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The Tenants' Rights Movement

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THE TENANTS' RIGHTS MOVEMENT*

By
TOVA INDRITZ**

Tenants constitute 70 million Americans and a majority of urban residents. Because of traditional concepts of land and property, reflected in the legal structure, and because of relatively tight conditions in the housing market, tenants have had few rights and protections and often little choice of dwelling units. The urban poor, and particularly the black poor, have long paid high prices for poorly maintained housing and increasingly middle and upper income tenants find themselves in a similar position.

It is in this context and in the era of civil rights, student rights, welfare rights, and protests against capitalism that the tenants' rights movement has gained support. Only in 1969 has it emerged as a multi-class national movement, but its impetus is strong and growing.

Pressure, chiefly by the poor and their advocates, on legislators, administrators, and courts has begun a slow but significant and irreversible movement toward implementation of greater tenant rights. Each small victory increases the momentum toward pushing down the next barrier.

Though still disjointed, the tenants' rights movement deserves careful attention. This article will consider the scope, grievances, organizing problems and tactics, the legal aspects of landlord-tenant relations including current law and ameliorative efforts, and the future directions and implications of the movement. Its purpose is to be useful to those persons and groups actively involved in the movement to win justice for American tenants.

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PART I: SCOPE, CONCERNS, AND TACTICS

A. The Housing Market

1. The Supply

About 7.8 million families, one in every eight, cannot now afford to pay the market price for standard housing that would cost no more than twenty percent of their total income. A family of five members or more with income below the poverty level has only one chance in five of finding adequate housing at a rent it can afford, according to the National Commission on Urban Problems.¹ At the end of the 1960’s there were nearly eleven million units of sub-standard or overcrowded housing in the United States out of a total housing stock of almost 70 million units.² Fully twenty-six percent of the housing in the United States is dilapidated, deteriorating, or lacking sanitary facilities.³ Estimates of households inadequately housed vary from 6.7 million to 12 million.⁴ Although they are only ten percent of all metropolitan area households, Negro families occupy a third of all substandard housing in metropolitan areas.⁵

Urban renewal has resulted in the construction of 20,000 units of public housing, but the demolition of 400,000 units of low income housing.⁶ Thus the availability of housing to the poor shrinks and public funds allotted for the construction of low income housing are consistently less than the goals set.⁷

The nation’s housing shortage grew to nearly 2.6 million units during 1969. Each year new family formations run at 1.3 million while 600,000 to 700,000 units leave the housing market.⁸ Yet in 1969 there were only 1.5 million new housing starts, mostly upper income units. The nation’s housing barely meets current demand and wholly fails to ameliorate the backlog demand for decent housing to

². Housing Scarcest for Big Poor Family, supra note 1.
³. Alvin Schorr, Slums and Social Insecurity, at 87.
⁵. Housing Scarcest for Big Poor Family, supra note 1.
⁶. Id.
⁷. For example, the Housing Act of 1949 authorized the construction of 800,000 units of public housing by 1955, but from 1949 to 1968 only 500,000 such units had been built. Id.
replace deteriorated units. Secretary of Housing and Urban Development George Romney has called the housing shortage the most severe since World War II.\(^9\)

While Americans still flaunt the value of home ownership, urban dwellers are increasingly renters. Forty percent of all housing in the U.S. is occupied by tenants; in New York City over 78 percent of the residents are renters.\(^10\) For reasons of poverty as well as discrimination by real estate agents and financial institutions\(^11\) blacks are renters in especially high proportions. In 1960, 67 percent of non-white families in urban areas were renters as compared to 40 percent of urban white families.\(^12\)

Individual cities have long been faced with a shortage of land and outdated housing. In Pittsburgh, for example, 22 percent of the dwellings in 1960, 44,500 units, were dilapidated or deteriorating; of the rental units, 29 percent, 28,000 units, were deficient. Of the 196,000 housing units in Pittsburgh, fully 122,500 were built before 1920. Nearly half of the non-white families were in substandard housing.\(^13\) Similar statistics showing a substantial proportion of poor housing can be cited for most older American cities that have had periods of rapid growth. At the 1960 census, the District of Columbia had 3,870 dilapidated units, 23,143 deteriorating units, and an additional 16,909 units lacked some or all plumbing facilities, these categories comprising 17 percent of all the housing in Washington.\(^14\)

The fact of massive deterioration must be comprehended on a human scale. Poor housing means a lack of such basic facilities as heat, gas, running water, light, or electricity. It means peeling plaster, broken or missing stairs and railings, exposed wiring or pipes, holes in the walls or floors large enough for an infant to fall through. It means the stench and filth of uncollected garbage and trash, flooding from broken pipes. It means rats and cockroaches, and other rodents

\(^9\) Id.
\(^11\) See Leonard Downie, Jr. and Jim Hoagland, Mortgaging the Ghetto, ten article series, Washington Post, Jan. 5-14, 1969, for a cogent treatment of financial and real estate institutions' exploitation of blacks.
\(^13\) Norman Krumholz, Rent Withholding as an Aid to Housing Code Enforcement, 25 J. Housing 242 (1968).
and vermin. It means inconvenience, poor health, and accidents, but most of all housing unfit for human habitation means the omnipresent and overwhelming reminder of one's inability to take action about those indecent living conditions and thus an immeasurable psychological depression.

Housing and building codes have been passed across the country to insure good quality housing and they provide for civil and criminal penalties for non-compliance. But inspection staffs are paltry, and very few urban dwellings are actually inspected in compliance with the law. Since 1968 Washington, D.C. has refused to issue permits to operate apartment buildings until all code violations have been corrected; the practical result of this policy has been hundreds of landlords operating without licenses, receiving only repeated warnings from the city.

Violations also exist in city-owned properties, both in formerly private housing purchased for urban renewal and in public housing.

Why is it that owners can continue to rent tumble-down housing and that tenants remain in cold, rat-infested, and dangerous "living" quarters? The fact is that we are now in the midst of an acute housing shortage at all income levels which makes every tenant a buyer in a seller's market. The shortage hits especially hard at poor people, those displaced by urban renewal demolition, and members of racial minorities (often all three are the same). Despite government programs, new construction of low income units is almost nonexistent, while older units leave the market at the rate of 600,000 to 700,000 per year.

Vacancy rates are low in most urban areas. In New York City, the vacancy rate was 1.23 percent in 1968; in Pittsburgh it was 2.2 percent in 1965 and by 1969 had declined to 1.1 percent. Every major city has long waiting lists for public housing.

15. See discussion of Code enforcement in Part II, infra.
16. One judge has recently held that by failing to prosecute an owner during a three-year period in which he operated apartments without a license, the city had in effect given the landlord permission to operate illegally and thus participated in the offense. Charges against the landlord were dismissed. Joseph D. Whitaker, Charge Dismissed Against Landlord, Washington Post, Jun. 3, 1970, § B, at 1.
17. Many families displaced by urban renewal have been relocated into substandard housing. See Elinor Richey, Tenant Oppression: Our Smoldering Housing Scandal, 24 Antioch Rev. 337, at 346-347 (Fall, 1964).
18. Flaum and Salzman, supra note 1, at 3.
19. Supra note 8.
Drastic housing shortages for low income and average income renters in most cities are not adequately revealed by "average" vacancy rates for the cities, for there is continual public and private destruction of low income housing to construct luxury apartments. There is substantial reason to believe that a great portion of those center city vacancies that do exist is in the new luxury housing unavailable to the poor. The consensus of writers is that from 1950 to the present the low income population has "actually lost ground with respect to most of the housing that had been within its reach in 1950." 

Thus it is that tenants continue to pay high rent and endure wet basements, leaky plumbing, exposed wires, unvented gas fixtures, doors that won't lock, sagging stairs and porches, days without heat or hot water, unlit corridors, rats and rat bites, illegally converted apartments without proper light and air, weeks without garbage collection, and combination kitchen-toilets. And all the while the landlord can say, "If you don't like it, move out," knowing he can rent the apartment to someone else.

2. Grievances

In a recent study of tenant organizing, the Urban Research Corporation tabulated the grievances expressed in 89 cases of tenant activity between January and August of 1969.

The major complaint expressed (64 percent) was poor maintenance, including substandard housing, code violation, unsafe and unsanitary conditions and, in the case of middle to upper income groups and new public housing, poor housekeeping such as unclean stairs, hallways, and lobbies, and unkept grounds. The second complaint was of high rent and unreasonable rent increases (34 percent). Lack of tenant control (18 percent) included the desire for control over building policies, particularly in public housing, or recognition of tenant organizations. Another area of concern was inadequate security (11 percent) including broken or absent locks and inadequate lighting. For a breakdown of grievances by housing type, see Chart I.

Of the rent complaints, those concerning unreasonable increases outnumbered complaints that rents were too high by three to one.

23. See Krumholz, supra note 13.

24. William Grigsby, Housing Markets and Public Policy at 155 (1963). However, it has been suggested that in some central city neighborhoods characterized by an outflow of whites to the suburbs and lack of further in-migration, the vacancy rates have risen. See Gordon J. Davis and Michael W. Schwartz, Tenant Unions: An Experiment in Private Law-Making in Housing for the Poor: Rights and Remedies (N. Dorsen and S. Zimmerman, eds. 1967), at 106.

25. Flaum and Salzman, supra note 1, at 12.
Chart I:
Major Grievances of Tenant Activity

Based on 89 cases of tenant activity between January and August, 1969

Reproduced from Flaum and Salzman, supra note 1, at 13.
The grievances voiced are a product not only of the living conditions but also of the tenants’ perceptions. While low income tenants are most concerned about maintenance and upper income tenants about rent, they may focus on solving these particular problems or upon creating a mechanism for change, such as a recognized tenant organization.

Additional specific complaints of tenants include security deposits of up to two or three months rent, key fees, malfunctioning stoves and refrigerators, reduced services, broken doorbells and mailboxes, buckling wallpaper, shredded carpets, broken plumbing. Important problems are the lack of any lease (tenancy at will) and the onerous provisions in existing leases.

It should be noted that these are the initial and basic grievances; often when tenants begin to organize and/or protest and landlords take further action, the grievances may include retaliatory rent increases or eviction attempts and other such acts, discussed below.

3. Lack of bargaining power: Leases

Because of the tight housing market at all income levels, discussed above, non-homeowners seeking housing are at a disadvantage in bargaining over prices, duration, and services. Their real lack of bargaining power is reinforced by the legal constraints forced upon them by an outmoded set of principles which assume a free market negotiation.

Tenants are forced to accept premises less than habitable “as is” and the housing shortage curtails their ability to move when the premises become uninhabitable due to neglect. If tenants attempt to better their conditions by withholding rent, by taking affirmative action in the courts, or simply by seeking compliance with the housing code—and thus become militant or overly demanding in the landlord’s judgment—they will often face retaliatory eviction or rent increases, be forced to vacate, and thus incur the expense and social dislocation of removing their families to a questionably improved or equally substandard apartment.

In slum areas, many tenants have no leases at all, but occupy their homes subject to a “30 day notice” requirement and can generally be evicted at any time if they default on payments. They have only a tenancy from month to month, an oral hiring by the month requiring only the 30 day notice to quit. These tenants are wholly at the mercy of the common law which devolves upon them the duty of repair and provides no realistic remedies for tenants who are sum-
Landlords are under no duty to mitigate damages when tenants abandon the premises or to disclose latent defects such as rats or vermin. There is no implied warranty that quarters are safe or suitable, as discussed in Part II, below.

Tenants who do have leases are not necessarily any better off and may well find they have given up what few rights they did possess. They almost never have an opportunity to negotiate terms. The poor tenant particularly, often unschooled and with limited ability to read simple language, no less legal terminology set in fine print, either does not read the fine print or does not understand it. The usual practice is for the landlord to submit to the prospective tenant a harsh standard form printed lease. For example, in Allegheny County, Pennsylvania, of which Pittsburgh is a part, over 90 percent of the realtors use the same lease, drafted by the county realtors' association. In fact, the typical lease across the country, weighted heavily in favor of landlords, is a copyrighted form lease developed by real estate interests. It is a catalogue of do's and don'ts for tenants and a series of exculpatory clauses for landlords, and tenants are often forced to accept truly onerous terms. Common clauses—prohibit use of the premises for unlawful purposes, prohibit noise, disturbance, or annoyance detrimental to the premises or other inhabitants, and prohibit any acts which constitute annoyance, damage, or disturbance to the landlord, of which the landlord shall be the sole judge.

—waive the statutory 30 day notice to quit
—provide for the non-payment of rent to operate as notice to quit, so tenants can be evicted without any notice at all
—exculpate the landlord for damages to tenant for failure to repair or any other act of nonfeasance and also exculpate the landlord from damages from fire, water, rain, snow, steam, sewage, gas, or odors from any source whatsoever, from interruptions in any service, from any cause whatsoever, and from theft or burglary in or about the premises, by whomsoever committed and other damages
—provide for the acceleration of rent for the entire year upon the tenant's failure to pay any monthly installment and provide for

28. Interview with Sholom Comay, magistrate of the City of Pittsburgh Housing Court, in Pittsburgh, Mar. 27, 1970.
30. Schoshinski, supra note 27, at 552-553.
31. From a lease adopted by the Building Owners and Managers Ass'n of Pittsburgh.
termination of the tenancy at the landlord’s option in the event of default
-prohibit the tenant from subletting or assigning the lease
—provide that the tenant undertakes to pay attorney’s fees and other costs and expenses of the landlord incurred by reason of the tenant’s default
—impose the duty to repair and to keep the premises free from rodents or vermin upon the tenant.

Courts have generally upheld all these provisions, although now there is increasing pressure to regard some of the more onerous as contracts of adhesion, as discussed in Part II.

Some written leases are not yearly but provide for a tenancy from month to month whereby the tenant has only periodic rights for the current month plus expectation of continuation for one month beyond. Such a lease may be terminated by a 30-day notice to quit and expires on the day of the month on which it commenced.

Eighteen states permit the use of a confession of judgment clause whereby the tenant authorizes the landlord’s lawyer to appear in court and obtain judgment against the tenant without having to inform the tenant of these proceedings. Where the tenant signs a lease with such a clause, he has in effect agreed to accept responsibility for any charge the landlord may care to bring against him!

In some leases the tenant waives any rights which state or local tenants’ rights laws may have bestowed upon him. Very few leases afford any protection to a tenant’s security deposit and these monies are often lost to the tenant.

In an analysis of the standard form leases used in Louisville, Minneapolis, Atlanta, Miami, St. Louis, Dallas, Houston, Newark, Chicago, and Washington, D.C., the Urban Research Corporation

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32. See, e.g., H. L. Rust Co. v. Drury, 62 D.C. App. 329, 68 F.2d 167 (1933) upholding a provision whereby parties to a lease waived 30 day notice.

33. See Schoshinski, supra note 27, at 553.

34. Flaum and Salzman, supra note 1, at 35, 37.

35. For example, "Lessee also expressly waives to Lessor the benefits of Acts of Assembly approved Mar. 31, 1905 requiring thirty (30) days notice to vacate said premises, and also the 21st day of Mar., A.D. 1772 and the 14th day of Dec., A.D. 1863, requiring three (3) months notice to vacate the premises and Act No. 20, approved Apr. 6, 1951, entitled the 'Landlord and Tenant Act of 1951' requiring three (3) months notice to vacate the premises at the end of the term. The Lessee also waives to the Lessor the benefits of all laws now or hereafter in this state or elsewhere exempting property from liability for rent, or for debt, expressly waiving the Act of Assembly entitled 'An Act for the Relief of the Poor' approved the 10th day of Apr., A.D. 1828 and its several supplements; also Act No. 20 approved Apr. 6, 1951 entitled 'The Landlord and Tenant Act of 1951.' (Emphasis added.) Standard 'Naly Form No. 40 Lease' used in Pittsburgh, Pa., available from P. O. Naly Co., Pittsburgh. See also lease distributed by the Austin Apartment Ass’n of Austin, Tex., in Samuel A. Simon, Tenant Interest Representation. Proposal for a National Tenants’ Association, 47 Texas L. Rev. 1160 at 1177 (Jun. 1969).
found that none provided adequate protection for security deposits. All but one allow the landlord to enter the tenants' apartments "at all reasonable times," a vagueness which leaves room for tenant inconvenience and harassment. Five of these ten allow for a waiver of notice to terminate. Since form leases often detail prohibitions of the lease such as carrying groceries up the front stairs, or wearing a sun suit on the front lawn, a capricious or vindictive landlord may use the waiver of notice clause to summarily break the lease.36

Waivers of tort liability, excusing the landlord from liability for damages caused by his negligence, are in eight of the cities' leases. Although they are unenforceable and landlords will in most cases be held liable for their negligence (see discussion in Part II), their insertion is significant enough to convince the majority of tenants, uninformed on their rights, of their loss of any claims for damages.

No wonder it is then, that when tenants become organized one of their first targets is (or should be) the commencement of negotiations on a new lease treating tenants and landlords equitably.

Current inequities in bargaining power spread beyond the lease, for tenant remedies are far from adequate. For example, even where the landlord has the duty to repair but fails to do so, the tenant must continue to pay rent under theories of independent covenants.37 And it is unlikely that damages will be sufficiently great to warrant the expenses of a lawsuit. In most jurisdictions the legal defenses to an eviction are limited to lack of notice of the proceeding,38 failure to demand rent, or overcharge. And the tenant is still required to pay the court costs.

Where the tenant is protected by the law, landlords have been known to resort to self-help measures; sometimes of the "goon squad" variety.39

And being in the right is not decisive for those without access to legal help. In the District of Columbia alone, there are 92,000

36. Flaum and Salzman, supra note 1, at 36.
37. See Part II, infra.
38. Failure to deliver notice to tenants by personal service and posting on the door as required is a severe problem. A District of Columbia Neighborhood Legal Services Program survey showed that in 1967 only 56 of 117,651 complaints for possession were personally served. See note 7, Bell v. Tsintolas Realty Co., 430 F.2d 474 at 477-478 (D.C. Cir. 1970). See also Abuse of Process: Sewer Service, 3 Colum. J. Law and Social Problems 17 (June, 1967).
39. A front page New York Times story related attempts of owners, often new owners, to persuade tenants of rent controlled apartments to vacate, either so the rent could be increased for a new tenant or so the building could be razed to make way for new luxury apartment or office building construction. "Agents" would act overtly to the extent of physical beatings, gun threats, and child molesting or indirectly, from jamming door locks and removing handles to charging for expensive and unwanted improvements, drilling holes in the roof to cause flooding, and placing a dead dog to rot in an empty room. Nora Sayre, New York's Rachmans, 74 New Statesman 136 (Aug. 1967).
evictions a year. Legal aid services to the poor can handle only a small fraction of the demand and many tenants lose what rights they do have by default.

