is invalid because the length of the term is unknowable *ex ante*.[87]

Principle, Property Custom, and the Emergence of New Property Forms, 100 Iowa L. Rev. 2275 (2015).

84. For doctrinal and comparative analysis of the *numerus clausus* principle, *see* Akkermans, *supra* note 48; Bram Akkermans, *The Numerus Clausus of Property Rights*, *in* Comparative Property Law: Global Perspectives 100 (Michele Graziadei & Lionel Smith eds., 2017).

85. Restatement (Fourth) of Property § 4.3.2.1 (Tentative Draft No.5) (Am. L. Inst. April 2024). For Canada, see Bruce Ziff, Principles of Property Law 325 (7th ed. 2018). For Australia, see Samantha Hepburn, Australian Property Law 309-10 (5th ed. 2021). Secondary sources often reference a fourth type: the tenancy at sufferance, which is said to apply when a lessee holds over after the expiration of a lease. Technically a holdover is a trespasser, but, depending on the jurisdiction, may have a status analogous to a lessee at will.

86. Restatement (Fourth) of Property § 4.3.2.2

87. *See, e.g.*, Nat'l Bellas Hess v. Kalis, 191 F.2d 739 (8th Cir. 1951).

Nonetheless, defeasible leases are permissible – which would allow the parties to create a lease for the duration of war with careful drafting.[88] Viewed this way, almost any type of lease can be created in common-law jurisdictions, despite the *numerus clausus* principle. In the world of commercial leases, the common law of leasing appears to converge with the civil law — and both adopt what is essentially a purely contractual position.

On the other side of the divide, while civil-law jurisdictions appear to allow the parties to create whatever type of lease they choose, lease forms are highly standardized, both in law and in practice. Regarding real property leases, 81 of the 86 studied civil codes explicitly recognize two (and only two) forms of leases: the periodic lease and the fixed-term lease.[89] These two correspond to periodic tenancy and term of years in the common law. Theoretically, parties may use a third form of lease (say, lease at will[90]). Nonetheless, as the civil codes stipulate default and mandatory rules for the two forms, courts would be inclined to view ambiguous lease terms as one of two statutorily sanctioned forms. Some countries' consumer protection agencies publish template lease contracts based on the civil code, which further push the lease market towards the two forms recognized in the civil codes. Therefore, in this sense, with or without the *numerus clausus* principle, the civil and common law, at least in practice, may not be that different.

2. *Transfers of Leases*

We also find evidence of the *numerus clausus* principle with respect to standardization in the forms in which lessees may transfer their interest to third parties. Here, we find a convergence of sorts in that both common law and civil law countries restrict the form in which lessees may transfer their interest. Nevertheless, the nature of the restrictions differs as between common law and civil law countries, and this plausibly reflects differences in legal origins.

Given the foundational principle in the common law that a lease is a type of property, it is unsurprising that the default understanding is that leases are freely alienable.[91] Absent a lease provision to the contrary, lessees are free to transfer their interest in the lease to anyone else. Even when a lease stipulates that the lessors' consent is required, at least some courts (and the Restatement of Property) have held that consent cannot be unreasonably withheld.[92]

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88. Restatement (Fourth) of Property § 4.3.2.5. For example, the parties could enter a lease for 99 years, determinable upon the end of the war.

89. Iran arts. 468 & 494 and Malta art. 1566 appear to recognize the fixed-term lease only. Braz. art. 574; Arg. art. 1218; Cuba Civ. Code art. 392; and Oman arts. 529 & 558 have fixed-term leases but recognize indeterminate leases only for holdover lessees (similar to tenancy at sufferance at the common law).

90. Nonetheless, a lease at will is antithetical to the binding nature of bilateral contracts and may be invalidated. For instance, Est. art. 309 explicitly bans leases that can be terminated at will by lessors.

91. Restatement (Fourth) of Property §§ 4.3.11.1 and 4.3.12.1 (Council Draft) (Am. L. Inst. Jan. 2025). For the U.K., see *Landlord and Tenant Act of 1927*, c. 36 § 19; *Landlord and Tenant Act of 1988*, c.26 § 3.

92. *See, e.g.,* Kendall v. Ernest Pestana, 709 P.2d 837 (Cal. 1985).

The common law nevertheless intrudes here to limit transfers of the lessee's interest to one of two forms: assignments and subleases. In the former, the lessee transfers the entire lease to a third party, who steps in the lessee's shoes. In the latter, the lessee creates a new lease with a third party, and the lessee acts like a lessor to the sublessee. The restriction to one of two forms can plausibly be explained as a means to reduce the costs to the lessor, who is effectively a stranger to agreements between the lessee and a third party to whom the lessee's interest is transferred. Such agreements can also complicate the interests of other third parties interested in purchasing the reversion interest (or ownership) from lessors, or in understanding the significance of any particular transfer of interests.

Civil law jurisdictions also commonly restrict the lessee's ability to transfer the lease. Regarding leases of real property, 49 of the 86 coded civil-law jurisdictions, as a default rule, prohibit subleases,[93] whereas 43 of the 86 in principle prohibit assignment of lease — unless with the (written) consent of lessors,[94] and 23 of the 86 do not explicitly take a position on alienation of leases[95] — likely meaning that in practice alienation of lease is not valid without the lessors' consent, if not flat-out prohibited.[96] In most of these countries, the default rule of prohibition can be opted out *ex ante* or *ex post* with the

93. Alg. art. 505; Armenia art. 620; Azer. art. 712; Bahr. art. 541; Belarus art. 586; Bol. art. 702; Cambodia Art. 608; Chile art.1946; China art. 716; Colom. art. 2004; Cuba art. 395; Czech art. 2215; Ecuador art. 1887; El Salvador art. 1734; Estonia art. 288; Ethiopian art. 2734; Georg. art. 549; Ger. art. 540; Hond. art.1712; Hung. VI:334; Japan art. 612; Jordan art. 703; Kazak. art. 551; Kyrg. art. 553; Laos art. 438; Lat. art. 2115; Lith. art. 6.490; Malta art. 1614; Mex. art. 2480; Moldova art. 894; Mongolia art. 289.2.7; Nicar. art. 2884; Oman art. 554; Peru art.1681; Port. art. 1038; Quebec art. 1870; Russ. art. 615; S. Kor. art. 629; Surin. art. 1580; Swed. art. VIII:19; Switz. art. 262; Taiwan art. 443; Thai. art.544; Timor-Leste art. 967; Turkm. art. 574; Ukr. art. 774; UAE art. 787; Uzbekistan art. 546; Vietnam art. 475.

For a visualization of these different rules on a world map, see Zhu & Chang, *supra* note 63.

94. Alb. art. 818; Alg. art. 505 ; Arg. art. 1213; Armenia art. 620; Azer. art. 712.1; Bahr. art. 541; Belarus art. 586; Bol. art. 707; Cambodia art. 252; Chile art. 1946; Colom. art. 2004; Cuba art. 395; Czech art. 2215; Ecuador art. 1887; El Salvador art. 1734; Estonia art. 290; Ethiopian art. 2734; Guat. art. 1890; Hond. art.1712; Hung. VI:334; Indo art. 1559; Japan art. 612; Kazak. art. 551; Lat. art. 2115; Lith. art. 6.491; Malta art.1614; Mex. art. 2480; Moldova art. 894; Mongolia art. 289.2.7; Oman art. 554; Peru art. 1681; Phil. art. 1649; Port. art. 1038; Quebec art. 1870; Russ. art. 631; S. Kor. art. 629; Surin. art.1580; Swed. 8:19; Switz. art. 263; Thai. art.544; Timor-Leste art. 967; Uruguay art. 1791; Uzbekistan art. 546.

95. These jurisdictions include Austria, Brazil, China, Croatia, Georgia, Germany, Iran, Jordan, Kyrgyzstan, Laos, Liechtenstein, Netherlands, Nicaragua, Panama, Poland, Slovakia, Slovenia, Spain, Taiwan, Turkmenistan, Ukraine, United Arab Emirates, and Vietnam.

96. The original Napoleonic Code reflected a traditional conception of contracts and did not view contracts as assignable. The French court toward the end of the twentieth century and the French legislature in 2016 (in arts. 1216–1216-3 of the French Civil Code), after a long debate, recognize assignment of contracts. *See* Jean-Sébastien Borghetti, *The Effects of Contracts and Third Parties*, *in* THE CODE NAPOLÉON REWRITTEN: FRENCH CONTRACT LAW AFTER THE 2016 REFORMS 227, 238–40 (John Cartwright & Simon Whittaker eds., 2017). Yet, as § 1216 makes clear, lessors' consent is still required.