Because housing is a relatively inelastic commodity now in short supply, its price in urban areas is highly inflated. Tenants and prospective tenants are caught in the squeeze of a very tight housing market, have legitimate grievances, and have very little economic or legal bargaining power with which to extricate themselves. Therefore, tenants are increasingly turning to organization and political tactics for relief.

B. Tenant Organizing

The state of tenants' consciousness of injustices and their ability to remedy them covers a very broad spectrum at this time. Many writers on the subject believe that the typical urban tenant rarely appreciates or considers the unsuitability of the premises he occupies unless a crisis in habitability occurs or he is contacted by an organizer. Those who hold this view point out that the poor who live in deteriorating or substandard housing are generally unaware of their rights and the means of implementing them; rarely can they organize without help from anti-poverty agencies, private organizations, or professionals.

However, the general political consciousness of the urban poor has risen significantly during the 1960's civil rights movement and their experience at organizing has been greatly enhanced by the community action organizations of the federal anti-poverty programs. Further, not all urban tenants are poor and an important feature of the recent tenant activity is the beginning of organizing and activity among the middle and upper income tenants who have greater resources with which to pursue their ends. The 1960's profound escalation of political consciousness among college students has resulted in some of the best organized of the rent strikes among the student population, especially in concentrated college-oriented communities.

1. Action taken

Organized tenant protests and strikes on a broad scale are in gen-

41. "In Boston in 1963 there were 5,275 summary rent proceedings; in the poorer sections only 14 percent went to trial. Legal Aid handled only 759 rent actions. In most of the others the tenant had no counsel and judgment for the landlord was by default." Id.
42. The demand for an inelastic commodity remains relatively stable regardless of price.
43. Garrity, supra note 26, at 699.
44. Tenant Rent Strikes, 3 Colum. J. Law and Social Problems 1, at 7-8 (Jun., 1967).
eral a recent phenomenon, but rent strikes were organized during housing shortages as early as 1919.4 5

Recent actions and tactics in the United States began with the Harlem rent strikes of 1963 and 1964 and have continued at an accelerating pace since then. The Urban Research Corporation indicates that in the first eight months of 1969 tenant organizations have taken collective action on 67 occasions in 29 cities.4 6 The major classes of tenants, which draw from one another for support and tactics, are the low-income private market tenants, the middle and upper income private market tenants of which college students are a special case, and the public housing tenants.

a. Private low income housing

The thrust of activity by private low income tenants began in New York City in December, 1963, under the aegis of the Community Council on Housing, a Harlem area civic group, when activist Jesse Gray called for the withholding of rent. At first only 16 tenements were involved, but the effort grew in two months to include many more—estimates range from 150 to 500 buildings.4 7 At the beginning of the strike, rights of landlords for court suit for payment and/or eviction during such strikes had not been tested. The first legal and psychological break for the tenants was the December 30, 1963, civil court ruling upholding the rights of tenants to refuse rent payments where hazardous violations were so serious as to constitute constructive eviction; the judge announced that although he did not condone the strike, the conditions in the particular buildings in the

45. New York and Chicago experienced rent strikes after World War I. See New York Times articles, May 7, 1919, at 9, May 2, 1920, at 16, Nov. 28, 1920, at 3, and Dec. 3, 1920, at 2. In Mexico there was a rent strike during this same period from the spring of 1922 until the spring of 1925; it involved bloodshed as the tenants took over the town of Vera Cruz, defying the military's attempt to evict them. New York Times, May 14, 1922, § II, at 1, July 8, 1922, at 6, July 8, 1923, § VII, at 3, referred to in John C. Fossum, Rent Withholding and the Improvement of Substandard Housing, 53 Cal. L. Rev. 304, at 322-323 (Mar., 1965). An agreement was reached whereby the tenants were given twenty years in which to pay their back rents. New York Times, Mar. 16, 1925, at 21. A somewhat more successful strike from the tenants' viewpoint was conducted in England during the spring and summer of 1939. After forty-eight hours of negotiations between landlords and tenants, a 21-week old rent strike in Stepney reached a settlement according to which 320 families were granted rent reductions totalling £1000 per year, and the landlords agreed to spend £2500 on repairs the first year and £1500 per year thereafter. The Times (London), Jun. 28, 1939, at 16, and Jun. 30, 1939, at 16, as referred to in Fossum, supra this note.

46. Flaum and Salzman, supra note 1, at 1.

47. The three most extensive printed discussions of the Harlem strike vary widely in their estimate of its strength. Michael Lipsky, Rent Strikes: Poor Man's Weapon, Transaction (Feb., 1969) at 10, writes that the strikes affected some 150 buildings. Withholding Rent: New Weapon Added to Arsenal for War on Slumlords, J. Housing 70 (Mar. 1964) cites 225 buildings. Frances Fox Piven and Richard A. Cloward, Rent Strike: Disrupting the Slum System, The New Republic (Dec. 2, 1967) allege 500 buildings were involved.
litigation were "shocking and should be remedied as soon as possible." He directed the tenants to pay their rents to the court and he set up a process whereby the rents would be used for repair of the buildings and correction of the code violations. The decision, hailed as a victory, helped the strike to grow.

The city responded by initiating an anti-rat campaign, proposing ways to legalize rent strikes, starting a program to permit the city to make repairs, and contracting for an expensive university study of housing code enforcement procedures. In fact, the major innovative New York legislation allowing for receiverships, building certification for rent withholding, and rent abatement after six months, to be discussed in greater detail in Part II infra, all grew out of city response to this strike effort.

Some of the buildings struck were repaired, but in general when winter of 1964 came, the strike faded away for organizational reasons and lack of real political power.

In January, 1964, there was a small rent strike in Washington, D.C. organized by the Student Non-Violent Coordinating Committee. The Congress of Racial Equality (CORE) organized strikes in Brooklyn and one in Cleveland in December, 1963, which was successful in using a withholding escrow fund to convince one landlord to make repairs and was followed by several other one-building strikes. A threatened strike in Providence in late 1963 never materialized. Other strikes were begun in Detroit and Chicago. Most of these involved a single building or a larger complex, and occasionally a whole neighborhood was involved, as in Chicago's East Garfield Park. Some citywide federations of tenants' groups formed, among them the Metropolitan Council on Housing in New York and United Tenants for Collective Action in Detroit. The modern tenants' movement had had a halting start, but it had begun, and had attracted the nation's attention.

Tenant activity continued to be sporadic and scattered for several years. Citizens Against Slum Housing (CASH), a group of mostly poor citizens from the North Side of Pittsburgh began in 1965 to upgrade their neighborhood and turned their attention to housing. In 1966 they petitioned the Pittsburgh City Council to convene hearings on slum conditions and presented a series of reforms. Results of

48. Withholding Rent: New Weapon Added to Arsenal for War on Slumlords, id., at 71.
49. See the cogent analysis of the Harlem strike by Lipsky, supra note 47.
51. See Withholding Rent: New Weapon Added to Arsenal for War on Slumlords, supra note 47, at 72.
52. Flaum and Salzman, supra note 1, at 2.
their instigation were the establishment of a combined City of Pittsburgh and Allegheny County code enforcement effort,\(^5\) the strengthening of Pennsylvania's rent withholding law, the establishment of a single housing court to deal with violations of housing, health, and building codes,\(^4\) and the organization of a city relocation agency.

The major upsurge in tenant activity, through political activism of tenant groups and through legal advocacy (mostly by OEO neighborhood legal services attorneys), began in Chicago in 1966 and in other parts of the country in 1968 and continues to expand, with new developments almost daily.

The National Tenants Organization, a coalition of local tenants' organizations, grew out of a conference sponsored by the Chicago Tenants Union, the Chicago Urban League, and American Friends Service Committee. Formed in January, 1969, it aims to unite tenants in a movement to gain their just rights. Its small central staff, headquartered in Washington, publishes a monthly newsletter, lobbies with the Department of Housing and Urban Development and with Congress on behalf of tenants, provides advice on organizing, and serves as a clearinghouse for information so that tenant groups can benefit from one another's experiences. It is broadly representative of its four regions—east, mid-west, south, and west—and includes blacks, whites, Indians, and Spanish-speaking Americans. Any tenant group can join if it meets these four qualifications: (1) is composed primarily of tenants, (2) has at least ten members, (3) is organizing tenants in their roles as tenants, and (4) elects its officers democratically, a majority of whom are themselves tenants. The membership of the group must vote to join and the fee is ten dollars per year for each group. Well over 150 local groups belong, most of which did not exist in 1968.\(^5\)\(^6\)

In the first eight months of 1969 alone, tenant organizations acted on 67 occasions\(^5\)\(^6\) so it is not possible to describe each action here; a sampling of groups and their activities will suffice.

The Minneapolis Tenants Union has distributed over 3,000 copies of a tenants' rights handbook, "If You Pay Rent, You've Got Rights Too," which explains in clear and simple language the city Housing Maintenance Code and how to get it enforced and tenants' legal rights in such areas as eviction and invasion of privacy. As a result,

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\(^5\) See Krumholz, Rent Withholding as an Aid to Housing Code Enforcement, supra note 13.
\(^4\) See Sholom D. Comay, The City of Pittsburgh Housing Court, 30 U. Pitt. L. Rev. 459-480 (Spring, 1969), and discussion in Part II, infra.
\(^5\) National Tenant Organization affiliates list and local union list.
\(^6\) Flaum and Salzman, supra note 1, at 1.
they get five to ten calls a day for assistance. They provide information, help make complaints to the housing inspector, refer tenants to Legal Aid, help with relocation, and help organize building groups. With limited successes, they have organized about fifteen small tenants groups for negotiations with landlords, several groups of tenants of large-scale landlords, and tenants of two FHA-financed moderate income projects. The Minneapolis Tenants Union has also lobbied for political action—making presentations to the city council resulting in the hiring of ten additional housing inspectors and in endorsement of a statewide tenants’ rights bill, drafting a rent withholding bill and getting it introduced into the Minnesota legislature (it was later killed), petitioning Model Cities for inclusion of low income housing construction, and helping residents affected by urban renewal with their problems.\(^5\)\(^7\) They also put pressure on the Housing Inspection Department to follow up complaints. These activities have brought the magnitude and critical nature of the city’s housing problem to the attention of city agencies and the public.

The New Jersey Tenants Organization by contrast is a state-wide group of over 450,000 tenants, according to its own count.

The first aim of the NJTO is to unite tenants in apartment buildings into organizations which can force their landlord to maintain rents at a reasonable level and to make the necessary repairs in their building. Pressuring the local and state governments to pass tenant protective legislation, including the regulation of rents and protection against landlord abuses and no maintenance, is the other main objective of the Tenants Organization.\(^5\)\(^8\)

The New Jersey Tenants Organization has drafted a proposed municipal resolution expressing encouragement of tenant organizing and backing proposed state legislation that would

1. prevent unreasonable rent increases and relate rental increases to the cost of living
2. limit security deposits to an amount equal to one month’s rent and require its deposit in an account with interest paid to the tenant
3. increase the amount of claims for tenant-landlord matters in Small Claims Court to $1000
4. protect tenants from retaliatory evictions or refusal to renew leases
5. provide for ninety day notice of eviction to tenants on a month-to-month tenancy

\(^5\) What We’ve Accomplished, unpublished stencil, Minneapolis Tenants Union.

\(^6\) Stencil, New Jersey Tenants Organization, P.O. Box 1142, Fort Lee, New Jersey, 07024.
6. create a uniform lease, including a provision that the lease must be renewed except for just cause and prohibiting rent increases except for the amount of tax increases
7. repeal all laws allowing landlords self-help action
8. prevent landlords' refusals to lease to persons solely because they receive public assistance and require landlords to advise prospective tenants of specific reasons why they are ineligible for a vacancy.59

The first real tenants' unions, in the true sense of a recognized bargaining agent, were born in 1966 in Chicago—East Garfield Park on Chicago's West Side, JOIN on Chicago's North Side, and Old Town Gardens on Chicago's near North Side. When the Southern Christian Leadership Conference was looking for a way to have an impact on the urban north in 1965, Dr. Martin Luther King, Jr. sent organizers to Chicago. They decided to work on the West Side, the place of settlement for Southern migrant blacks, and found the deepest concern there to be the rat-infested housing. Pickets were organized against one of the largest realty firms on the West Side, Condor and Costalis. The firm, faced with political pressure, agreed to meet with the marchers. Civil rights and labor lawyer Gilbert Cornfield gives this account:

We had been picketing, there had been a lot of excitement on the West Side, and finally, here we were: they were willing to talk to us. But after all of that action, publicity and excitement, you couldn't go in and say you wanted some toilets repaired after they asked you what you wanted. . . . We decided that what we wanted was a contract, like a collective bargaining contract, a piece of paper that guaranteed certain rights to the tenants that they hadn't had before, and that set forth some responsibilities of management to the tenant instead of always the other way around. . . . Once you have a collective bargaining agreement . . . you had to have somebody to sign it on behalf of the tenants. That's how the East Garfield Park Tenants Union was born.60

The East Garfield Union's agreement with Condor-Costalis was much negotiated and included numerous protections for the tenants: it prohibited leases inconsistent with the contract, allowing rents to be withheld and deposited with a third party upon default by the landlord, and instituted a three step grievance procedure. The realty firm also agreed to cease managing buildings whose owners refused to sign the final agreement.61

61. See history and analysis in Davis and Schwartz, supra note 24, at 108-112.
Actually just prior to the July 6, 1966, signing of the East Garfield agreement, on May 20, 1966, a smaller group, Jobs or Income Now, organized by Students for a Democratic Society, had the distinction of signing the first negotiated landlord-tenant contract in the nation. Its provisions were less sophisticated than the East Garfield contract and the union subsequently diminished in activity.  

The most sophisticated contract yet was achieved in the early fall of 1966 at a middle income apartment complex, Old Town Gardens. Organizing included a rent strike and recruiting the political influence of Congressman Sidney Yates. The two major demands—a collective agreement and the sale or new management of the building—were met. The final agreement included union security and dues checkoff, repairs to be made, and provision for rent withholding. The collective bargaining agreement is contained in Appendix A.  

In one case the Englewood Tenant Union on Chicago’s South Side effected a total union takeover.

[A] provision, giving the union an equal voice in decisions that are traditionally the exclusive province of the owner, amounts to a “constructive abandonment” by the landlord. Section 5 of that agreement redefines rents—to be collected by the landlord and the union and deposited in a joint account—as a “fund,” “available first for Necessary Expenditures and second for Discretionary Expenditures.” “Necessary Expenditures shall be made only upon proof submitted by Landlord in the form of a bill or statement”; and section 4 provides that withdrawals from the “fund” must be approved by a representative of the union. As for the owner’s profit, the agreement provides that a fraction of the fund remaining, after Necessary Expenditures, less $200, is to be “available for distribution to Landlord”; in an extraordinary sentence, the contract states: “This money is the Landlord’s, to do with what he will.”

To end rent strikes subsequent Chicago groups have also emphasized the achievement of a contract specifying repairs required of the landlord (beyond housing law requirements) and providing for rent withholding if these are not made. The contracts also set up arbitration committees, forbid evictions except for specified reasons, and require union approval before any changes are made in buildings (to prevent subdividing apartments).  

In August, 1969, the Boston South End Tenants Council took over the management and rehabilitation of 34 buildings in which its members live. United Tenants for Collective Action in Detroit also

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62. Id., at 105-108.
63. Id., at 120.
manages some buildings. In Chicago the courts have appointed some tenant councils as receivers for the buildings against whose owners they were conducting strikes. Several groups have thought that tenant management and/or ownership were the desirable end goals of a tenants union, but where deteriorated slum buildings are involved and tenants are inexperienced in the complexities of management, the burden is usually too great for success. In any event, landlords will not give away profitable buildings, the price is too steep for impoverished tenants to pay alone, and any building "given" cheap will prove too costly to operate.

An important percentage of the rent collected by slum landlords comes from the public till in the form of welfare payments. When a local welfare department withholds rent to be paid by recipients living in property with code violations, it can mean that numerous whole buildings go on strike simultaneously. New York's Spiegel Law permits this and has been upheld in the courts (see infra, Part II).

The first occurrence of public rent withholding in the 1960's was in 1961 when the Cook County, Illinois, Department of Public Aid set a "no payment" program. Out of the $5.2 million it was paying out each month in rent relief allowances, $1 million went for sub-standard housing; it was "unwillingly the largest subsidizer of slums in the community."6 County public aid department director Raymond M. Hilliard called meetings with the health, building, and fire departments which resulted in task forces representing the departments inspecting the worst buildings. The city's Corporation Counsel prosecuted in superior court. The first three cases resulted in orders for demolition and 72 families were relocated to standard dwellings. One other case covered sixteen buildings owned by a single landlord who was receiving $5000 per month in rents from public assistance alone; the court issued an injunction to make repairs and correct code violations within a period of months and to make periodic reports to the court. As soon as the injunction was issued, the department of public aid ordered that all rent allowances for tenants of these buildings be deleted and that no rents be paid until the landlord complied with the injunction. When the landlord filed a detainer suit against the tenants for non-payment, the department attorneys filed jury demands on behalf of the tenants. No tenants were evicted; the department relocated 89 families and the buildings went into receiverships.


65. Withholding Rent: New Weapon Added to Arsenal for War on Slumlords, supra note 47, at 67.
rent withholding statute, rent was withheld from 1348 families, consisting of 5001 persons, living in 160 buildings.66

The 1965 Illinois Statute67 provides for withholding of twenty percent of the rent of units with serious violations. From the effective date of the act in July, 1965, to December, 1969, the Cook County Department of Public Aid withheld rent from 7102 families of 30,116 persons, living in 1884 buildings.68 This amounted to only twenty-one percent of the eligible cases brought to the attention of the department.69 Compliance was achieved in 36 percent of the withholding buildings as opposed to 22 percent of non-withholding buildings of similar condition; median time for compliance was 240 days.70

In January of 1963 the Nassau County, Long Island, New York, welfare commissioners notified 14 landlords that the rent would not be paid until health, fire, sanitary, and building code violations were corrected. By March, 50 more landlords had been added and by December, 83 landlords had been cited. Eighty percent of the health violations were corrected within one month after the action was taken; other buildings were condemned and numerous relocations were undertaken.71

Welfare department campaigns have the special effect of encouraging other, non-cited landlords to repair their violations because they know they may well be the next target.

b. Private middle and upper income housing

The stereotype of an oppressed tenant may be a poverty-stricken mother living in an unheated, rat-infested hovel; while it is true that poor people have the least mobility in the housing market, the fact is that the housing shortage and the laws which govern landlord-tenant relationships also constrain middle and upper income renters. Leases for luxury apartments have the same harsh and one-sided features discussed above, including waiver of the right of notice to quit and release of the management's liability for lack of heat or air conditioning. The standard "form no. 40" lease used almost exclusively in

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68. Rent Withholding for Welfare Recipients, supra note 66 at 803.
69. Id., at 836.
70. Id., at 840. For more detailed analysis of the operations of welfare rent withholding in Illinois, see id.
71. Withholding Rent: New Weapon Added to Arsenal for War on Slumlords, supra note 47, at 68-69.
Pittsburgh, for example, contains a confession of judgment clause.\(^\text{72}\)

Twenty-six percent of the tenant activity noted by the Urban Research Corporation was among middle and upper income groups.\(^\text{73}\)

In the Washington, D.C. area alone there have been several rent strikes in middle and upper income apartments, with participants ranging from young professionals in Arlington, to the comfortably retired living in the upper Northwest, to the politically sophisticated in the new Southwest.\(^\text{74}\) Usually the strikes are to protest deteriorating maintenance, prolonged failure of a building's air conditioning, or rent increases of as much as 30 percent.

The Urban Research Corporation reports this case study of what is probably the most prestigious membership tenant group in the country.

On New Year's Eve, a large number of tenants of the 800-apartment complex of Tiber Island-Carrollsburg Square in Southwest Washington, D.C., received notices that starting February 1, [1969] when their leases expired, their rents would be increased by as much as 30 percent. The majority of the increases fell between $20-$40 per month, with typical efficiency apartments jumping from $150 to $195 per month, and one-bedroom apartments from $205 to $250.

Some tenants simply moved out, but about 450 others responded by joining the Tiber Island-Carrollsburg Square Tenants Council, which was formed at the end of January. On February 1, about 160 tenants whose rents had been raised made out two rent checks: They sent the management-owners one check for the former monthly rate; and then made out another check for the amount of the rent increase to the "Tenants Council Escrow Account." About 150 tenants have continued to do so every month since.

Tiber Island-Carrollsburg Square is part of Washington's urban renewal program and has mortgages insured by the Federal Housing Administration. By law, the FHA is required to approve rent schedules and increases. The Tenants Council contends that the rent hikes are illegal because they were not approved by the FHA in advance, and that, in any case, they should be disapproved because they are "unreasonable and economically unjustified." The Council is now locked in a legal battle with both the FHA and HUD over the issue, and is also fighting five test-case repossession (eviction) suits brought against rent-withholding tenants by the owners.

The racially-integrated tenants of Tiber Island-Carrollsburg

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\(^{72}\) Naly Form No. 40 Lease, *supra* note 35.

\(^{73}\) Flaum and Salzman, *supra* note 1, at 9.

Square have annual incomes in the $12,000-$40,000 range. Most are federal employees, lawyers, doctors, economists. Among the apartment-dwellers are Senator Edward Brooke of Massachusetts, and Representative John Conyers, Jr., of Michigan. The Tenants Council membership contains a large reservoir of professional expertise. As Washington Post columnist William Raspberry commented: “These people are the system. If they can’t beat it, nobody can.”

Although the Council was organized around outrage at steep increases, tenants soon found that they shared other grievances: inadequate security measures, poor maintenance of buildings and grounds, and steadily deteriorating services. The Tenants Council’s motto became “Hi-Rise, Hi-Rent, Hi-Handed.” In addition to their legal battles, the tenants are now demanding more equitable lease forms and tenant control through “regular management-tenant meetings to consider and act upon tenant grievances and rules regulating tenant activities and properties.”

College and university students are probably the easiest of any large interest group to organize, for they are physically located in clusters and their social and private life is melded with their chief occupation into the encompassing identity of “student.” Students are also the most exploited of middle income groups, for they are almost wholly without economic power. The exploitation is multiplied where market access is restricted, as is the case in isolated “college towns.” Every university neighborhood has shops and services that cater chiefly to students, but in metropolitan areas students have freer access to the general market, including the housing market.

In March, 1969, over 1200 students at the University of Michigan began an organized rent strike in off-campus housing, demanding recognition of their union as a collective bargaining agent. Since then a massive strike has begun in Berkeley, California, and strong organizing has been undertaken at the University of Wisconsin, Michigan State University, Central and Eastern Michigan Universities, the University of Colorado at Boulder, Ohio State University, Wayne State, and numerous others. The Ann Arbor Tenants Union, at that time the strongest union in the country because of its activist man-power and womanpower, joined with the National Tenants Organization to sponsor a conference in February, 1970, on students and the tenants’ rights movement. Well over a hundred people from Cambridge to Berkeley came to share experiences and learn. Most of the participants were anxious to begin organizing and were looking for

75. Flaum and Salzman, supra note 1, at 19-20.
helpful advice. Some attended urban schools but a great many were from small isolated colleges where the housing markets are tight but the average student is not accustomed to political action. The conferees were politically left-leaning, often experienced in the peace movement. The indicants are toward greater tenant action on college campuses.

The University of Michigan at Ann Arbor was the first campus to experience large scale tenant organizing. Housing costs in Ann Arbor are the third highest in the nation. Large landlords control a third of the market. The greatly expanded student enrollment in recent years has not been matched by construction of University housing. A 1967-68 drive for a school-year lease resulted in eight month leases at twelve months rental costs. "This campaign proved to those who might have doubted it before that a broader attack on the realtors was needed if there were to be any significant gains." 

Beginning in the fall of 1968, the prospect of a rent strike attracted widespread support. Interested workers formed a steering committee and over a hundred organizers went from door to door gathering pledges to strike.

The goal of the rent strike was to form a tenants' union made up originally of all those willing to strike, which would be the sole bargaining agent for tenants who were members of the union. Recognition of the union was a precondition to any negotiation. The strategy was to put economic pressure on the landlords by withholding the rents.

In February, 1969, some 1200 strikers began depositing their rents in a Tenants Union escrow account safely across the border in a Canadian bank. The escrow fund kept the money from landlords while demonstrating good faith payment and allowing the union to earn the interest.

The chief strategies were legal and economic—to clog the courts, delay owners' receipt of the rents, and defend every tenant. As an unexpected bonus, the court cases actually brought rent reductions of from $25 to $480.

76. An average two-bedroom cheaply furnished apartment costs $300 per month, is of new but shoddy construction, and is shared by four students. Maintenance is almost nonexistent. Three-year old buildings have cracked plaster, falling ceilings, paper-thin walls, and unreliable heat. Peter H. Denton and Nancy Holstrom, Ann Arbor Rent Strike, [1969].
77. Id.
78. Id.
79. Cases were settled through jury trials, later through arbitration by a local judge, and still later, when the rent reduction pattern was clear, through direct negotiation with landlords. In April, 1969, the biggest landlords brought a conspiracy suit against 91 persons involved in the strike, charging conspiracy to have tenants break their contracts, but failed to achieve the injunction they sought. The Tenants Union filed a countersuit charging landlords' breaches of their own leases and violations of the state anti-trust laws.
A great deal of economic pressure had been brought, but only one landlord recognized the union. Many tenants settled with their landlords, in or out of court. Concerted student organizing maintained a high level of interest in the strike for two years, with as many as 2,000 strikers at peak times, but the general political apathy of 1970 dampened reorganizing efforts at the start of the academic year and slowed the strike to token proportions.

c. Public housing

Nearly 2.5 million people live in public housing; their median annual family income in 1966 was $2,709.80 Public housing is heavily subsidized by the federal government, mostly in the construction cost, but projects are operated by local housing authorities and expected to maintain financial solvency in their operating costs. This is becoming increasingly impossible with fast rising maintenance and salary costs. In 1968, 43 of 82 major-size local authorities were in financial difficulties. Several face bankruptcy.

Announced rent increases have brought powerful strikes in Detroit, Dallas, Washington, D.C., St. Louis, and elsewhere. Deteriorating living conditions have been factors in all public housing strikes and have sometimes brought on strikes without the additional factor of rent increases. Eighteen percent of tenant activity from January through August of 1969 (sixteen cases) occurred in public housing.

The National Capital Housing Authority is the biggest landlord in Washington, operating 10,000 housing units. District of Columbia public housing tenants began striking in November, 1969, over the NCHA’s announcement of rent increases averaging $11 per month (some much higher) which meant that some elderly tenants would be paying as much as 50 percent of their income in rent. The rent increase was blocked by the courts until late January, 1970, when NCHA abandoned its attempts to raise rents pending federal guidelines on a new law limiting rents to 25 percent of a tenant’s income. The guidelines were issued March 19 and by late March NCHA was negotiating with members of the Citywide Tenants Union, the Rent Strike Coordinating Committee, and the Tenants Advisory Board.

After the 22 member Tenant Advisory Board had called for the resignation of the NCHA executive director on the grounds that the authority had failed to maintain its properties adequately, had poor

80. Flaum and Salzman, supra note 1, at 31.
81. “In one Portland, Oregon, housing authority, wage costs jumped from 9 per cent of the operating budget last year (1968) to 23 per cent of the budget this year (1969). The housing authority of King County, Washington, has had to face a 29 per cent wage increase each year for the past two years. In New York City, public housing operating costs rose 125.6 per cent between 1952-1967.” Id.
liaison between its downtown offices and individual housing projects, and suffered from general mismanagement; after a mayor's housing task force reported that "the NCHA is in very serious trouble from every point of view—financial, the condition of its physical properties and the quality of its operations... there is no apparent sense of direction or force in administration"; when there were 400 to 600 vacant or vandalized apartments but 3500 waiting list applicants, then Mayor Washington removed the head of the authority. Problems are far from solved; the deficit for fiscal 1969 was $900,000 and for the fiscal year ending June 30, 1970 it was expected to be $800,000.

Other public housing tenant groups have made inroads into controlling the policies of their housing. In 1966, New Haven, Connecticut, became the first city to place tenants on its housing board. In Boston tenants constitute a majority of the public housing board. At East Park Manor in Muskegon Heights, Michigan, after two rent strikes the tenants' union won official recognition in a new lease, repairs, a new housing director, and control of three of the five seats on the Public Housing Commission. Tenants also sit on local housing boards in Cambridge, Chicago, and Norwalk, Conn. Tenant review boards operate in Detroit and Louisville. In Detroit the Board of Tenant Affairs, composed of 16 public housing tenants, is empowered to review and veto the rules and regulations of the commission and to hear tenant appeals relating to admission and eviction. But the extent of tenant influence remains miniscule; only 20 authorities out of 2,975 around the nation, have tenant representation on their boards.

Not until August, 1970, did the U.S. Department of Housing and Urban Development take firm steps to encourage tenant participation on housing authority boards. Even then, the HUD directive urging that tenants be appointed to local housing authority boards is only a recommendation. No provision has ever been made for tenants to elect their own representatives, and HUD has not yet developed any comprehensive policy on tenant participation.

The most spectacular public housing strike was in St. Louis, Missouri. The Pruitt-Igoe public housing there, once hailed as a model for the nation, is now generally recognized as a physical and human

83. For an in-depth analysis of this case, see George V. Neagu, Case Study: East Park Manor Rent Strike, State of Mich. Civil Rights Commission, Xerox.
84. Flaum and Salzman, supra note 1, at 34.
86. Id.
disaster area. Heavily vandalized, the high rise buildings often have a foot of garbage in the stairwells and halls, are frequently flooded from bursting water pipes in unheated apartments, and hold the constant stench of garbage and urine. Police are afraid to enter the project and sniper fire on tenants is not uncommon.87

An announced rent increase of up to $19 per month, raising rents for some families to 72 percent of their income and for half of the 6,700 public housing families to over 25 percent of their income, met with sharp opposition.88 Tenants began to organize. From February 1, 1969, through October, 1969, some 1,000 families (15 to 20 percent) withheld their rent. At first organizers asked tenants to give their money to strike leaders for deposit in an escrow account, but this was deemed a tactical mistake when the housing authority took legal steps to immobilize the account. Later the money was deposited in a church safe, but a month afterward the organizers returned the money and encouraged tenants to “hold their own” money. This encouraged many to join the strike. For poor as the tenants of public housing are, they began to satisfy needs long neglected: they bought shoes, and steaks, and began to ride instead of walk; some saved enough to be able to move out of public housing altogether. Of the money lost to it, there is well over half a million dollars that the housing authority never will collect.

As months passed, reserve funds grew scarce and St. Louis seemed destined to be the first public housing authority to go bankrupt. HUD refused to give additional federal subsidies; a rent subsidy bill was defeated by the Missouri state legislature in June; after the mayor agreed to a list of 18 demands in July the tenants refused to call off the strike because they knew the authority did not have the money to meet the demands. In desperation the Mayor tried to raise private donations.

During the strike a HUD investigating team, finding that the director of the housing authority was also the director of land clearance, recommended that he give up one job. The individual’s subsequent resignation from the housing authority was used as a victory to build morale. Evictions were prevented by political action: militant groups threatened that any vacant apartments caused by evictions would be burned to preclude their further use; none were ever burned.89

Final settlement of the St. Louis strike included these points:

88. The Housing Act of 1969, § 213, now requires that local housing authorities charge tenants no more than 25 percent of the family income for rent. HUD News, No. 70-513.
the authority gained the small amount of money put in the early escrow account
the authority agreed not to sue anyone who had moved out of public housing
rents were lowered to 25 percent of income, and less for unemployed people; minimum and maximum rent schedules were adopted
rules were adopted governing grounds for eviction, tenants having the right to a hearing at which they can be represented by counsel
better facilities and maintenance
24-hour security protection
tenant control: a tenants' advisory board consists of one tenant from each of nine projects; tenants name three members of the board of commissioners and accept or reject the other two
a fired public relations director was rehired at a greater salary.

The chief demands were of course the rent reduction and greater tenant control. From a tactical point of view the St. Louis tenants won an astounding victory, but the financial problems of the authority remain acute and are far from solved.

2. Organizing tactics and problems

To date, tenant protest comprises little more than isolated shoring actions against a growing landslide of oppression. Restricting itself to narrow categories with limited goals, protest has concerned itself mainly with symptoms instead of causes. Small protest groups have focused on special problems—the needs of clearance relocatees, or of the elderly, or of minority groups. Middle class tenant protest particularly is unorganized, while the slum bootstrap operations for the most part lack resources to exert really effective pressure or to broaden their scope. American tenants, bowed separately over individual grievances, have yet to recognize the common roots of their oppressions, analyze them for means of recourse, and join forces to achieve decent housing.

The Urban Research Corporation's analysis of 1969 tenant actions categorized tenant action four ways:

1. organizing or forming a union, including the formation of any tenant group, occurred in 75 percent of the cases
2. legal activity occurred in 55 percent of the cases—30 percent

91. The Board of Commissioners now consists of two tenants, two ministers sympathetic to tenant demands, and a teamster who assisted in tenant organizing.
92. Richey, supra note 17, at 350.
93. Flaum and Salzman, supra note 1, at 16.
involved efforts to seek legislation and 25 percent involved court cases

(3) withholding of rent was used as a tactic 24 percent of the time

(4) mass protest or street protest, generally encompassing picketing, rallies, marches and demonstrations, involved 20 percent of the cases.

The various income groups used these tactics in varying, but not significantly varying proportions. The Urban Research Corporation findings are reproduced here in Chart II.

Particular tactics reflect the goals of the group and its life style, but tactics are generally aimed to exert public pressure through publicity and embarrassment, to exert economic pressure, or to create legal backing in the legislatures or cull existing legal backing in the courts.

Public pressure tactics include marches, rallies, and picketing, which not only attack the owner but serve to arouse support from tenants in a bandwagon effect. The Woodlawn Organization in Chicago has picketed landlords' homes with signs, "Did you know your neighbor is a slum landlord?" and found suburbanites quick to pressure their errant neighbor, if only to get the picketers to leave. A variation on this theme is to picket a landlord's church. In the Harlem strike tenants demonstrated with dead rats allegedly from their apartments. Berkeley tenants once left a dead cow in a vestibule to demonstrate the lack of proper fire exits.

In more direct action, TWO moved some tenants into better buildings leaving behind the sign "Condemned by Tenants." Victims of the housing shortage have become squatters in public property to demonstrate the lack of available housing.

Although the single large publicly owned housing authority might be most amenable to public opinion pressure this sort of tactic has been used least by public housing tenants.

Adverse publicity and political pressure can be very strong weapons, particularly against owners of middle income property or others not generally known as slumlords.

The most common economic pressure tactic is some form of rent withholding or receivership. Slum owners particularly operate with

94. Id., at 17.
96. Mass or street protest has been used in only 2 percent of public housing activity. Id.
Chart II: Kinds of Tenant Action

Based on 89 cases of tenant activity between January and August, 1969

Reproduced from Flaum and Salzman, supra note 1, at 17.
low cash reserves. If tenants can survive pressure from the landlord and can rely either on legal backing from existing laws (as in New York) or court decisions (as in the District of Columbia) or otherwise prove their case in court, the rent strike may succeed in bringing the landlord to terms. The rent strike is most effective, not as an end in itself but as a means to coerce the owner to meet his legal obligations (such as abiding by the housing code) or to bargain with tenants. It should be noted that where the property involved is old and truly deteriorated so that massive repairs will be necessary, when it comes down to the choice, some landlords will prefer to board up their properties and vacate rather than invest large amounts they know they cannot soon recoup. Especially in New York City and Chicago, landlords faced with housing code enforcement crackdowns have vacated rather than repair. Tenant militancy has hit the landlords at the same time as a very tight money market, rising maintenance and service costs; consequently some properties are no longer economical to maintain in a habitable condition. Tenant organizers must be aware of market pressures and prepared for the possibility of vacation or demolition.