In Ger. art. 415, China arts. 551 & 555, and Taiwan art. 301, the three jurisdictions listed in note 95 as not having explicit rules regarding leases, the general provisions about contracts and obligations in their civil codes stipulate that for transfers of civil duties and assignment of contracts, the consent of claimants is required. Hence, assignment of lease, at the very least, requires the permission of lessors.

lessors' consent. In addition, the default rule of allowing assignment and sublease can also be opted out *ex ante* in a lease.

This difference between civil and common law systems with respect to transfers of the lessee's interest is plausibly explained by their different starting points. Historically, contractual obligations were regarded as personal and hence as inalienable.[97] Hence it follows that the civil law would adopt default rules prohibiting alienation and would limit the lessee' ability to transfer the lease to affirmative permission by the lessor.

In effect then, the common law starts with the default rule that alienation is permissible but may be restricted *ex ante* by the agreement of the parties. The civil law often starts with the default rule that alienation is prohibited but may be permitted *ex ante* by the agreement of the parties. Default rules matter of course.[98] But this appears to be another area where we see significant but not complete convergence. Moreover, whether a country allows two types of transfers (say, assignment and sublease), allows one type of transfer but not the other, or prohibits transfers of leases outright may not matter that much. The most critical issue is that leases can be transferred only in certain ways, so that it is easy for third parties to understand and price the value of the reversion (or in civil law, ownership subject to a lease). Of course, the fewer channels there are for transfers of leases, the easier it is for third parties to understand and evaluate them.

The standardization of property forms facilitates alienation (by reducing information costs), but other concerns such as prevention of waste or assuring the credit-worthiness of transferees work against free alienation. Whether to allow or prohibit alienation, as a default rule, is a context-dependent policy decision. Thus, whether the common law allows alienation by default subject to contractual modification, or the civil law prohibits alienation by default subject to contractual modification, does not fundamentally change the nature of lease as a contract or property. Neither does it change the function of lease as a mode of holding assets.[99]

IV. Continued Divergence

As we have seen, the law as it relates to leases has witnessed important examples of convergence toward the property conception of leases: lessees in both systems (generally) have rights against interference by third parties and sales of the lessor's reversion (generally) do not break the lease. Also, we see significant convergence with respect to whether the parties are restricted to using certain standardized forms or may engage in contractual modification of leases. Yet notwithstanding these forms of convergence, the very different starting points of the two systems have resulted in a number of divergences.

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97. *See id.*

98. *See* Omri Ben-Shahar & John Pottow, *On the Stickiness of Default Rules*, 33 Fla. St. U. L. Rev. 651 (2006); Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1 (2013).

99. *See* Thomas W. Merrill, *The Economics of Leasing*, 12 J. Legal Analysis 221 (2020).

A. Lease versus Rental

The common law distinguishes between leases (regarded as a form of property) and licenses (not regarded as a form of property) which the forthcoming Restatement (Fourth) of Property calls "rentals."[100] The key distinction is that a lessee is said to have "exclusive possession" of the leased property whereas a licensee holding a rental has only a contractual right of possession based on an agreement with the owner. The primary practical differences are that lessees have a right to alienate (at least as a default as discussed above) whereas licensees do not, and lessees (because they have a right to possession) have standing to sue for property torts like trespass, nuisance, and conversion, whereas licensees do not.

Licensees presumably have the right to use reasonable self-help[101] to exclude others (for instance, a hotel guest excluding intruders from the hotel room or someone renting a car and pursuing a thief), and arguably this right suffices to establish rights *in rem*. However, the case law on these points is very thin. If self-help is permitted but legal action is not, is this enough to say that the licensee has a right to exclude? If so, is this property? The answers to such questions are uncertain.[102] The common law nonetheless continues to distinguish between leases and rentals on the ground that lessees have a superior right to possess vis-à-vis the owner during the time of the arrangement whereas licensees do not.

A perhaps more difficult question is whether leases and what the Fourth Restatement calls rentals *should* be distinguished. None of the coded civil-law jurisdictions recognize the concept of rentals in real property.[103] Airbnb rentals, shared bikes, rental cars, hotel rooms, etc. — prime examples of rentals in common law systems — are simply regarded in civil-law jurisdictions as a standard lease contract or a mixture of lease and service contract.[104] Given that

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100. Restatement (Fourth) of Property § 4.3.1.2 (Tentative Ed.) (Am. L. Inst. 2024); 230. For England, see Alison Clarke & Paul Kohler, Property Law: Commentary and Material 626-30 (2005). For Canada, see Mary Jane Mossman & Philip Girard, Property Law Cases and Commentary 371-373 (3rd ed. 2014). For Australia, see Anthony Moore et al., Australian Real Property Law 675 (7th ed. 2019). Traditionally, the common law referred to persons holding a mere license to occupy real property as "lodgers."