Rent withholding is difficult to organize. The highly successful Old Town Gardens strike had 46.8 percent of the tenants withholding; the St. Louis public housing strike never attracted more than 15 to 20 percent of the tenants. In most jurisdictions rent strikes remain illegal and tenants are afraid of eviction. Also most people, the poor and students included, are conservative and unwilling to adopt a radical and illegal tactic.

Where property owners have close connections with other elements of community power, they may be able to deflect the economic impact of rent withholding. In Ann Arbor, for example, despite landlords' financial overextension they were not hurt as much as the student strikers had hoped, as owners were able to arrange delays on the due dates of their loans. Unless there is a great deal of community solidarity, picketing a landlord's non-realty place of business will not effect a boycott.

Reliance on legally sanctioned tactics protects tenants against evictions, but, depending on what tactics are legal in an area, may fail to attract broad support. Various jurisdictions now sanction rent withholding, rent abatement, receivership, tenant repair with deduction, city repair with lien, and civil suit in addition to code enforcement. In New York where defective buildings properly certified are eligible for rent withholding, and vacant apartments are sparse,
most protesters have been careful to adhere to legal requirements, and organizing has revolved around these requirements. Tenants have subpoenaed the Department of Buildings records listing histories of outstanding building code violations; tenant testimony as a supplemental means of proving the existence of violations has the additional organizational benefit of tenant education and involvement with the judicial process; tenants have recruited architects to testify on defects and estimated costs of repairs for receivership proceedings. Where withholding is illegal, receivership non-existent, and protest discouraged, organizing will be much more difficult.

The most effective tactic for continued tenant impact, rather than for one-shot repairs, is some form of collective bargaining agreement or at minimum a new lease form more equitably balanced. This can be accomplished through legislative adoption of a model lease or through individual tenant group-landlord bargaining. Lease bargaining is a flexible tactic that both allows for the bargaining and trade-off of provisions and effects permanent changes in the landlord-tenant relationship.\(^9\)\(^9\)

Tenant organizing, a relatively new art, has drawn from the experience of poverty organizing and labor union organizing. Organizers are usually civil rights leaders\(^10\)\(^0\) or members of the new left. Occasionally they are simply frustrated tenants who determine to organize their own building, but this sort is rare among the poor.

Even in poorly maintained buildings where tenants have many complaints, they are difficult or organize. Says Jesse Gray, organizer of the Harlem strike,

Tenants are difficult to organize because they don’t believe the average person can solve their problems. But organization is the only answer to build the kind of movement needed to deal with the system.\(^10\)\(^1\)

Changes in the landlord-tenant relationship particularly require a continuous effort to force the owner not only to take a single action, but to continuously maintain the premises, provide security, and meet the demands of renters relative to their ongoing place of residence. The poor especially cannot sustain the kind of pressure

\(^9\) Copies of the leases used in Chicago by the East Garfield Union to End Slums, JOIN, the Tenants Action Council of Old Town Gardens, and the Englewood Tenants Union can be obtained for postage and copying costs from the Harv. Civ. Rights-Civ. Lib. L. Rev. Davis and Schwartz, supra note 24, at 100. The Old Town Gardens lease is printed in appendix A.

\(^10\) Withholding Rent: New Weapon Added to Arsenal for War on Slumlords, supra note 47, at 70.

needed for fundamental changes in a constant system without massive organization.

Mobilizing poor tenants presents special problems. Their general suspicion of outsiders has required primary reliance on the recruitment of organizers from within the neighborhood;\(^{102}\) these workers need special instruction on available tenant remedies and rent strike techniques and are often handicapped by being available only on a part-time basis. An old organizing principle is to encourage activism, for the tenant who becomes a worker makes a real emotional commitment and identifies with the cause much more than the genuinely sympathizing tenant who only signs a pledge card. Active tenant participation, then, not only provides for the psychological feeling of self-help but also circumvents the tenant distrust of outside intervention.

Efforts to secure tenant leadership, however, have not been successful, and in most cases the goal of tenant involvement has had to be subordinated to that of actually guiding the tenants through each step of the... proceeding.\(^{103}\)

In every jurisdiction most of the remedies legally available are quite complicated, require initiation by well counseled tenants, and often become a trap for the unwary. Moreover, they have seldom been availed of by low-income residents absent time consuming efforts by organizers attempting to unify and to infuse militancy into the life style of the urban poor.\(^{104}\)

Further, the law relating to landlord and tenant is now in a period of flux; legislatures are enacting some revisions and some courts have recently upset old common law principles. Confusion over the meaning of the Brown v. Southall Realty Co. decision,\(^{105}\) holding leases entered into in violation of the housing code in the District of Columbia to be void and unenforceable, required several subsequent clarifying decisions concerning the rights of tenants asserting this defense. The Ann Arbor students found a similar confusion of interpretation regarding the new Michigan tenants laws.

Even where the laws are clearly understood, it has been suggested that over-reliance on legal tactics can hinder organizing efforts. Noted social activists Frances Piven and Richard Cloward, writing in The New Republic, cite cause for the failure of the Harlem rent

\(^{102}\) Tenant Rent Strikes, supra note 44, at 9.

\(^{103}\) Id., at 8.

\(^{104}\) Garrity, supra note 26, at 707.

strike as over-reliance upon legal requirements and bureaucratic administration. The organizers were relying on the courts to vindicate them. Although a few cases were decided for the tenants, many were not and reliance upon these tactics produced no long-range results.\textsuperscript{106}

While the legal underpinnings for collective tenant action are necessary protection, without organizing efforts these legal tools will never be activated. Organizing tenants is the vital spark of the tenants' rights movement.

Organizers are faced with a variety of impediments to successful collective action. Initially, they must dispel the tenants' fear of the landlord's authority and convince them that there is no possibility of eviction. Once these fears are overcome, the tenants must be convinced of the value of collective action and the importance of doing their part to make it successful. The tenants' reluctance to commit themselves is not the result of satisfaction with their present housing, but of suspicion of a remote and unfriendly judicial process.\ldots Consequently, the tenants must often be coaxed into signing the petition and appearing in court. These difficulties have not, however, been insurmountable. Where serious organization attempts have been made, few cases have failed in the initial stages.\textsuperscript{107}

Organizing methods must be adapted to the situation including physical characteristics of the neighborhood—single family units or apartments, degree of deterioration; population characteristics—stable families or students, income, racial patterns, experience with community organization or political action; patterns of property ownership—diverse owners or several large landlords and their financial resources, degree of speculation, degree of absentee ownership; indigenous leadership, active or potential; the mood and readiness of the people—angry and desperate or fairly apathetic; and possible support from local officials or organizations. Organizing by buildings or by groups of buildings owned by the same landlord has proven more effective than organizing by geographical areas such as blocks.

Specific techniques include door-to-door canvassing, meetings and rallies, mass action. Preventing evictions is important to reassure tenants. Checklists of housing code violations are both useful prerequisites for action and a concrete way for each tenant to participate. While reporting code violations to proper authorities was

\textsuperscript{106} Piven and Cloward, \textit{supra} note 47.

\textsuperscript{107} \textit{Tenant Rent Strikes, supra} note 44, at 8.
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formerly risky, several jurisdictions now specifically protect this activity from retaliation.108

Suggestions for action valuable to the potential organizer can be obtained from active and more experienced groups. The Minneapolis Tenants Union has put out eight pages of thoughtful ideas called “Tenant Organizing” and the Ann Arbor Tenants Union is willing to share its “Tenants Union Rent Strike Manual” and other materials. The Davis and Schwartz article cited herein is useful. As it grows, the National Tenants Organization, based in Washington, D.C., gains helpful resources also; its newsletter shares experiences of tenant groups across the country.

General steps in forming a union involve formation of a nucleus group, door-to-door canvassing and handbilling, picketing, organizing a union, demanding to negotiate, and some final contract or agreement.109 However, the contract cannot be seen as an end to the union. While the Chicago unions achieved some significant contracts, they had failed to build the organizational momentum to enforce and carry out the provisions; that part is less exciting than the early political activity but no less vital. In New York where rent strikes are relatively simple, rent strike organizing can be rather superficial; difficulties due to poor organization more frequently arise after a judgment in the tenants’ favor.

In addition to the failure to retain continued activity, three common problems of tenant groups should be mentioned.

First, the target should be carefully chosen—the landlord or the

108. See lengthy discussion of retaliatory eviction in Part II, § C-7, below.
109. Methods, again, depend on local circumstances, but this rather rigid procedure devised by a Chicago group of welfare recipients provides some ideas:
1. Survey the building for housing violations, using a checklist in questionnaire form.
2. Form a tenant union and explain the formula.
3. After a discussion with the tenant union, send affidavits of violations to the city fire, health, and building departments. Wait ten days for the various inspectors to begin their inspections in the building.
4. Send a letter to the landlord requesting that he meet with the tenants and the investigator at the landlord’s earliest convenience (threatening step 6 if he does not comply).
5. Have ready, at the meeting, four or five demands to landlord and set a time limit for completion to show good faith (again threatening step 6 if he does not comply).
6. Send an affidavit and letter to the housing consultant of the local department of public welfare, requesting rent withholding, and file a complaint for criminal housing management with the local prosecutor’s office if the landlord does not comply.

This sort of plan relies upon the existence of welfare rent withholding and is only useful in residences of welfare recipients. Law in Action, II, no. 12 (Apr. 1968), at 1, cited in Poverty Law Reporter at 3472.
city. The Harlem strike has been criticized for aiming at the landlords, many of whom were financially unable to make the repairs.\textsuperscript{110} Agreements with marginal speculative owners will be fruitless and often the pressure can result in demolition. Cities (and the state and federal governments) are going to have to shoulder more of the burden of providing decent housing for poor people. And sometimes the city is at fault—is the city's proposed urban renewal plan discouraging landlord incentive to repair buildings slated for demolition? Is code enforcement vigorous in inspection and prosecution?\textsuperscript{111}

Second, the landlord's reactions must be anticipated. When being sued he may attempt evictions (although they are expensive for the landlord), may cease all services to the building, or may seek repeated delays in code violation cases. An attempt to settle out of court may be a ploy so as not to have to ever complete the promised repairs. Faced with rent strikes, at least one landlord of a luxury high-rise initiated proceedings to sell tenants' furniture.\textsuperscript{112} Many tenants have faced eviction threats and even an injunction against organizing.\textsuperscript{113} In Washington, D.C. owners lost an injunction suit to destroy the tenants' escrow fund, especially since their claimed $23,000 monthly deficit would quickly wipe out the $40,000 escrow fund.\textsuperscript{114} These same landlords went so far as to harass the tenants' lawyer, filing a motion naming the Neighborhood Legal Services attorney, asking that she be enjoined from giving advice to the Tenants Council to continue with the rent strike.\textsuperscript{115} Landlords have resorted to self-help measures, cutting off the heat, water, or electricity, or locking tenants out. They have also threatened to abandon the building or take it off the market.

Third, tenants intending to take any serious action will need legal advice. Where tenants are in upper income brackets, this presents no problem. However, low income tenants, unable to pay for legal services and unable to proceed without them, must depend on volunteer legal assistance. Few attorneys are available to spend requisite time preparing subpoenas, filing motions, preventing evictions, and taking necessary action; it is difficult to maintain tenant interest during long

\begin{itemize}
\item \textsuperscript{110} Piven and Cloward, supra note 47.
\item \textsuperscript{111} See Whitaker, supra note 16.
\item \textsuperscript{112} Court Bars Selling Furniture of Rent-Striking Tenants, Washington Post, Apr. 10, 1970.
\item \textsuperscript{113} See Davis and Schwartz, supra note 24, at 108.
\item \textsuperscript{114} Dorfmann v. Boozer, 414 F.2d 1168 (D.C. Cir. 1969).
\item \textsuperscript{115} She filed a motion to dismiss on the grounds that the complaint sought to interfere with her, and her clients' right to a lawyer-client relationship. Motion was granted, without opinion. Id.
\end{itemize}
delays. Sophisticated tenants can, if instructed, prepare their own court cases; the University of Michigan students found this a helpful time saver and technique for involving individuals on their own behalf. Office of Economic Opportunity funded Neighborhood Legal Services program lawyers have been particularly effective in pressing test cases, especially in the District of Columbia. Once an attorney has been secured, few cases end with a judgment for the landlord. A lawyer who is to serve tenant unions—must be familiar with the judicial and statutory remedies available to dissatisfied tenants, especially rent withholding,—must be alert to the legal procedures the landlord might resort to during the organizing period, and—must be able to draft a contract or bargaining agreement which will not only improve the tenants’ living conditions but which will also withstand judicial inquiry into its validity.

3. Political consciousness

Persons who might previously have been reluctant to take action are now encouraged by the successes of other rent strikes and tenant organizing actions. For example, elderly white tenants of a luxury upper-Northwest apartment in Washington, faced with rent increases of 17 to 30 percent in March, 1970, began paying the extra amount into an escrow fund, formed a Tenants Association, and engaged the lawyer who won repeal of a rent increase for the tenants of Southwest Washington’s prestigious Carrollsburg Square and Tiber Island in October, 1969. Said one woman who declined to be identified, “We base our confidence on the outcome of similar actions taken by other tenant associations and in our trust in the law.”

As the old organizing maxim has it there is nothing like victory to gain strength and this is true not only within one organization but also from group to group within a movement. Almost certainly these elderly people would never have dealt with their housing problems through a rent strike (indeed, at all) five, or even two, years before.

There has also been a major change in city populations and in the articulateness of tenant demands. Legal and political machinery has helped too; in New York City, for instance, while in earlier times there had been rent strikes and organized tenant groups, the possibilities of tenant organization for the purpose of collective bargaining were newly opened by rent controls.

117. See generally Davis and Schwartz, supra note 24.
These possibilities are beginning to be realized today, largely in consequence of the political demands of underprivileged ethnic groups for full integration and for a fair share in the opportunities and amenities of life. In the past, the worst housing had generally been occupied by recently arrived immigrants, strangers in a new country who were ignorant of their legal rights and hence unlikely to voice demands for improvement. Today, the most recent arrivals . . . are Negroes and Puerto Ricans . . . While economic necessity and other pressures, including racial discrimination, compel the new arrivals to live in some of the worst housing, they have arrived at a time of political awakening and self-realization. New methods of protest have been used to call attention to their housing situation; the sit-in in government offices seeks to induce more decisive action by housing officials while the rent strike compels landlords to live up to their bargains.\textsuperscript{119}

Tenants are also becoming more attuned to the range of their potential solutions. Early actions tended to focus on a specific problem, such as repair of a faulty heating system; if it was met, the furor died and the next issue required new organizing. Tenant groups are now showing a greater appreciation of long term goals. Public housing tenants are seeking control of their homes and private housing tenants are seeking a voice in decision-making via a union or occasionally cooperative-style ownership. University students in closed market areas are asking that the universities build thousands of units of low income housing.\textsuperscript{120} Black civil rights activist Albert Raby, a tenant organizer for the Hyde Park-Kenwood Community Congress, has spearheaded a Chicago coalition between poor black tenants groups, white middle class Hyde Park apartment dwellers, and black middle class Lake Meadows towers renters. He is "convinced that tenant activities will breed radicalism and in time he hopes the movement will begin formulating radical alternatives to a number of current conventions,"\textsuperscript{121} such as regressive real estate taxes.

The single most outstanding aspect of the February, 1970, conference on students and the tenants' rights movement sponsored by the Ann Arbor Tenants Union and the National Tenant Organization, to this participant, was the continual emphasis on tenant organizing as a tool for radicalizing. Much more than rhetoric was involved; the majority of conferees, from across the country, recognized that the


\textsuperscript{120} See Denton and Holstrom, \textit{supra} note 76, at 2.

housing market is a controlled system and that housing is a concrete issue for tenants who have no bargaining power. The hope is that those who have not yet turned against the economic and governmental establishment because of the wars in Southeast Asia and subsequent domestic repression will come to perceive their impotence to affect such a vital aspect of their lives as the conditions under which they literally live and sleep.

Incidents were related of judges who also owned decaying residential rental property, of judges who tried cases of landlords that were close relatives or political cronies. After one large Ann Arbor bank that held many student accounts was garnisheed by landlords and failed to notify the depositors before removing the rent monies due, a relatively successful drive to withdraw funds from the bank was undertaken. These incidents and the oppressive standard form leases present in many areas are touted as further evidence of conspiratorial oppression. Where housing has become an important issue, landlord-tenant relations have become an emotional local campaign issue.

Tenant action and radical political consciousness are mutually reinforcing, at least so long as the concept of private property remains so entrenched.

4. The Tenant Union

Labor union organizing was once a highly radical activity deeply threatening to the reigning economic powers. Now labor union members are among the more conservative elements of American society, attracted to the racist philosophy of George Wallace, sporting flags on their hard hats as they menace leftist political dissenters. Perhaps one day tenant control of housing shall become a hallmark of American complacency.

For these present times, though, tenant organizing remains a radical activity, threatening to the large and powerful real estate industry. Real estate is considered the biggest business in New York City and in Washington is second only to the federal government. What parallels are there between the tenant union movement and the labor union movement? Might there be a National Tenant Organization analogous in power to the AFL-CIO and tenant protection laws analogous to the Wagner Act and other labor protection acts?

We speak here of a tenant union, "an organization of tenants formed to bargain collectively with their landlord for an agreement defining the parties' mutual obligations." Its primary objective is

122. Davis and Schwartz, supra note 24, at 101.
the negotiation and enforcement of a set of standards governing the
conduct of both the landlord and the tenants.