101. For analysis of self-help, see Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J.L. Econ. & Pol'y 1 (2005); Henry E. Smith, *Self-Help and the Nature of Property*, 1 J. L. Econ. & Pol'y 69 (2005).

102. The question is similar to the one posed in Intel Corp v. Hamidi, 71 P.3d 296 (Cal. 2003), where the Supreme Court of California ruled that a corporation has a privilege to screen out unwanted emails from a private server but has no right to exclude by suing for trespass to chattels if there is no harm to the personal property. For the analysis of self-help with regards to the Hamidi case, see Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace*, 1 J.L. Econ. & Pol'y 147 (2005).

103. In Armenia art. 629; Belarus art. 597; Kazak. art. 595; Kyrg. arts. 565 & 571; Russ. art. 626; and Uzbekistan art. 558; rental of commercial personal properties, up to one year, is recognized.

104. For instance, in Taiwan, a 2016 district court decision (臺北地方法院105年度消字第16號民事判決) observes that the shared bikes agreements between the company and the users are bicycle leases. A 2023 district court decision (高雄地方法院112年度小上字第40號民事裁定) observed that the shared cars (iRent) agreements between the company and the users are also leases. A 2012 district court decision (臺灣臺北地方法院101年度訴字第421號民事判決) observed that day-to-day lodging arrangement is short-term leasing.

even a long-term lease is a contract to start with, neither a lessee nor a renter is regarded as having an *in rem* right to possess. That is, civil lease law, in itself, does not give a lessee the claim to exclude third parties. The aforementioned sale-not-break-lease provision, even if absolute, does not extend to a context such as a third party illicitly occupying the leased premises. (This again shows how lease is merely partially *in rem* in civil law.) Nonetheless, in addition to *rei vindicatio* (i.e., the civil-law secondary claim arising from infringement of ownership and certain limited property rights that give their holders the right to possess), most civil-law jurisdictions have a separate set of rules governing the recovery of possession.[105] In these countries, under certain conditions, a lessee is able to evict trespassers through its possessory claim. For example, some of these civil-law jurisdictions afford possessory claims only after a possessor has been in possession for more than one year.[106] Given the short-term nature of "rentals", such as car rentals, hotel guests, or Citi Bike users, these and other renters in civil-law jurisdictions would not have a possessory claim. Hence, if there is any jurisdiction that should squarely distinguish lease from rental and conceptualize a renter as a contractual party with no right to possess, it should be one of these civil-law jurisdictions. But they do not, at least not in law.

B. Implied Warranty of Habitability

The implied warranty of habitability (IWH) is the most important development in lease law in common law jurisdictions over the past few decades. The leading judicial decisions heralding the need for an implied warranty of habitability associated it with the proposal to conceptualize leases as contracts rather than as a form of property.[107] It is odd, therefore, that most of the decisions advocating an implied warranty of habitability have stipulated that the warranty is non-disclaimable. Contracts, including implied warranties of fitness for intended purposes, are typically default rules that are disclaimable.

The puzzle disappears when we find that the IWH, or something roughly similar, has been adopted in other common law jurisdictions (England, Canada, and Australia) by statute, and that these statutes are expressly limited to residential leases.[108] Indeed, we find that the majority of U.S. jurisdictions have adopted the IWH by statute, such as the Uniform Residential Landlord and Tenant Act.[109] And even in the U.S. states that have adopted the IWH by common-law rule, the leading decisions have grounded the warranty in an

105. *See* Chang, *supra* note 17.

106. *See id.*

107. *See, e.g.,* Javins, *supra* note 32; Green v. Superior Court, 517 P.2d 1168 (Cal. 1974); Lemle v. Breeden, 462 P.2d 470 (Haw. 1969).

108. For the UK, see The Landlord Tenant Act of 1985, c. 70 § 11, and The Homes (Fitness for Human Habitation) Act of 2018, c. 34. For Canada, see Residential Tenancies Act, S.A. 2004, c. 17.1, ss. 6, 11, 12. For Australia, see Residential Tenancies Act 2010 (NSW), s 63; Residential Tenancies Act 1997 (Vic), s 65; Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 185; Residential Tenancies Act 1995 (SA), s 68(1)(a); Residential Tenancies Act 1987 (WA), s 42(1)(b); Residential Tenancy Act 1997 (Tas), s 32; Residential Tenancies Act 1997 (ACT), Sch 1, cl 54; Residential Tenancies Act (NT), ss 47, 57.

109. *See* Uniform Residential Landlord and Tenant Act of 1972 (adopted by 21 jurisdictions).

implication of local building codes, which are statutory.[110] As a consumer protection measure grounded in the asymmetric information between landlords and residential lessees, it is entirely understandable that the warranty should be made non-disclaimable when adopted by statute.

If forced to classify the IWH as either property (*in rem*) or contract (*in personam*), it would make more sense to put the warranty on the contract side of the ledger. The warranty runs between the lessor and lessee and does not implicate the rights or duties of the lessee (or the lessor) vis-à-vis third parties. That the warranty is mandatory rather than a default rule means that it is different from most rules of contract, but not all. The statute of frauds and the requirement that a valid promise involves consideration from both parties would be examples of mandatory rules of contract law.

The mandatory nature of the IWH, although justified as a type of conception of the (residential) lease as a form of contract, is also puzzling when we consider the civil law, where leases have always been regarded as a form of contract. Most civil-law jurisdictions, at least in their civil codes, do not have a warranty of habitability, even as a default rule.[111] While seventeen of the studied civil-law jurisdictions in their civil codes do have provisions that approximate the warranty of habitability as it exists in the common law,[112] most civil-law jurisdictions have default rules that defer to lessors. For instance, 39 jurisdictions, including Louisiana,[113] require lessors to maintain intended use,[114] and 12 countries require lessors to transfer things that are fitted for lessees to use.[115] While these provisions, especially the latter, could be interpreted

110. *E.g.* Javins, *supra* note 32, at 1081.

111. *But see* Zamir, *supra* note 18, at 27 (arguing that "[t]he warranty of habitability provides the tenant with rights which in other (Civil Law) systems she had obtained long ago"). To the extent that the warranty of habitability means a default or mandatory rule of *minimum* living standard in residential leases, our understanding is that the civil-law provisions only put lessors to task what the parties have (implicitly) agreed on in the lease, not externally imposed living standard. Granted, case laws (which we have not been able to survey systematically) could interpret the civil code provisions as if parties have entered into an implicit minimum standard (otherwise, the lease would not "fit" the parties' purposes). That said, note that the civil code provisions cited below are mostly general provisions that apply to all types of leases, which might make it difficult for courts to provide such an interpretation only in the residential context.

112. Afg. art. 1349; Azer. art. 676.0.4; Bol. art. 717; China art. 731; Czech arts. 2243 & 2247II; Georg. art. 542; Guat. art. 1931; Hung. VI:332(3); Lith. art. 6.587; Mex. arts. 2448-A & 2448-B; Neth. Code art. VII:279; Pol. art. 682; Quebec art. 1910; Swed. 12:9; Taiwan art. 424; Ukr. art. 812; and Uzbekistan art. 605.

113. La. Civ. Code art. 2682: "The lessor is bound: (1) To deliver the thing to the lessee; (2) To maintain the thing in a condition suitable for the purpose of which it was leased; and (3) To protect the lessee's peaceful possession for the duration of the lease."

114. Alb. art. 802; Arg. arts.1200–1201; Bahr. art. 515; Belg. art. 1719; Braz. art. 566; Chile art. 1924; Colom. art. 2092; Croatia art. 521; Domin. Repub. art. 1719; Ecuador art. 1865; El Salvador art. 1712; Estonia art. 276; Fr. art. 1719; Ger. arts. 535–536; Greece art. 575; Haiti art. 1490; Hond. art.1690; Indo. art. 1550; Iran art. 477; It. art. 1575; Kuwait art. 572; Liech. art. 1096; LA. Civ. Code art. 2682; Moldova art. 878; Monaco art. 1559; Nicar. art. 2826 Pan. art. 1306; Para. art. 811; Peru art. 1680; Phil. art. 1654; Port. art.1031; Qat. art. 591; Spain art. 1554; Surin. art.1571; Switz. art. 256; Timor-Leste art. 961; Uruguay art. 1796; Venez. art. 1585; and Viet. art. 477.