Just as the development of the labor collective agreement resulted in
the drastic upgrading of the "terms and conditions" of the workers'
employment, so it is hoped that a landlord-tenant agreement will
succeed where the courts and legislatures have failed in raising the
floor of legal protection secured to slum tenants.\textsuperscript{123}

At present there are no statutory provisions to protect organizing
(except as free speech) and no duty exists on the part of the landlord
to bargain in good faith.\textsuperscript{124} Although there has been no litigation on
the point, unions probably cannot speak for non-assenting tenants or
require a "union house."\textsuperscript{125}

While residence probably occupies the same importance to persons
today as employment and thus might fall under "new property"
theories of protection,\textsuperscript{126} there are differences between renters and
employees. For one, striking employees do not receive the benefits
of their salaries, whereas rent strikers have continued to reside in
their apartments. (Eventually, though, the monies usually do go to
the landlord.) The chief difference is that production of goods and
services is an open system—the extra costs of wage increases or other
employee benefits can be passed on to the consumer with no real
detriment to either labor or management. Residential property
rental, however, is a closed system; the landlord-tenant relationship is
inherently antagonistic because costs cannot be passed on and a bet-
ter deal for one party means a worse deal for the other.

An analogy to the National Labor Relations Act would provide
protection for tenant union organizing, though some suggest this
should wait, allowing time for experimentation and innovation.\textsuperscript{127}
Perhaps if thirty percent plus one of a building's occupants agreed,
there would have to be an election, and good faith recognition and
bargaining would be required of the owner.

The rights of labor groups to organize and negotiate is now clearly
recognized. But it cannot be forgotten that the right was won only
through much violence and bloodshed.

\textsuperscript{123} Id., at 102.
\textsuperscript{124} See generally id., at 123-140. No statutory authorization exists, but Massachusetts
has enacted a law requiring public housing authorities to confer with tenant organizations in
Two federal agencies, the Department of Housing and Urban Development and the Federal
Savings and Loan Insurance Corporation have implicitly recognized tenant unions. Notes
and Comments, 77 Yale L. J. 1269, n. 9 (Jun. 1968). See also V. O. Bazarko, Tenant
\textsuperscript{125} Davis and Schwartz, supra note 24, at 134-137.
\textsuperscript{127} Davis and Schwartz, supra note 24, at 121-122.
PART II: THE LAW: FROM CONVEYANCE TOWARD CONTRACT

A. Common Law of Landlord and Tenant

1. Historical Basis: Theories of Conveyance and Independent Covenant

The law governing the relationships between landlord and tenant in the Anglo-American system has not changed substantially since feudal times. Historically the law viewed a lease not as a contract recording mutual obligations, but as a conveyance of an interest in land subject to conditions. Consequently, the law as formulated by the courts does not adequately, with some recent notable exceptions, reflect the new aspirations and economic realities of an urbanized society. An updating of these archaic laws not only will tend to reduce tension in our cities by responding to the just claims of tenants, but may instill greater respect for law in general and provide greater incentives for the maintenance of property by those who occupy and own it. At the same time, responding to the valid claims of tenants while ignoring the legitimate interests of those who own and finance housing would not be productive.¹²⁸

American common law is based in old English common law. While many fields of law have evolved and adapted to changing societal conditions, the body of law governing the relations of landlord and tenant has been stultified for 400 years and continues to reflect feudal agrarianism. The very words “land lord” and “tenant” are monuments to their feudal origin; laws governing the relationship of the owner and the renter of a twelfth floor, heated and air-conditioned two-bedroom apartment would more appropriately speak of the “lessor” and the “lessee.”

The earliest landlord-tenant relationship grew out of the feudal relationship of lord and serf. The lord owned all the land but it was felt that giving the farmer-serf a possessory interest might increase his motivation and productivity. The tenant was primarily interested in the tillage use of the land, from which the rent was said to “issue.” Any building or housing was incidental, so if any structure should burn down, for example, the tenant was still responsible for the rent. Living accommodations were primitive, communication with the lord infrequent, and any man was as capable as the next of generalized repair, so the duty of repair devolved upon the tenant. The real emphasis was on tilling and not laying waste the land.

Prior to the sixteenth century the lessee’s obligations were

¹²⁸. Housing Staff of National Urban Coalition, Agenda for Positive Action: State Programs in Housing and Community Development, (1968), at 12-13, as quoted in Comay, supra note 54, at 475-476.
contractual, but by then the mechanism had evolved into a conveyance of an interest in the land. Later, as commerce developed, practices were revised to deal with the rental of business property and certain contract principles again became intertwined with the conveyancing-based law of landlord and tenant; provisions developed concerning repairs, insurance, and such commercial needs. These new developments became inflexibly adopted into all landlord-tenant common law. "Medieval conveyancing doctrines were not sufficiently modified... to incorporate into landlord-tenant theory such contract principles as mutuality of covenants and mitigation of damages." The tenant had the duty to inspect the premises for any defects and was presumed to have done so; caveat emptor—let the buyer beware.

In a modern urban society, the tenant has little or no interest in the land. He leases space in a building, often well above the ground level. The landlord is to provide services such as electricity, heat, water, elevator service, and maintenance. Services today are usually purchased by contract and indeed the rent often varies with the amount of services provided. Neither the tenant nor the landlord believes that an estate in land is conveyed but rather that there is an exchange of money for space and services. Thus, "... it cannot always be said that the lessor has substantially performed by merely executing the lease and allowing the lessee to take possession of the premises." The average tenant does not have specialized skills for repair, nor access to parts of the building under the landlord's control which may need repair, such as boiler rooms and central air conditioning equipment.

It would be logical and appropriate that the promises of the lessor and those of the lessee be mutual and interdependent. The principle of dependent covenants was first raised in the field of contract law in the 1669 English case *Pordage v. Cole*, further discussed in *Kingston v. Preston*, and was confirmed in 1797 in *Morton v. Lamb*. In the words of Chief Justice Lord Kenyon

where two concurrent acts are to be done, the party who sues the

129. 1 American Law of Property § 3.45 (A. J. Casner ed. 1952).
130. Garrity, supra note 26, at 701. For further analysis of the historical development of landlord-tenant principles, see Garrity at 700-701.
131. It is interesting to note that in Scotland and other civil law countries, there are different laws governing urban and rural leases. See, e.g., George Paton and Joseph Cameron, The Law of Landlord and Tenant in Scotland (1967).
133. 1 Saunders 319 (K. B. 1669).
134. Lofft 194, 2 Doug. 689 (K. B. 1773).
other for non-performance must aver that he had performed, or was ready to perform his part of the contract.\textsuperscript{136}

Mutuality of covenants is now well established in contract law, along with such other principles as the implied warranty of fitness for goods;\textsuperscript{137} these do not apply in the common law of landlord and tenant. The last major property law reform beneficial to tenants was the enactment of the Statute of Frauds in 1677 which required a written lease for a tenancy of more than three years,\textsuperscript{138} thus preventing the landlord from claiming a longer oral lease.

Although the covenants in a lease are mutual promises, it has long been the rule that "in the absence of an expression to the contrary, these mutual promises are not mutually conditional and dependent." This means in effect that the promises in a lease cannot also be constructive conditions precedent to the promisee's duty to perform.\textsuperscript{139}

The failure of performance gives rise to a cause of action but does not permit the other party to withhold his performance also. This is still the weight of authority in the United States.\textsuperscript{140}

Recognizing the injustice of this antiquated position, there have been efforts to circumvent the independence of covenants. Courts have broached the possibility of mutual covenants,\textsuperscript{141} or tacitly recognized mutuality by allowing equitable defenses or claim by way of recoupment or set-off in an amount equal to the rent claim.

It was not until December, 1969, that a modern court squarely faced contract mutuality by adopting the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness. As of November 1, 1970, there had been two

\begin{itemize}
  \item \textsuperscript{136} See Harry W. Jones, E. Allan Farnsworth, and William F. Young, Jr., Cases and Materials on Contracts 755-761, at 760 (1965).
  \item \textsuperscript{137} On Implied Warranty of Fitness for goods, see Uniform Commercial Code § 2-314.
  \item \textsuperscript{139} Carl Schier, Protecting the Interests of the Indigent Tenant: Two Approaches, 54 Calif. L. Rev. 670, 679-80 (1966).
  \item \textsuperscript{140} "Thus if the landlord covenants to repair and the tenant covenants to pay rent, the failure of the landlord to repair is not a defense to the tenant's later breach of the covenant to pay rent. The tenant is instead required to maintain an independent action to recover damages for the landlord's breach. If the covenants were viewed as being dependent and the landlord breached the covenant to repair, the tenant could abandon the premises and be released from his covenant to pay rent as well as recover damages for the breach, or he could continue in possession, affirming the contract, and pay a rent reduced by the damages resulting from the breach." Schoshinski, supra note 27, at 534-535.
\end{itemize}
such landmark decisions, *Lemle v. Breeden*\(^{142}\) by the Supreme Court of Hawaii and *Javins v. First National Realty Corporation* by the United States Court of Appeals for the District of Columbia,\(^ {143}\) although a stream of decisions had slowly crept toward this result.

Warranties of habitability are statutory in six states\(^ {144}\) and the District of Columbia. They are proposed in the American Bar Foundation Model Residential Landlord-Tenant Code.\(^ {145}\)

Like Rip Van Winkle, the whole field of landlord and tenant relations has lain dormant through centuries; legislatures and the judiciary must now race to catch up with urbanization and the industrial revolution.

In contrast with concern for and protection of consumers of other necessities of life, legislatures have reinforced the legal status of suppliers of rental housing and have under-regulated their responsibilities. Moreover, by refusing to overturn or condemn illogical precedents or unreasonable practices, courts have further entrenched landlords' prerogative and have impeded needed improvements to much urban low-income housing. There has been a conspicuous reluctance to revise legal theory to respond to the exigencies of the contemporary housing crisis.\(^ {146}\)

2. Some Onerous Terms

Most tenants are surprised to find out about their lack of rights; even educated and sophisticated people assume many rights they do not have.\(^ {147}\) Perhaps it will be useful to present a sampling of onerous practices sanctioned by the legal system.

a. Eviction practices: Most jurisdictions have a summary eviction procedure called "summary dispossess" or "unlawful detainer" allowing a court of limited jurisdiction to expedite inexpensive tenant removal.\(^ {148}\) "For the most part, landlord-tenant courts operate as a mill, running on high volume and limited administrative


\(^{146}\) Garrity, *supra* note 26, at 697-698.


resources."

Jury trials are discouraged as time consuming; certainly the landlord does not want one and the tenant rarely knows he can request one. Usually the case is limited to the question of fact: has the tenant paid the rent or not? Defenses based on non-performance of the landlord are sometimes not allowed. Written leases may waive defenses to evictions. Challenges have been made that eviction procedures violate constitutional rights.

Even where the eviction laws are just, lack of notice creates an unfair and unwieldy burden for the tenant who suddenly finds his belongings on the street and his family without shelter. Many leases waive the tenant's right to notice; numerous jurisdictions provide only for service by mail.

If a tenant loses in the summary eviction proceeding (and the vast majority do, mostly by default), judgment is entered for the landlord, and a warrant of eviction is issued. If the proceedings sought to recover back rent or damages and a separate cause of action was alleged, then a money judgment is also granted. The Model Code proposes that where the judgment is by default and the tenant cannot be found for actual notice, no claim for rent due should be allowed.

Evictions at the expiration of the lease or at the end of the month in tenancies from month to month may occur where there has been no default on the rent payments. Like the notion that the landlord may originally accept or reject any applicant for a vacancy without reason, this practice is premised on the theory that the owner of the property should be free to use it as he sees fit.

In such cases unless the tenant can prove that the termination and eviction are motivated by racial or other discrimination or in retaliation for informing public officials of housing code violations, or the tenant's attorney can ferret out a procedural flaw in the dispossess proceedings, the tenant must vacate.

This rule is based on ancient property concepts. It is significant that the only multiple dwellings known to common law—innns, and later rooming houses—were governed by quite different laws: "The proprietor of an inn must supply accomodations to any person who

149. Id. at 372.
151. For a discussion of federal and state jurisdiction in eviction procedure cases, see Poverty Law Reporter, at 3131-3133.
152. See Herbert G. Isaacsen, Notice to Quit Under the Landlord-Tenant Relationship, 42 Conn. B. J. 370 (Spring, 1968).
153. Model Code, supra note 145, § 3-213, at 84.
154. Garrity, supra note 26, at 710.
requests them, absent a showing of objectionableness, as long as the inn could hold him.\textsuperscript{155} Further, the tight housing market is not taken into account. Time for relocation is discretionary and often not provided. The assumption is that suitable housing can be found, even for the indigent tenant or the tenant with a large family.\textsuperscript{156}

There are still many jurisdictions which allow the landlord to re-enter and expel an overstaying tenant without legal process at all.\textsuperscript{157} This is true even where the tenant has a lease. The seriousness of situations arising under this rule is compounded by waivers of notice of eviction. Self-help evictions may lead to violence by both parties.

In many jurisdictions the successful landlord in an eviction proceeding is entitled to court costs, usually a set fee for filing and service of process costs, but sometimes a percentage of any rent judgment. The Model Code suggests a limitation of $25 on court costs.\textsuperscript{158} The landlord's attorney's fees are not chargeable to the tenant under any statutory requirement, but many standard form leases impose such an obligation on the tenant even in the situation where the landlord loses the case. A recent New York case held such a provision unenforceable against low income tenants.\textsuperscript{159} Under the Model Code lease provisions for tenant payment of attorney's fees are expressly made unenforceable.\textsuperscript{160}

In some states tenants against whom a judgment for possession has been executed can apply to the court for a stay of execution if hardship would result otherwise, providing the tenant pays all back rent and is not damaging to the premises. A rather extraordinary extension of this hardship stay is the denial of an eviction order by a New York court, holding that repeated late payments "caused by a tenant's temporary financial embarrassment are excusable and eviction under such circumstances would cause an unwarranted hardship."\textsuperscript{161}

\begin{itemize}
  \item \textsuperscript{155} Model Code, \textit{supra} note 145, at 6-7.
  \item \textsuperscript{156} For information on laws governing the disposition of tenants' property during evictions, see Poverty Law Reporter, at 3142-3145.
  \item \textsuperscript{158} Model Code, \textit{supra} note 145, § 3-212(4), at 83.
  \item \textsuperscript{159} Edot Realty Co. v. Levinson, 54 Misc.2d 673, 283 N.Y.S.2d 232 (N.Y. City Civ. Ct. 1967) cited in Gibbons, \textit{supra} note 148, at 375.
  \item \textsuperscript{160} Model Code, \textit{supra} note 145, § 3-402, at 95.
  \item \textsuperscript{161} Weil v. Chandler, 38 Misc.2d 58 (N.Y. Sup. Ct. 1962). However, repeatedly failing to pay rent on time and paying only after the landlord has brought eviction proceedings eight
\end{itemize}
b. Posting bond for appeal from eviction order:

Little of the vast iceberg of residential landlord-tenant law is discernible from written court opinions because the cost of appeals has outweighed the amounts at stake in litigation.\(^162\)

In New Jersey, summary eviction proceedings in the county district court are nonappealable by statute.\(^163\) In some other states the same result is achieved by requiring the posting of bond to defend the dispossession warrant. The bond must be in cash, backed by equity in real property or secured by a bonding company. Also costs of subpoenas and certification of records can be expensive. Appeal from an unfavorable decision on a rent strike can require as high as $8,000 bond.\(^{164}\) Georgia had a statute requiring that the tenant, in order to defend against his eviction, must post bond equal to the sum that may be recovered against him—twice the amount of rent due.\(^{165}\) The Georgia Supreme Court upheld the policy in \textit{Williams v. Schaffer},\(^{166}\) and the U.S. Supreme Court denied certiorari.\(^{167}\) Needless to say, this practice is especially discriminatory against the poor.

On June 29, 1970, the Supreme Court dismissed an appeal in the Connecticut case of Simmons v. West Haven Housing Authority on procedural grounds.\(^{168}\) This failure precluded consideration of the tenant’s claim that the denial of his appeal deprived him of equal protection and due process. Justice Douglas’ dissent stated:

A rich tenant, whatever his motives for appeal, would obtain appellate review. This tenant, because of his poverty, obtains none.... Whether the case is criminal or civil, wealth, like race, is a suspect criterion for classification of those who have rights, and

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\(^{162}\) Gibbons, \textit{supra} note 148, at 376.


\(^{164}\) Wald, \textit{supra} note 40, at 60.

\(^{165}\) The double-rent provision has now been eliminated.


\(^{168}\) Simmons v. West Haven Housing Authority, 90 S. Ct. 1960, (1970). The record failed to indicate whether the Connecticut court’s refusal to permit the tenant’s appeal from summary eviction judgment was based on his inability to post statutory bond for the landlord’s protection or on the court’s finding that the appeal was merely a delaying tactic.
those who do not... Eviction laws emphasize speed for the benefit of landlords. Equal protection often necessitates an opportunity for the poor as well as the affluent to be heard.  

The Supreme Court again considered arguments that the Georgia laws violate the Due Process and Equal Protection clauses of the Fourteenth Amendment in oral argument November 23, 1970.  

c. Distress: Another harsh provision arising out of the common law is the practice of distress, also called distraint. At common law, if the tenant defaulted on the rent, the landlord had the right to seize the tenant's goods and hold them until the rent was paid. Later, by statute in England in 1689, the landlord was given the power to sell the tenant's goods at a public auction and apply the proceeds toward the amount due. The practice originally applied to the taking of the land by the feudal lord but the injustice of removing the means by which the tenant might meet his obligations caused the restriction of distraint to chattels. The landlord's right of distraint still exists in England, in Canada, and in most American states. While several midwestern states have abolished the remedy by statute, the major northeastern and southern states have codified it. Exceptions, such as tools necessary for the tenant's occupation, are provided, but exceptions phrased in terms of dollar value (for example, excepting $300 worth of personal property in Pennsylvania) usually do not take inflation into account. The Great Britain Laws Commission, in a 1966 study of distress, recommended that the remedy be continued but that a court warrant be required.  

d. Confession of judgment: As mentioned in Part I above, eighteen states sanction confession of judgment clauses in a lease. In those states, standard form leases frequently include a warrant of attorney for confession of judgment for unpaid rent and confession of judgment for the recovery of possession of the premises. The only real

172. Id.
175. Great Britain Law Commission, supra note 171.
176. See text accompanying note 34, supra.
possibility of nullifying these wholesale waivers of rights is through legislation or through judicial determinations that such clauses are unconscionable or that they are parts of contracts of adhesion.