115. Armenia art. 665; Austria art. 1096; Costa Rica art. 1128; Jordan art. 677; Lat. art. 2130; Oman art. 540; Romania art. 1.786; Seychelles arts. 1719–1720; Slovak. art. 687; Thai. art. 548; Tun. art. 742; and Turkm. arts. 556–557.

to impose a minimum criterion of habitability, this does not appear to be the case, at least not the original intent of lawmakers. Hence, viewing the lease as contract does not necessarily require a warranty of habitability.

That said, 32 civil-law jurisdictions expressly stipulate that if lessors do not deliver the leased property according to the agreed terms, lessees may terminate the lease.[116] Moreover, 53 civil-law jurisdictions expressly stipulate that when lessors have the duty to repair but fail to do so, lessees are entitled to terminate the lease, or withhold paying rent and/or demand reduced rent.[117] It is beyond our capacity to assess whether the general principle of contract law in the civil-law jurisdictions without such express stipulations would lead to the same legal conclusion that lessees may terminate the lease or withhold rent payment. Still, the important point is that, even if all civil-law leases make the covenant to pay rent depend on the covenant of enjoyment or habitability, such reciprocal covenants are still not the defining feature of contract vis-à-vis property. Rather, they are simply products of consumer-protection policies that govern internal relationships rather than external relations.

V. Implication for the Complex Systems Theory

The positive[118] prong of the complex systems theory of private law posits that whether a doctrine evolves over time depends on the relative costs and

116. Afg. art. 1348; Alg. art. 477; Arg. art. 1220; Armenia art. 623; Azer. art. 676.0.1; Bahr. art. 513; Belarus Civ. Code arts. 583 & 591, Belg. art. 1719, Chile art. 1924; Colom. art. 1982; Domin. Repub. art. 1719; Ecuador art. 1865; Egypt art. 565; El Salvador art. 1712; Estonia art. 277; Ethiopia art. 2904; Georg. art. 532; Ger. art. 535; Greece art. 575; Guat. art.1897; Haiti art.1490; Hond. art. 1690; Iran art. 477; Kazak. art. 556; Kuwait art. 570; Kyrg. art. 559; Libya art. 564; Liech. art. 1117; Lith. art. 6.484; LA. Civ. Code art. 2682; Malta art. 1539; Mex. art. 2412; Mold. art. 878; Monaco art. 1559; Nicar. art. 2935; Pan. art. 1306; Peru art. 1680; Phil. art. 1654; P.R. Laws Ann. tit. 31, § 1349; Qat. art. 591; Romania art. 1792; Russ. art. 611; Slovak. art. 679; Slovenia art. 598; Spain art. 1554; Swed. VIII:9 (not as clear as other cited jurisdictions); Switz. art. 258; Taiwan 423; Thai. art. 548; Tun. art. 759; Ukr. art. 784; UAE art. 763; Uzbekistan art. 552; and Viet. art. 476.

117. Afg. art. 1352; Alb. art. 809; Alg. art. 480; Arg. arts. 1201 & 1220; Armenia art. 618; Bahr. art. 516; Belarus art. 587; Belg. art. 1720 and art. 1741; China art. 713; Costa Rica art.1129; Domin. Repub. arts. 1720 & 1741; Egypt art. 568; Estonia art. 279; Ethiopian art. 2920; Guat. art.1902; Haiti arts.1490–1491 & 1512; Japan art. 611; Jordan art. 681; Kazak. art. 552; Kuwait art. 573; Kyrg. art. 554; Lao art. 436; Lat. Law art. 2172; Libya arts. 566–567; Liech. art. 1096; Lith. art. 6.492; LA. Civ. Code art. 2719; Malta arts.1543–1544 Mex. art. 2416; Mold. art. 898; Monaco arts.1559–1560 & 1581; Mongolia art. 294.2.1; Neth. arts. VII:206–207; Nicar. art. 2936; Oman art. 535; Pan. arts. 1306 & 1308; Para. art. 822; Peru arts. 1680 & 1697; Phil. arts. 1658–1659; P.R. Laws Ann. tit. 31, § 1349; Qat. art. 594; Russ. art. 616; Seychelles arts. 1720 & 1741; Spain art. 1556; Switz. arts. 259a–259b; Taiwan art. 430; Thai. art. 551; Timor-Leste arts. 975 & 1001; Turkm. art. 560; Ukr. art. 776; UAE art. 767; Uzbekistan art. 547; and Viet. art. 477.