Not all countries have such a disparity in the protection afforded landlord and tenant as do the English common law countries. In Germany the obligations of the landlord and the tenant are mutual and interdependent. The landlord has the duty to inspect as well as maintain and repair the property; if he does not, then the tenant may withhold his rent. In an insightful comparison of German and American approaches to landlord and tenant law, Lipsky and Neumann comment

... landlord-tenant legal relations in America may currently contribute to the development of substandard housing and act to inhibit the development of solutions to substandard housing through suppression of initiative.

B. Between the Government and the Landlord

1. Criminal Sanctions: The Housing Code

Even if there were a competitive parity between urban landlords and tenants, the public interest demands that the government ensure that all housing conform with the housing codes. Long before the emergence of modern concepts of the responsibility of the state for the welfare of its people, it was recognized that the public had a general interest in the quality and safety of the housing stock; the concern was originally with preventing fires and building collapse but later with the health and safety of the building's inhabitants. Housing codes of some substance began to appear around the turn of this century. The first true housing law, the New York Tenement House

179. Housing codes and their enforcement have been dissected and discussed at great length elsewhere. Their potential impact to conserve and upgrade housing and their degree of success or failure in this regard, and the similar potential of other governmental programs treated in this section B, would constitute adequate subject matter for another article. Such remedies will therefore be touched only generally and only in regard to their value vis-a-vis the tenants' rights movement. For further analysis, see Gribetz and Grad, supra note 119, at 1254; Frank P. Grad, Legal Remedies for Housing Code Violations (1968); B. R. Dick and J. S. Pfarr, Jr., Detroit Housing Code Enforcement and Community Renewal: A Study in Futility, 3 Prospectus 61 (Dec. 1969); C. Moerdler, J. L. Debrot, W. J. Quirk, G. J. Castrataro, and E. Weidenfeld, A Program for Housing Maintenance and Emergency Repair, 42 St. Johns L. Rev. 165 (Oct. 1967); R. Carlton, R. Landfield, and J. Loken, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801 (Feb., 1965).
Act of 1901, was emulated by some eastern cities, but by 1954 there were only 56 such codes in the entire country. The need for a housing code to meet the "workable program" requirement of the Federal Housing Act of 1954 sparked an avalanche of code adoption; today such codes exist in approximately 4,900 jurisdictions.

Theoretically the regulatory powers of the state expressed in the combination of building codes to control new construction standards and housing codes to control maintenance standards would serve to upgrade and conserve salvageable housing and vacate the unsalvable. Sanctions imposed are chiefly criminal penalties, civil penalties, and vacate orders, though some jurisdictions also assume the task of repair through court collected rent payments, establishment of an escrow account, or receiverships.

While housing codes are certainly necessary, their ineffectiveness to date is generally conceded. Everywhere the enforcement staff is far short of the numbers needed to regularly inspect all units, as are appropriations. There are suspicions, though difficult to substantiate, that some health and building inspectors are taking bribes to fail to inspect particular buildings, to fail to find violations upon inspection, or even to perjure themselves in court testimony. Inspections are not efficient, with two to four different city or county departments' jurisdictions overlapping: structural aspects might be the responsibility of the buildings department, vermin infestation that of the county health department, and electrical wiring that of the fire department, with little coordination.

A great deal of enforcement relies upon citizen complaints. Unfortunately many tenants are discouraged from making complaints because of landlord retaliation and because of experience that housing inspectors may report only the defect complained of or that the report will have no ameliorative effect. Concentrated code enforcement programs have lowered enforcement levels in other areas of the city and caused hardships via rent increases to meet costs of required repairs or via evictions resulting from condemnation or orders for major repairs. Most cities do not provide relocation assistance and in any event, there is seldom much available low income housing at rents the evicted poor can afford. Sadly and ironically, it often be-

180. Grad, id., at 112.
181. Id.
182. Even in Detroit's enforcement program, considered by some to be the best in the nation, in five years only 87,000 of 500,000 housing units had been inspected in the health department's planned inspection program. Dick and Pfarr, supra note 179, at 63, 68. Jesse Gray has called the state of housing inspections in New York City "a fraud on the public." See Richey, supra note 17, at 341.
183. See Dick and Pfarr, id., at 73-74.
comes in the interest of the poor to conceal overcrowding into converted “studio” apartments, even where they know such arrangements are illegal.184 Organizing tenants for positive action under such circumstances is difficult indeed.

The emphasis in enforcement has been on “friendly collaboration and gentle persuasion” between the inspector or prosecutor and the landlord; “grace periods” and extensions can postpone repairs for a year and a half in the District of Columbia.185

Housing codes generally provide for stringent criminal penalties. New York law, for example, provides for fines ranging up to $1,000 per violation for repeated offenders and jail sentences of up to six months.186 The practice across the country has been to avoid conviction where possible, often through repeated delays and adjournments and then several months allotted for abatement. Where the violation had in fact existed but had subsequently been abated, courts frequently do not convict. Where fines are imposed they are outrageously low, so as to render them an expense of doing business rather than an inducement to repair. In New York City the fines per case (not per violation) have steadily decreased from a 1960 high of $26.67 to $13.73 in 1965.187 Fines per violation are thus somewhat less than fifty cents. Jail terms are practically never imposed.188 “Courts have been reluctant to impose realistic civil or criminal penalties for such revolting violations as failure to provide heat even when the severity of the fines provided approximates the gravity of the violations.”189

Landlords are businessmen dealing in the commodity of housing. It must be acknowledged that the great majority are honest, decent citizens who need only the notice of a code violation to commence prompt repair. Many are small owners or owner-occupants who are themselves poor and ignorant of housing management techniques, legal requirements, and compliance methods. Sometimes tenants are themselves the code violators. For such persons Pittsburgh Housing

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184. The Supreme Court has ruled that it is necessary to have a search warrant when entry is refused for municipal housing inspections. Camara v. Municipal Court, 387 U.S. 523 (1967). See v. City of Seattle, 387 U.S. 541 (1967).
185. Wald, supra note 40, at 15.
186. See Gribetz and Grad, supra note 119, at 1276-1277.
187. 1964 Annual Report of the Criminal Court of the City of New York cited in id., 1276, and in Moerdler, et al., supra note 179, at 172. See also Dick and Pfarr, supra note 179 at 75, concerning Detroit.
188. See Grad, supra note 179, at 26, Gribetz and Grad, supra note 119, at 1277. Pittsburgh Housing Court magistrate Sholom Comay asserts that he does not intend to apply this sanction against a person for a crime against property. Personal interview, Mar. 27, 1970.
Court magistrate Sholom Comay recommends a housing clinic arm of the court, a probation service whereby education in code compliance can be provided in lieu of a fine. But the fact remains that an owner wants to gain as much profit from his business venture as he can. Why should he undertake expensive major repair work when he knows he can get off with a small fine that can better be accounted as an expense of doing business? If the fine does become stringent, it may be more economical for the owner to abandon his buildings; in this case the city might take over operation or help tenants make some arrangements for cooperative ownership. The very existence of code enforcement will mean that some few structures will end up demolished. While the low income housing supply is thereby reduced, no family should have to live in any structure that deserved to be condemned. Perhaps municipalities should be required to provide relocation assistance to families displaced by code enforcement.

When the city fails to take action against code violators, sometimes tenants have attempted to do so as third party beneficiaries. Some thirty years ago an attempt was made to assert that the owner's obligation imposed by the housing code created an implied covenant under the lease to maintain those standards, a duty enforceable by the tenant. In that case the New York Court of Appeals held that the "controversy is between the landlord and the public authorities" with no rights vesting in the tenants. It has been followed throughout the country. Criminal complaints for code violations may not even be brought by private citizens. Some citizen input into code enforcement programs has been effected, but in general code enforcement remains in the hands of understaffed and underfunded administrative agencies of overlapping jurisdictions and of court officials unwilling to render harsh penalties. Tenant organizing to step up enforcement prosecutions, while occasionally effecting short term improvements in particular buildings, has done little to change the quality of the general housing market or provoke action by the hard-core slum owners.

Clearly other means are needed.

190. Comay, supra note 54, at 473-474. Classroom sessions would cover code requirements, family health, and encourage the development of "positive attitudes"; follow-up visits to the home would determine compliance. The probation officer could certify abatement of violations or recommend further action.


193. See Krumholz, supra note 13.
Courts can apply economic pressure to encourage stringent municipal code enforcement. The U.S. District Court for the District of Columbia has ruled that landlords must provide such basic services as heat and water even in the face of rent strikes, and that where an apartment owner refuses to pay for gas, water, and electricity, having ceased collecting rents in the face of a tenant strike, and the city shares responsibility for conditions that brought about the nuisance, the city must provide water free of charge to tenants and enter into contracts with gas and electric utilities to provide services.

Other methods used to force corrective action against code violations include civil sanctions: suits to invalidate leases, rent strikes, demands for receiverships, tort liability suits, and demolition orders. Some authors have suggested that the whole idea of a criminal sanction for defective housing is inappropriate, chiefly because of the difficulties of finding owners for the necessary in personam jurisdiction. They suggest conversion to a cumulative civil penalty which could proceed in rem against the building, regardless of its ownership. This would render meaningless failures to register title or last minute sales and would circumvent anonymous ownership. Penalties would be specified and would accumulate for each day of continued violation.

In jurisdictions where the housing codes prohibit occupancy of dwellings which violate the code, it has been suggested that the lease of such premises in violation of the regulations constitutes an illegal contract and confers no rights on the landlord. This is an important theory and will be discussed under Brown v. Southall Realty Co., in Part II, Section C-6 below.

2. Civil Sanctions
a. Vacate orders and demolition orders: Orders to vacate a deteriorated building, often with the alternative of repairing to code standard, or to demolish it were once an effective device. The vacate order, authorized in New York’s Tenement House Act of 1901, the first modern Housing Code, swiftly reduces the owner’s rent roll. It could be used when an unsafe building is unfit for human habitation or in imminent danger of collapse or fire; only an administrative

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194. See Sanford J. Ungar, Dissident Tenants Must Get Heat, Water, Landlord Told, Washington Post, Nov. 14, 1970, § B, at 1. The city was required to provide basic services where the city had allowed over 1,000 housing code violations to exist, had allowed the owner to operate the apartments for nine years without obtaining the required certificate of occupancy, and for two years without the required apartment house license. Masszonia v. Washington, 315 F. Supp. 529 (D.D.C. 1970). See also supra note 16.

195. Gribetz and Grad, supra note 119. See their proposal for civil sanctions, also contained in Grad, supra note 179, at 29-33.
procedure is necessary though it can be appealed to the courts. Where defects are major but correctable, a temporary order to vacate until repairs are completed may encourage owners to make prompt repairs.

Because vacant buildings encourage further blight, are hazardous to children, and may become shelters for derelicts, demolition is expedient in cases of permanent vacation. Often owners will not spend the money to demolish and cities have no money to do so. Now federal demolition grants are available.\(^{196}\)

However, the vacancy and demolition orders are rarely used today because of the tight market situation. Destroying units will only deplete the supply of low income housing and consequently raise the price of the remaining housing. These remedies need to be utilized occasionally, especially the demolition order where the unit has already been abandoned and cannot be renovated, but they must be used sparingly.

The city of New Haven’s enforcement agency has recently issued vacate orders for specific apartments rather than an entire building, prohibiting rerenting until leave for occupancy has been granted. However, this remedy still has the effect of removing units from the market.\(^{197}\)

b. Injunctive powers: Many writers emphasize the need for positive enforcement procedures. Injunctions for rapid repairs to bring compliance with housing codes are much more effective than small fines in cases where the repairs are more costly than the fines.

The injunction, an order of the court addressed to a defendant, commanding or prohibiting specified conduct, with failure to comply punishable as a contempt of court, is a most useful sanction, because of its great flexibility. Instead of punishing for past conduct, it compels compliance with the requirements of law in the future. Unlike other less discriminating remedies, it allows the court to fit the contents of its order to the specific circumstances of the case, and to the specific defendant. This very flexibility makes the remedy one of useful application in housing code enforcement.\(^{198}\)

Injunctive powers as an equitable remedy for maintenance of housing was included in the New York Tenement House Act of 1901 and upheld in the 1904 case of Tenement House Dept. v.

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\(^{196}\) Housing and Urban Dev. Act of 1965, P.106 (a) HUD, Demolition Grant Handbook (Feb., 1968).

\(^{197}\) For a discussion of vacate and demolition orders, see Grad, supra note 179, at 56-61.

\(^{198}\) Id., at 40.
Moeschen. Several states authorize the use of such injunctions.

However, these powers have been little used. In recent years California courts have issued some sweeping injunctions ordering extensive repairs and reconversion of dwellings to conditions prior to alteration. Philadelphia has used a mandatory injunction more along the lines of a vacate-or-repair order. The only city having made extensive use of injunctions is Chicago, issuing 223 in 1964 and insisting on retaining jurisdiction for as long as necessary to “complete determination of the controversy.” Generally courts feel injunctions to be too stringent for ordinary, non-hazardous violations, but they can be excellent, flexible remedies for major violations. Public agencies can also seek injunctions based on theories of public nuisance.

c. Receivership: Former New York City Buildings Commissioner Judah Gribetz has described receivership as “an essential and primary code enforcement weapon.” Others have touted it as the answer to poorly maintained housing. Receivership is indeed a valuable tool, but it too depends upon the economics of the buildings involved.

At least eight states now have specific receivership authorizations. These laws have generally been upheld to the extent they have been challenged.

201. Carlton, et al., supra note 179, at 827.
202. Grad, supra note 179, at 41.
203. Quoted in Moerdler, et al., supra note 179, at 170.
204. For further discussion of receivership, see id., 170-172; Carlton, et al., supra note 179, at 828-830; Grad, supra note 179, at 42-55; Gribetz and Grad, supra note 119, at 1272-1274; Gribetz, New York City’s Receivership Law, 21 J. Housing 297 (1964).
206. The 1962 New York law has been upheld. See Matter of Dep’t of Bldgs. of City of
Basically the receivership laws operate as follows: When a landlord fails or refuses to make repairs on code violation conditions, a municipal agency may initiate proceedings to have a court appoint a receiver for the building. Provision is made to give proper notice to all mortgagees and lien-holders. The receiver has a prior lien on all rents and undertakes to bring the building into compliance, recouping costs out of rents collected. Once the building is restored and costs have been recouped, control reverts to the owner.

The Indiana, Connecticut, New Jersey, and § 309 New York statutes provide that only the code enforcement agency may institute proceedings for receivership. In Massachusetts the law provides for tenants to institute such proceedings. Illinois provides statutory authorization to the code enforcement agency, but judicial decisions have also allowed for tenant initiation in a class action. Missouri law specifically provides for initiation by either a municipal code enforcement agency or one-third or more of the occupants of a building.

New York’s Real Property Actions and Proceedings Law, article 7-A puts a premium on tenant organization, providing that where one-third of the tenants in a building join in a petition alleging the existence of actual conditions (not necessarily code violations) dangerous to health or safety, an administrator may be appointed to collect the rents and make repairs. The administrator may be the landlord, an attorney, a mortgagee or lienor of record, a real estate broker, or a certified public accountant, but not the city.

Chicago began a receivership program in the early 1960’s, well before it was explicitly authorized by statute. The standards to be met are not those of the housing code, but the higher standards of the conservation plan. The Chicago program appears to be very successful, with repairs begun in 800 to 900 buildings. The most frequently designated receiver has been the Chicago Dwellings Association, a limited dividend subsidiary of the Chicago Housing Authority.


207. Supra note 194.
211. By June 30, 1967, the CDA had been appointed receiver for 374 buildings with
Once the receiver is appointed he investigates the situation, and if the building cannot be rehabilitated economically, he reports the information to the court. In such cases often the owner will agree to the entry of a demolition order. "Thus receivership has actually served not only the end of rehabilitation but also the purpose of demolition of deteriorated buildings where rehabilitation is no longer practicable." \(^2\)\(^1\)\(^2\)

Half the receivership buildings have three units or fewer. The investment of time and money into each building is very great, of a magnitude that most government agencies are unable to provide. Moneys are constantly needed to pay for repairs in advance of rent receipts. Negotiable Receivership certificates are a first lien upon real estate and rents and are superior to all prior assignments of rent and all existing liens.\(^2\)\(^1\)\(^3\)

In New York, the first jurisdiction to statutorily authorize receivership, section 309 of the Multiple Dwelling Law permits the code enforcement agency to petition for the appointment of a receiver where an owner fails or refuses to remedy conditions certified as "a nuisance... which constitutes a serious fire hazard or is a serious threat to life, health, or safety." A special receivership unit of lawyers and inspectors in the enforcement agency selected buildings for receivership based on current conditions and past records of code violations. They secured ownership and lien information, then issued an order to repair within 21 days, by mail service and by posting in the building. Within five days the owner and all lienors of record received notice that absent compliance, application to the court for receivership would be made. If a reinspection showed continued violation, the City Department of Real Estate would be asked to

4,112 dwelling units. Grad, supra note 179, at 50. Receivership was completed and the receiver discharged in 286 buildings with 3,353 units. At that time there were 88 buildings with 759 units in current receivership. The Chicago Dwelling Authority works closely with the Chicago Housing Authority and the Chicago Department of Buildings in the selection of buildings for receivership. They are using the receivership mechanism to experiment with the feasibility of rehabilitation, with the following count:

<table>
<thead>
<tr>
<th>Rehabilitation</th>
<th>Buildings</th>
<th>Dwelling Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>Completed</td>
<td>11</td>
<td>63</td>
</tr>
<tr>
<td>In progress</td>
<td>4</td>
<td>22</td>
</tr>
<tr>
<td>Pending</td>
<td>70</td>
<td>1010</td>
</tr>
</tbody>
</table>


212. Grad, supra note 179, at 50. Under the economic pressure of receivership some owners have undertaken rehabilitation, 105 buildings with 1,239 dwelling units having been brought into compliance, and 31 buildings with 323 units in progress in 1967. Demolitions completed numbered 53 with 498 units, and 30 more buildings of 197 units were pending as of that date.

prepare a statement of economic feasibility to determine whether the building would be worth salvaging or whether a vacate or demolition order would be more appropriate. The corporation counsel would then apply to the court for an order directing the owner, mortgagee, or lienor to show cause why the Department of Real Estate should not be appointed receiver to remove the violations and obtain a lien on the rents. Upon a finding of hazardous nuisance the court would appoint the department as receiver, or accept an application of the owner, mortgagee, or lienor to undertake the work, with security posted for satisfactory performance.214

In the event of insufficient funds to pay costs of repair, almost always the case, the Department of Real Estate could advance money from a special "revolving fund" and obtain a lien for future rents. As a matter of experience the fund was more depleting than revolving. During the first 2½ years of operation only ten percent of the $1.5 million spent had been recovered.215

Finances have been the chief difficulty of receivership, but the program has proved highly effective in correcting seriously substandard living conditions. "Of all the available sanctions, receivership alone provided for certain removal of all serious hazards and restoration of at least minimal legal habitability."216 Receivership is a powerful deterrent weapon. "According to the statistics of the receivership unit (in New York City) . . . in the approximately 600 cases handled. . . as of May 1965, at least 20% were closed because the owner had undertaken substantial or total compliance before the Court's show cause hearing."217 And neighboring owners, fearing their building may be next, have taken steps to improve their holdings. The Commissioner of Buildings for the City of New York has confirmed this:

In calculating the costs of continuing an effective receivership program, results to date establish that receivership is a means of inducing several dollars of private investment for every dollar of city expenditure. We have obtained desired code compliance in more than twice the number of buildings than those that resulted in the appointment of receivership.218

Personal service of process is not necessary but there is no longer any

214. See Grad, supra note 179, at 44-48.
216. Id., at 47.
218. Gribetz, supra note 204, at 300.
advantage to the owner in vanishing and he may be induced to come forward to protect his property.