118. The normative version of the complex systems theory argues that the legal system should have "organized complexity" or "optimal complexity" — that is, the two extremes of zero and total connectivity of doctrines should be avoided. *See* Henry E. Smith, *Property beyond Flatland*, 10 Brigham-Kanner Property Rights Journal 9 (2021); Henry E. Smith, *Complexity and the Cathedral: Making Law and Economics More Calabresian*, 48 Eur. J. L. & Econ. 43 (2019). One way to achieve optimal complexity is to create modules within the legal system. *See* Thomas W. Merrill, *Property as Modularity*, 125 Harv. L. Rev. 151 (2012); Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. Tort L. 1 (2011); Henry

benefits of change.[119] The costs primarily stem from within the legal system itself. More specifically, doctrines that are more deeply integrated into the broader legal structure — such as the law of possession[120] — are more resistant to change. In contrast, doctrines that can be addressed in isolation, with minimal ripple effects—like the structure of common-interest communities—are more amenable to divergence.[121] The benefits, by contrast, are largely external to the legal system and derive from achieving substantively superior legal outcomes. Intuitively, greater expected benefits from reform increase the plausibility of change.

This theory may implicitly assume the presence of benevolent and informed lawmakers, although such an assumption is not strictly necessary. From an evolutionary standpoint, if the balance of costs and benefits is sufficiently compelling, even flawed incentives and strategic behavior can be overcome over time.

When applied to the convergence and divergence of private law, the complex systems theory generates several predictions. First, isolated doctrines are more likely to change, and if a clearly superior legal solution exists, convergence across jurisdictions can be expected. Second, integrated doctrines resist change; if jurisdictions begin with different doctrinal foundations and the benefits of reform are small, divergence will persist. These two prototypes represent the most straightforward cases for prediction. As discussed below, the theory can explain both convergence and divergence in doctrinal development of lease law.[122]

A striking case of convergence is the movement toward treating leases under a property model. A plausible explanation lies in the reliance interests of lessee's in being able to use the leased property without unanticipated interference. The dual recognition that lessees' right to exclude third-party intrusions and the principle that a lessor cannot terminate a lease by transferring the reversion are essential to protecting this reliance interest. These protections offer substantial substantive benefits. Thus, even if civil law originally conceptualized leases as entailing no exclusion rights, such a regime cannot endure. Nonetheless, systemic costs are high. Civil law systems have long classified leases as contracts, and the property–contract distinction is often viewed as foundational to private law. Allowing contractual rights to bind third parties—even those acting in good faith—appears to many civil law theorists as doctrinally incoherent. This theoretical discomfort helps explain why not all

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E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 Mich. L. Rev. 1175 (2006).

119. There are of course other reasons, such as colonization and decolonization. *See, e.g.*, Daniel M. Klerman et al., *Legal Origin or Colonial History?*, 3 J. Legal Analysis 379 (2011); Daniel Berkowitz et al., *The Transplant Effect*, 51 Am. J. Comp. L. 163 (2003); Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 European Economic Review 165 (2003).

120. *See* Chang, *The Economy of Concept and Possession, supra* note 49.

121. *See* Henry E. Smith, *The Persistence of System in Property Law*, 163 U. Pa. L. Rev. 2055, 2067–74 (2015).

122. As for an application of the complex systems theory to trust law in the U.S. and East Asia, see Yun-chien Chang, *A Complex Systems Theory of Trust*, Geo. Mason L. Rev. (2026 forthcoming).

civil law jurisdictions treat the rule "a sale does not break a lease" as given or unconditional. Moreover, despite the procedural simplicity of granting lessees direct claims against intruding third parties and the inadequacy of possession recovery doctrines, no civil law system fully empowers lessees to assert such claims solely by virtue of their status as lessees. These jurisdictions have sought to capture substantive benefits while minimizing systemic disruptions.

The same dynamic applies to subleasing and assignment. Both practices carry policy tradeoffs. Allowing them by default introduces risks for lessors—who must deal with parties they did not choose—but increases flexibility and value for lessees, who may then be willing to pay higher rents or enter into longer leases. In civil law, assignment prohibitions are more prevalent than restrictions on subleases. This likely reflects differing system costs. Subleasing creates a new contractual relationship between the prime lessee and a sublessee and poses no conceptual challenge. Assignment, by contrast, conflicts with the civil law view of contractual status (or, alternatively, the entire bundle of Hohfeldian "ablements"[123] held by a contracting party) as personal and non-alienable — at least unilaterally. Consequently, assignment is seen as a more profound conceptual departure from the system's architecture.