The New York program has been criticized on a number of counts. The city as receiver has the power only to correct code violations, not to make other improvements which might be indicated to make the building profitable. Repairs have been said to cost more than when done privately and the red tape is frequently time consuming.

One controversy over publicly-initiated receivership has been the choice of buildings. Should the condition of the building and its need for rehabilitation be the decisive factor or should its economic feasibility be controlling? New York City has steered a middle course for which it has been soundly criticized. Those who want the building's need alone to be decisive favor thousands rather than hundreds of receiverships, recognizing that this would mean substantial municipal subsidies. Others point to the small portion of city outlays that have been regained from rent incomes and the fact the program is deeply in debt and unlikely ever to recover its costs. Costs are truly the crux of the problem. The average repair cost per building in New York has turned out to be over $25,000. It is for this reason that the New York § 309 receivership program has been largely abandoned.

Where administrators are non-governmental as in New York's 7-A proceeding, there are also problems of administration. Competent and willing administrators are difficult to find. They have limited funds for making major expensive repairs: the rent roll is low, the landlord may refuse to pay operating expenses, and tenants may fail to pay rent to the administrator. The powers of the administrator are unclear; can he bring dispossess actions for non-payment? Can he lease vacant units and if so, only for the duration of the administration or to bind the landlord beyond the receivership? Receivers have difficulty finding contractors willing to work in the slums and to accept monthly installment payments. Financing is particularly difficult to secure because of the uncertainty of recouping the money.

In the cases surveyed where rehabilitation was considered relatively successful, there was at most a seven-to-one ratio between the cost of repairs and the monthly rent roll. However, contingencies such as

220. Grad, supra note 179, at 47.
tenants vacating the premises or not paying rent may make this seven-to-one ratio too optimistic to serve as a rule of thumb. 224

Buildings in good condition that provide their owner with a profit do not go into receivership; only the "problems" are candidates for this remedy. Receivership cannot succeed on a broad scale unless it is underwritten by governmental or private subsidies. One proposed plan for a summary receivership would allow tenants to petition for receivership; where code violations do in fact exist a private receiver would be appointed. 225 Other suggestions for reform concern who should be appointed receiver, under what circumstances, and with what power. 226 Tenant groups, especially, ought to be able to participate actively in receivership. Even these methods, though, assume that either the building is basically economic or that subsidies will come from somewhere.

In fact the great majority of buildings taken into receivership either never pay for themselves or do so only over a very long period of time.

d. City repair with lien:

Today the city no longer views its role as that of policeman or sanitary inspector whose obligation has been met when he prosecutes an owner whose building violates legal standards. Rather the city has begun to accept the responsibility of seeing that the owner in fact meets his obligations, and, in default, of undertaking the burden of putting dwellings into decently habitable condition—not in order to relieve the landlord of his obligation, but rather in tacit or express acknowledgment of the people's rightful expectation of decent dwellings even at the municipality's own expense. 227

The trend toward municipal responsibility for decent housing has extended beyond receivership to actual city repair of dwellings. Most codes have long contained authorizations to repair, usually for any violation not abated after notice and a reasonable compliance period. Repair may be either by the code enforcement department or its contractor and repayment is effected through a lien on the property and its rents. 228

224. Id., at 16.
225. See the interesting proposal for summary receivership in Dick and Pfarr, supra note 179, at 86-88.
228. See Grad, supra note 179, at 62-69.
On the whole such authority has been little exercised, chiefly because of a dearth of funds with which to begin. Even when repair programs do begin they seldom recoup more than a tiny fraction of the costs. Collection costs on liens under $50 would outweigh the lien sum, and since the repair lien is subordinate to taxes, assessments, and prior recorded mortgages, there is often not sufficient income from the property to meet this obligation.

New York City began an emergency repair program in the mid-1960's. In 1964 there was a rodent eradication program. On January 29, 1965, the Board of Health of the City of New York declared buildings with violations dangerous to life and health to be public nuisances and directed persons having an interest in such buildings to abate the nuisance immediately; this served as formal notice to owners of all such buildings. Two days later the Anti-Poverty Operations Board granted $1 million as the means to effect a repair program. After an executive order from the Mayor designating the emergency repair program, an elaborate organizational scheme was devised. An Emergency Repair Action Committee was established, procedures designed, and numerous agencies involved in "Project Rescu" (sic). In five neighborhoods, trailer headquarters were staffed by indigenous complaint "verifiers", Department of Building inspectors, and Department of Real Estate estimators sixteen hours a day, seven days a week. Correctable violations were limited to the most severe such as no running water, no electricity, no heat after repeated violations, or no effective sewage disposal facilities. Repair work was done by contractors, mostly indigenous to the neighborhoods. Out of over $1 million spent, recoupment has totalled only $21,500, about 2 percent. Somehow a substantial relief of human misery must be calculated into the cost-benefit analysis of this venture; as with receivership, lack of recoupment does not indicate a failure of the project.

The city emergency repair program, including causing code violations to be repaired, billing the landlord, and directing tenants to pay their rent to the city when the landlord does not pay, was upheld as constitutional in 1968. Such powers derive from the power to abate nuisances.

Further efforts under this program continued with such improve-

229. Moerdler, et al., supra note 179, at 178. This account of New York's experience comes generally from Moerdler, at 177-185. See also Grad, supra note 179, at 62-67.
230. Id., 181.
ments as mobile units with special skills for immediate repairs and involvement of the community in recommending contractors.232

Once cities begin to undertake rehabilitation and repair, the public, particularly those who live in miserable deteriorating tenements, will come to expect the city to make repairs. Their just expectations of minimum health and safety conditions cannot long be denied.

e. Welfare Rent Withholding: As discussed in Part I above,233 the withholding of rent allowances by public welfare departments can have a keen impact on major slumlords who "specialize" in welfare clients. These programs, chiefly in New York and Illinois, operate between the city and the landlord. In Illinois, despite the active use of this remedy in 74 buildings in Chicago, there was no statutory authorization for welfare rent withholding234 until 1965.235 In New York the Spiegel Law236 enacted in 1962 allows public authorities, after 10 days notice for corrections to the owner, to withhold the rent where code violations are "dangerous, hazardous, or detrimental to health or life." In 1963 in New York 2,849 families had their rent allowance withheld under this law. A provision for partial payment on showing of partial correction provides particular incentive for repair. While the Illinois law provides for the rent to be paid to the landlord upon completion of repair, a 1965 New York amendment makes abatement of the rent mandatory.237 Tenants are protected from eviction during this time in New York. In Illinois they are protected only so long as the violations exist; afterwards the welfare department can only intervene to the extent of relocating the evicted tenant.238

Welfare rent withholding has been challenged on numerous grounds, constitutional and procedural, but has been upheld.239 In the words of Chief Judge Fuld in the Farrell v. Drew decision

233. See § B-1.a.
237. N.Y. Sess. Laws 1965, Ch. 701. California has welfare rent withholding for recipients of public assistance for the elderly, blind, and disabled only. Michigan law provides: "No general relief authorized under this [public welfare] act shall be used to pay rent for any dwelling that does not meet the standard established under this section [minimum housing standards for the maintenance of health and safety]." Mich. Comp. Laws Ann. § 400.14c (1967).
...it is the landlords of welfare recipients who, the Legislature found, "conspicuously offend." To be sure, they are not the only landlords who fail to make repairs in slum dwellings. But welfare recipients have even less freedom than other tenants of deteriorated buildings in selecting a place to live...and the landlords of welfare recipients, secure in their receipt of rents directly from public funds, have even less incentive than other landlords to make repairs. Under circumstances such as these, if the Legislature chooses to select one class of landlords and impose a special sanction against them, the equal protection clause does not forbid it.

f. Rent Control: Many jurisdictions enacted rent controls during the housing shortages of World Wars I and II. New York City, with its acute shortage, is the only major city still covered by the controversial rent controls. The price limitation prevents landlords from unlimited rent increases following code compliance and allows for the possible sanction of rent reductions for reduced services or for code violations.

In 1966 New Jersey enacted a selective rent control law permitting municipalities to establish rent controls for substandard multiple dwellings only. The municipal officer who administers the controls may also act as receiver in the event of appropriate court proceedings following the owner's failure to make repairs previously ordered. The New Jersey law is an effort to further penalize code violators without incurring the disadvantages of permanent rent control, as experienced in New York City. Its effectiveness depends upon administration and the financial position of the owner.

g. Other Governmental Sanctions: Other civil sanctions which exist or have been proposed deserve mention.

Drawing from the long standing analogy to hotels, some jurisdictions, including Baltimore, Philadelphia, and Washington, require the licensing of multiple dwellings. Compliance with housing, zoning, and related codes is required for issuance and for renewal of the license. The necessary inspections facilitate a regular inspection procedure and systematic enforcement. If licenses are revoked the building must be vacated or reduced to single family status. Unlicensed operation carries a stiff fine. However, this theory does not


241. There are some who feel that the reduction in owner income results only in further loss of services and maintenance.

work where inspection staff is inadequate and prosecutions sparse.\textsuperscript{2 4 3}

Certificates of code compliance have been used in Chicago, Washington, Philadelphia and elsewhere to protect ignorant buyers from purchasing property laden with code violations and to hinder owners of such property who are being prosecuted from abandoning their property in the face of code enforcement. The buyer can request an inspection; if there are no violations he can receive a certificate to that effect. In Washington the applicant must agree in advance to comply with any order resulting from the inspection.\textsuperscript{2 4 4}

Dick and Pfarr have proposed that the marketing of dwellings with major code violations ought to be halted altogether; contracts for the sale of multiple dwellings with one or more serious code violations would be voidable.\textsuperscript{2 4 5}

A variation on the licensing concept, the more potent certificate of occupancy, is used in Washington.

Owners of all but single family dwellings must obtain and display this certificate, which states that the building complies with all laws and codes. A purchaser may secure an inspection in advance of transfer for $10; since he must have an inspection after sale to obtain a certificate, there is a strong incentive to learn of conditions in advance.\textsuperscript{2 4 6}

This practice can force the sale price to reflect needed repairs. There are generally too many transfers to make inspections in all cases and a usual practice is to rely on an inspection during the previous year.

3. Housing Court

The lumping together of housing code violators with misdemeanants before the general criminal courts of inadequate jurisdiction has long been criticized. The purpose of a single housing court is to educate judges in the area of housing deterioration and its implications and to provide continuity. Chiefly a tool for larger cities, it has the side effect of allowing judges to recognize repeated offenders. A specialized housing court dealing with housing, building, and related codes can coordinate the judicial process of housing code enforcement with other programs; for example, the judge can take into account the availability of urban renewal grants, facilities for relocation of tenants where a vacate or demotion order might be

\textsuperscript{243.} See Whitaker, supra note 16, where charge of operating rental units without license against owner was dismissed because of poor enforcement procedure.

\textsuperscript{244.} Carlton, et al., supra note 179, at 838.

\textsuperscript{245.} Dick and Pfarr, supra note 179, at 88.

\textsuperscript{246.} Carlton, et al., supra note 179, at 839.
involved, and current negotiations for sales to an urban renewal authority.

The first housing court was established in Baltimore in 1947; others now exist in Chicago, Atlanta, New York City, and Washington, D. C. All are special parts of the criminal court except Chicago’s which has both civil and criminal jurisdiction. Cleveland, Denver, Milwaukee, Pittsburgh, Syracuse, Toledo, and St. Louis all have some variation on the arrangement, having a day set aside for housing cases or assigning one judge to such cases.

Washington has perverted the idea, turning its landlord and tenant branch into a mill for summary evictions of tenants.247

Other such courts have turned their attention to code enforcement. For example, prior to the commencement of a housing court in Pittsburgh in 1967, the Housing and Building Code enforcement effort seldom produced more than 50 prosecutions a year. In 1968, the first full year of operation, 1,047 such prosecutions were filed in Pittsburgh and the rate seems to be increasing.248

The Pittsburgh housing court was designed to coordinate action on and expedite code violation cases, as one part of a five part program to upgrade housing.249 The court is only a part-time magistrate’s level court, but the sole magistrate has expressed an awareness of the dynamics of the housing market, such as the effect of demolitions on the thin supply of low income housing and relocation facilities.250

The idea of criminal courts for housing code offenders has frequently been criticized.251 However, a criminal court with a full range of powers, including staffing for pre-sentencing investigation, probation, and a housing clinic to educate tenants and landlords, can be effective. Fines might be based on compliance records or made conditional or suspended if violations are abated within a specified time. The objective is to bring about the repair of housing accommodations, not to punish the offender, but meaningless light fines are no inducement to repair. Across the country, fines are miniscule and


248. Comay, supra note 54, at 462. In 1968 there was complete abatement of all violations in 360 cases. During 1969 the figure rose 135 percent to 842. City of Pittsburgh Housing Court 1969 Report.

249. The five part program consists of (1) systematic city-county code enforcement, (2) federally assisted code enforcement and conservation projects under section 117 of the 1965 Housing Act, (3) expanded demolition of dilapidated structures, (4) a magistrate’s housing court and (5) the beginnings of public-private rehabilitation. Krumholz, supra note 13, at 242.

250. Comay, supra note 54, at 463.

251. See e.g., Gribetz and Grad, supra note 119 and Grad, supra note 179.
jail terms practically never imposed, when indeed the violators do finally come to court. The fact that of the 4900 jurisdictions having housing codes less than 20 have housing courts is an indication of the level of prosecution.

The Chicago court has both criminal and civil jurisdiction. It can order receiverships and demolition orders as well as code violation penalties; it can be aware of rent strikes as a defense to an owner's inability to repair. Generally the joint jurisdiction has been quite effective.252 Whereas a criminal court can only make repair a condition for suspension of a fine, a court of equitable jurisdiction can issue injunctions.253

In their persuasive and much cited article "Housing Code Enforcement: Sanctions and Remedies," Gribetz and Grad proposed the abolition of criminal penalties for code violations and the institution of a mandatory cumulative per diem civil penalty.254 Each day's offense would bring an increase in the fine. In a consolidated civil court all relevant facts could be considered and the court would have in rem jurisdiction over the building, thus avoiding tracking down absentee owners for personal jurisdiction. Fines in most cases would total enough to act as a real deterrent. If the fine were three dollars a day, for example, a building having four violations would accumulate $252 of fines in three weeks. The court would have

jurisdiction of routine actions for the collections of civil penalties, actions for the collections of expenses incurred by the municipality in the repair or demolition of dwellings, proceedings for injunctive relief, receivership actions, actions by tenants to compel code compliance, including proceedings for summary dispossess for non-payment of rent in which the existence of housing violations has been raised as a defense, as well as any other action or proceeding in which the existence of housing violations is an issue.255

This procedure is likely to be much more fair and more effective in upgrading housing quality than current techniques.

C. Between the Tenant and the Landlord

1. Short Term Relief Tactics: Tenant Defenses

An essential area for clarification is the nature and extent of tenant defenses to suits for possession or for rent. Such defenses are

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252. Grad, supra note 179 at 75-76.
254. See Gribetz and Grad, supra note 119, at 1281-1290.
255. Gribetz and Grad, supra note 119, at 1282-1283.
not only useful to individual tenants but can be vital to the success of a collective tenant action.

The most important defenses are those which involve long term changes in the law governing landlord-tenant relationships. As the law slowly revolves from a stance of independent covenants to one of mutual and dependent covenants, courts are adopting the intermediate doctrines of constructive eviction, implied warranties of habitability, and illegal leases. Each of these will be dealt with in detail in section II, C, parts 3, 5, and 6, respectively, below. Here the short term defenses will be mentioned briefly.

While the common law of real property does not include warranties of habitability or of fitness for use intended, it does grant some negligible protections. The prospective tenant is presumed to have inspected the premises; if he fails to perform this duty or if he inspects and subsequently complains of defects he discovered or should have discovered at that time, he has no protection. Where the landlord actually conceals defects, fraudulently denies existing defects, or where latent defects not discoverable by inspection appear, these may void the lease.256

The owner does not generally have an obligation to repair except the common areas controlled by him (for example, halls, stairwells, lobby).

Some jurisdictions provide for counterclaims to actions for rent; including actions for injuries to persons or property arising out of the tenancy. This would apply to medical costs from injuries resulting from the landlord's failure to repair common areas or to damages resulting from the landlord's wrongful forcible entry, for example.257

Lack of a certificate of code compliance has been suggested as a defense but has not been generally accepted.258 Occasionally this defense has resulted in rent reductions, however.259

Retaliatory rent increase or eviction is increasingly a valid and acceptable defense. It will be dealt with in section II, C-7 below.