The persistence of divergence in certain areas, such as lease versus rental and the implied warranty of habitability, can be explained by lower expected benefits from reform. For example, although rental agencies retain the right to repossess, their behavior is typically constrained by reputational concerns, making legal conflicts rare. Accordingly, the benefits of granting rentees a legal right to possess are marginal. Civil law jurisdictions see no compelling reason to shift to the common law's binary distinction between lease and rental, so initial differences endure.

As for the warranty of habitability, civil law jurisdictions face relatively low systemic costs in imposing mandatory or default habitability standards. These changes do not significantly affect other contract types. Accordingly, some jurisdictions have begun to require minimum habitability, and others have interpretive tools available under existing codes. Hence, major reforms remain limited, perhaps due to a lack of compelling evidence that such warranties materially improve lessee welfare.[124]

In the U.S., it took decades for the independent covenant model to yield to the dependent covenant model, with IWH becoming a central feature. This slow transition reflects both policy concerns and the entrenched notion that property law is characterized by independent covenants. Yet, as discussed in Part I, a legal relationship becomes a form of property when claim–duty relationships with third parties are automatically created. Whether lease covenants are mutually dependent within the internal lease relationship between lessors and lessees is irrelevant to its classification as property or contract. This conceptual confusion ("contractized lease") did not ultimately prevent American

123. "Ablements" may be a better technical term to refer to the Hohfeldian claim-right, privilege, power, and immunity than "entitlements" which have been used in many other different contexts with ill-defined nature. *See also* Schlag, *supra* note 12, at 188; Frydrych, *supra* note 12.

124. *See* Nicole Summers, *The Limits of Good Law*, 87 U. Chi. L. Rev. 145 (2020).

jurisdictions from embracing the dependent covenant model, perhaps because the underlying structure of lease as a property form in fact remains intact, imposing negligible systemic cost.

Finally, the persistent divergence in lease doctrines may also reflect the traditional link between leases and land. Because land is immovable, it tends to be governed by more varied legal rules than those for movable property. As the leasing of personal property—such as aircraft, automobiles, and computer systems—becomes more common, we may see greater convergence in lease law across other dimensions as well.

Conclusion

Are leases a form of property, a species of contract, or some kind of hybrid institution partaking of the features of both? In order to answer this question, it is necessary to begin with a clear conceptual distinction between property and contract. We start with the Hohfeldian distinction between property as the right to exclude all others in the relevant legal community from a certain thing, and a correlative duty on the part of all others to desist from interference with the thing. Property is *in rem*. Contract, in contrast, is a right in one party that corresponds to a duty in another party, and hence inheres only as an obligation between the parties to the contract. Contract is *in personam*. Based on this distinction, we see that common law systems begin with the assumption that the lease is a form of property, whereas civil law systems, following Roman law, regard leases as a type of contract.

When we examine lease law more closely, however, we find significant convergence along certain dimensions. The common law gives lessees the right to exclude others because lessees have a form of property. Although the civil law could logically give lessees recourse for interference by the lessor, nearly all civil law systems allow lessees to bring actions against third parties — not because they have property in the lease but because they are in possession. Similarly, although under the common law a sale of the lessor's interest in the lease does not break a lease so long as the lease remains in effect, the civil law starts with the assumption that leases are personal contractual obligations that are not binding on successors to the lessor. Nevertheless, most but not all civil law jurisdictions have modified their codes to provide that a sale of the lessor's property interest (reversion in the eyes of the common law; ownership in the eyes of the civil law) does not break a lease. Requirements of recording or registering leases appear to vary without regard to the underlying theory of the nature of the lease.

In other respects, we see little evidence of convergence toward the property model or perhaps a slight movement in the direction of the contractual model of the civil law. The *numerus clausus* plays only a weak role in the common law of leases, except with respect to the permissible forms of transfer. As one would expect, this principle is generally weak in civil lease law. Because of its insistence that leases are property rights, the common law jurisdictions have been forced to carve out a separate category for short-term licenses called rentals. The civil law encounters no such problem, since leases and rentals

(to the extent this concept exists) are both conceived as contracts. The implied warranty of habitability, heralded as a contractual innovation in the common law, is actually more contract-like in civil law jurisdictions because it is more likely to be amenable to negotiated revision and the default rules in most civil law jurisdictions are not expressed in terms of an implied warranty of habitability. These findings are consistent with the predictions of the complex systems theory.