Past landlord practices may be a defense for a particular tenant where a usual pattern of dealing at variance with the letter of lease terms has existed. For instance, a lease provision may provide that rent payments are to be made in advance on the first day of each month and failure to do so will result in forfeiture; however, where a

256. See Schier, supra note 139, at 673-674.
257. Michigan Compiled Laws 600.5637(4), (1968) provides in part "...A defendant against whom a claim is made may file a counterclaim against the plaintiff by way of set off or recoupment."
258. See N.Y. Mult. Dwell. Law § 302(a).
259. See Part II, §§ C-3, -5, and -6 below.
landlord consistently accepts late payments and this becomes established as a pattern, he cannot evict a tenant for failure to strictly comply with the lease without some notice of a change in practice.260

The overwhelming majority of courts rely on the common law doctrine that the landlord has no duty to mitigate damages by attempting to relet premises abandoned by the tenant. Four states have held that landlords must attempt to mitigate damages, and Iowa recently held that the landlord cannot recover rent due under the lease unless he pleads and proves efforts to relet.261

The generally allowed tenant defenses are few indeed. Any significant change depends upon the further swing toward viewing the lease as a contract and allowing all the substantive defenses available under contract theories, as discussed below.

2. Short Term Relief Tactics: Tenant Offenses

a. Injunctive Relief

Tenants can institute injunctive proceedings based on statutory authorizations to do so. Massachusetts, for example, allows tenants to initiate affirmative action where violations of the housing code exist,262 not substantially caused by the tenant. The court may issue appropriate restraining orders, or injunctions, authorize rent withholding, order the premises vacated, or appoint a receiver. New York has a similar allowance for tenant initiated action.263

Even without statutory authorization, tenants can bring suit for injunctive relief based on the common law theory of nuisance. "Private nuisance is an interference with the use or enjoyment of real property."264 It will be remembered that the common law view of


264. Schoshinski, supra note 27, at 538-539. In the District of Columbia nuisance has been defined as "anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his reasonable rights of person or property." District of Columbia v. Totten, 55 App. D. C. 312, 5 F.2d 374, 380, cert. denied, 269 U.S. 562 (1925). It must be a continuing or recurring act. See Schoshinski, at 22.
Tenancy is the conveyance of an interest in the land. All tenants, therefore, have such an interest, whether they are tenants for a term, from month to month, at will, or at sufferance.\textsuperscript{2}65

Generally it has been stated that a nuisance can only emanate from activities or conditions outside the affected property.\textsuperscript{2}66 Yet, according to Schoshinski there are numerous instances where the courts have found an act on the property of the injured party to be a nuisance.

For example, a dog howling under his window, or cattle wandering over his fields, or a building standing on his land have been held to amount to a nuisance when the continued invasion caused substantial interference with the use and enjoyment of the property. Nor is it necessary that the nuisance arise by some positive act of interference. It may be caused by the defendant’s failure to act.\textsuperscript{2}67

If the fee owner has been allowed relief from nuisances on his own land, there seems to be no reason why the holder of a leasehold interest cannot also. Premises that have fallen into a state of disrepair cause disturbance and inconvenience to the tenant. Clearly a nuisance can be said to exist when the landlord fails to maintain areas of the building over which he retains control and which by their disrepair cause interference with the property interest of the tenant. Rat and vermin infestation caused by the unsanitary condition of the areas controlled by the landlord or disrepair of areas of ingress and egress posing a threat of bodily injury to tenants are surely nuisances.

Tenant remedies for nuisances include action for damages measured by the loss of rental value of the property, compensation for any personal injury sustained, and equitable relief in the form of an injunction compelling the landlord to abate the condition. Nuisance relief may therefore be a valuable remedy for conditions which occur after the tenancy commenced.\textsuperscript{2}68

\textbf{b. Slumlordism as a Tort}

One who undertakes to perform a service for his own economic benefit, but who performs it in a way both inconsistent with those

\textsuperscript{265}Id.

\textsuperscript{266}“Thus, it has been held that a tenant could not recover damages under a nuisance theory because of the conditions existing in or on the leased premises.” Miller v. Morse, 9 App. Div. 188, 192 N.Y.S.2d 571 (1959); \textit{contra} American Electronics, Inc. v. Christo Poulos & Co., 43 Misc.2d 302, 250 N.Y.S.2d 738 (Sup. Ct. 1964) cited in Schoshinski, \textit{id.}, 539.

\textsuperscript{267}Schoshinski, \textit{id.}

\textsuperscript{268}If the conditions existed at the time the tenancy commenced, the tenant might be precluded from obtaining relief on the grounds that he “came to the nuisance.” \textit{Id.}, 541.
standards which represent minimum social goals as to decent treatment and in a manner that itself is violative of the law, under circumstances where the victim has no meaningful alternative but to deal with him, commits a tort for which substantial damages ought to lie.\(^2\)\(^6\)\(^9\)

This is the theory of slumlordism as a tort. Sax and Hiestand contend, as do others, that tenants must be able to participate in the amelioration of their housing misery. The traditional tort law served to protect substantive liberties and later the concept of redress for inflicted emotional distress was added. The deplorable state of the market for low cost housing and its effects on the frame of mind and life style of its residents are analyzed by Sax and Hiestand as tortious in nature and degree. They propose that structural dilapidation, absence or inadequacy of basic facilities, absence of rudimentary sanitary services, and severe crowding ought to be recognized as new torts.\(^2\)\(^7\)\(^0\)

c. Increased Scope of Governmental Regulation

As societal living becomes more complex and as the individual consumer consequently becomes less able to protect himself, the government takes on greater regulatory power. Thus does the federal government inspect meat, drugs, and cosmetics for purity, states license members of occupations, and local governments regulate health and building standards. Much organized tenant effort has been channelled into lobbying for more effective governmental regulation of housing. Various tenant groups have proposed legislation providing for receivership, repair and deduct arrangements, city repair programs, and other positive remedies. Such groups also have proposed administrative implementation of existing regulations. Chiefly, though, the thrust of legislative lobbying has been toward changing the relationship of the individual tenant and the landlord (and in some cases, the relationship of tenant organizations and the landlord).

Security deposits are an issue on which tenant groups have pressed for more stringent governmental control via legislative change. At present many leases contain provisions requiring a tenant to deposit an amount of money with the landlord as security for the performance of the rental terms and to guarantee payment for any damage the tenant, his family, or guests may do to the premises. Sometimes no such clauses are in the lease, but the landlord demands a deposit


\(^2\)\(^7\)\(^0\). See generally, id., 869-922.
anyway. Problems arise concerning the time and under what conditions the amount is returnable to the tenant. Further, requiring a large deposit often precludes occupancy by low income tenants. Most people will not expend the time or money to bring suit for unreturned deposits.

Utility companies, of a somewhat analogous situation to landlords of low-income housing because of a comparable market situation, exact security deposits from customers and especially discriminate both in frequency and in amounts against low income residential areas. Because of these facts there has been increasing governmental interest in and regulation of deposits by utilities. Such an approach would not be uncalled-for in the area of low income housing and one solution might require justification by landlords before such deposits are levied with the paying in of deposits to an escrow fund maintained by the municipal housing agency which would adjudicate conflicts as to its payment on the termination of a tenancy.2 71

Some states have already legislated that tenants are entitled not only to their deposit but also to the interest accrued during the term. Pennsylvania requires that the landlord provide a written accounting of any damages within thirty days of termination of the lease or upon surrender of the premises; any waivers of this provision are void.2 72 New Jersey requires investment of any deposit in a federally insured bank or savings and loan association.2 73

Some approaches to changing landlord-tenant relations have been attempted at the federal level. For example, Congressmen Benjamin Rosenthal and Edward Koch have introduced a bill that would require landlords of buildings with FHA guaranteed mortgages to furnish tenants and prospective tenants with the applicable FHA maximum rent schedule and would require a public hearing, with notice to tenants, before any rent increase above the schedule could be approved by the Secretary of Housing and Urban Development.2 74

d. Repair and Deduct

At common law, a landlord has no duty to repair in the absence of an express covenant.2 75 Some states have imposed a statutory duty to repair upon the landlord, often tied with housing code standards. Where the landlord fails to make essential repairs, half a dozen or so

271. Garrity, supra note 26, at 718, 719.
274. H. R. 8024, 91st Cong., 1st sess. See also S. 3199, 90th Cong. 2nd sess., and H. R. 16902, 89th Cong., 2nd sess., both referring to the District of Columbia.
states have made provision for the tenants to make the repairs and deduct the cost from their rent. A typical provision is California's:\(^\text{276}\)

§ 1941. The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine.\(^\text{277}\)

§ 1942. If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair he neglects to do so, the lessee may repair the same himself, where the cost of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.

Other states have similar provisions.\(^\text{278}\) However, they have several drawbacks. California and Montana's statutes limit the deduction to one month's rent which is too restrictive when extensive repairs are necessary. Where the landlord can obviate the responsibility for repair by inserting an exculpatory clause in the lease, the tenant has not enough bargaining power to prevent it. "In the rare case where the slum tenant reads and understands his lease he will almost certainly discover that he has waived any protection he might have gained under these laws."\(^\text{279}\)

In at least two states without such a repair and deduct law, a superior court held that where the lease calls for repairs to be made by the lessor and he refuses, the tenant may have the repairs made and deduct the cost from his rent.\(^\text{280}\)

e. Rent Withholding and Abatement

Several states have enacted laws that provide for the termination

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of the tenant's obligation to pay rent under certain circumstances. In addition to repair and deduct procedures and payments into receiverships, discussed above, there are two additional categories—rent withholding and rent abatement.

Rent withholding is a practice by which the tenant is relieved of his obligation to pay rent to the landlord but must instead pay the rent into court or a court approved fund. Under this judicial escrow arrangement the funds are retained until the violations in question are corrected. Sometimes the money may be used toward repair, but eventually it usually goes to the landlord.

Rent abatement, on the other hand, is more economically threatening to the landlord. The presence of housing code violations on the premises constitutes an absolute defense to any action brought for non-payment of rent and the tenant is relieved of any obligation for rent until the violations have been corrected.

Rent "strike" actions may be private, where the tenants agree among themselves to refuse to make rent payments, or public, where welfare officials withhold rental allotments from public assistance recipients who live in substandard accommodations. Welfare rent withholding is discussed above in Part II, B-2; this discussion will deal with private rent withholding, statutorily sanctioned, judicially sanctioned, or illegal.

As a private device rent withholding has the advantage of getting at an absentee landlord who cannot be arrested outside the jurisdiction of the court for housing code violations; the "ghost" owner who can never be found to make repairs will want to come forward to protect his income flow.

In the field of rent withholding, New York is the most advanced and most experienced state, providing for individual and collective action. Proceeding under section 755 of the Real Property Actions and Proceedings Law, tenants in buildings with significant code violations may deposit their rent into court. Upon proof of a city-certified violation, if the court deems it "such as to constructively evict the tenant from a portion of the premises occupied by him" the court may stay any dispossess proceedings or action for rent provided the tenant deposits the rent due with the court. In 1965 the law was amended to allow the tenant to contract for "necessary" repairs and to withdraw court-deposited money to pay for such repairs. When the defects are remedied the landlord is entitled to all the accrued rent.

While this law has been utilized to the tenants' advantage, it has been much criticized by tenants. The ways in which it overlaps with

281. N.Y. Real Prop. Actions Law § 755 (1), (2) and (3) (Supp. 1966).
other developments in landlord-tenant law, such as constructive eviction, are not altogether clear. In one case, *Gombo v. Martise*, the trial court declared that when violations exist in a dwelling that are a hazard to life and limb the tenant is entitled to a full refund of his deposit made to the court and until the repairs are made he is not obligated to pay rent to anyone.

An original criticism that the withheld money was unavailable for repair work was overcome by the 1966 amendment, but the criticism of vague standards for withholding still applies.

To avail himself of this remedy, the tenant must first subject himself to the risk of being evicted. Since the defense turns on the finding of a constructive eviction, the court has substantial discretion.

In addition, the tenant runs the risk of being held personally liable for repairs which the court finds were not "necessary." In this form of withholding the landlord knows that he will eventually recover the money withheld, so his only spur to prompt action are convenience, any mortgage obligations, and possible interim repairs which might deplete the escrow fund.

In 1965 the New York Real Property Actions and Proceedings Law, article 7-A provided a legal basis for collective tenant action. One-third or more of the tenants occupying a multiple dwelling in New York City may bring an action for a judgment directing the deposit of all rents into court and their use in remedying conditions dangerous to life, health, or safety if there exists in any part of their building

a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition dangerous to life, health or safety, which has existed for five days, or an infestation by rodents, or any combination of such conditions.

The tenants' petition must specify the nature of the defects, the estimated cost of removing them, and the rent due from each of the petitioning tenants. The landlord may raise as a defense that the alleged defects are non-existent, that they were caused by the tenants, or that the tenants refused him entry to repair. Upon judgment for the tenants, the owner or any person having an interest in the prop-

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283. Fossum, *supra* note 45, at 324. This decision relied upon the characterization of such hazardous violations as a partial eviction, quoting from Justice Cardozo's opinion in *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N.Y. 370, 117 N.E. 579 (1917). However, the *Gombo* decision was overruled on appeal.


TENANTS' RIGHTS MOVEMENT

Property will have the opportunity to undertake rehabilitation himself provided he shows ability to do the work promptly and posts security for performance. Otherwise all tenants in the building, irrespective of whether they are parties to the action, are ordered to pay rents due and all future rents into court. The court appoints an administrator (a certified public accountant, an attorney, or a real estate broker) to supervise repairs, withdraw deposited rents and render an accounting. After completion all surplus funds are paid to the owner. The administrator may receive a "reasonable sum" for his services.286

The chief advantages of the section 7-A proceeding over the older section 755 proceeding are, first, that the legality of the strike would be settled by a court beforehand and thus tenants would not bear the heavy burden of uncertainty and, second, that the entire building would strike simultaneously, even where only a third had signed the original petition. One hundred percent rent strikes are otherwise tremendously difficult to organize and they obviously have greater economic impact on the owner than any lesser strike.

Since New York first legalized rent withholding at least four other states have followed, providing for withholding in buildings certified as unfit. Pennsylvania's statute287 authorizes tenants of dwellings certified by the appropriate public agency as unfit for human habitation to pay rent into a bank escrow account approved by the housing court. If, at the expiration of six months, the violations are corrected the money goes to the landlord; if not corrected, the money is returned to the depositing tenant, except that it may be used for purposes of repair. No tenant may be evicted for any reason whatsoever while rent is deposited in escrow.

Michigan's rent withholding statute is slightly less stringent.288 There when the owner cannot receive a certificate of compliance with the housing code, or has his certificate suspended, the duty to pay rent is suspended and tenants are to pay rent into an escrow account until compliance is achieved. The money is to be paid to a party authorized to make repairs.

Missouri's 1969 statute, which can be activated by either the code enforcement agency or one-third of a building's tenants provides the court a choice of receiving rents and appointing a receiver or allowing

286. Tenant Rent Strikes, supra note 44, at 6.
the owner to correct the deficiencies. Any tenant wrongfully dispossessed during the time of withholding "shall be entitled to recover twice the amount of rent for the period for which he has wrongfully disposed or twice the damages sustained by him, whichever is greater, and the cost of the suit, including a reasonable attorney's fee." 

Reports on the effectiveness of Pennsylvania's law depend upon the commentator. A former director of city planning in Pittsburgh suggests that rent withholding has had only a small impact on Pittsburgh's deficient housing, pointing out that in the first two years of operation only 1340 units were certified as eligible. Of those, 573 tenants opened escrow accounts; 351 were actually paying into them. As of March, 1968, only $49,000 was being held in escrow accounts while it is estimated that $1.6 million is collected every month for the 28,000 substandard rental units in Pittsburgh. The city has published a simple booklet, Rent Withholding in the City of Pittsburgh, which it distributes to eligible tenants, not all of whom will withhold their rent. Their reasons vary from landlord pressures, inconvenience, to a lack of understanding of their rights. Of all those who do utilize escrow, only 100 cases have resulted in abatement. This represents less than 8 percent of the units certified as eligible.

However, intensified code enforcement coupled with the threat of rent withholding has caused some landlords to repair, particularly because of the provision for abatement. Perhaps the greatest value of the act is as a bargaining tool on the side of tenants, creating an opportunity for them to participate in negotiation and have some real effect upon the conditions of their housing.

The abatement tool exists in New York City and Massachusetts also. In New York cities with a population of two million or more, tenants are eligible for rent abatement if their building has a "rent-impairing" code violation. The Department of Buildings was required to publish a list of "rent-impairing" violations, defined as any "condition in a multiple dwelling which, in the opinion of the department, constitutes, or if not promptly corrected, will constitute, a fire hazard or a serious threat to the life, health, or safety of

290. Id. at § 441.620.
291. See Krumholz, supra note 13, at 243-244.
292. Id.
293. For another description of the law's operation in Allegheny County, Pa. see John H. Clough, Pennsylvania's Rent Withholding Law, 73 Dickinson L. Rev. 583, at 596-603 (Summer, 1969). Krumholz cites an increase of 75 percent in building permits for general repairs in 1967 over 1965 and an increase in inspections, supra note 13, at 243.
occupants." When any such violation has remained uncorrected for six months the tenant may cease to pay rent for as long as the violation exists, but must file the amount due with the court pending final disposition.

This statute eliminates some of the risk the tenant would have to undertake by establishing specific standards. Once the tenant has produced a copy of the Department of Buildings record showing that a violation has existed six months, the burden shifts to the landlord who must prove that the violation has been removed. However, because of the six month waiting period many serious violations, such as lack of heat, are unaffected.

Massachusetts' law is even stronger, providing for no recovery of rents if the premises are in violation of the code and if the violations will endanger the health or safety of the occupant.

The applicability of rent withholding to state and locally funded, and especially federally funded, public housing is unclear. State laws, such as those requiring landlords to keep premises in good repair, cannot be applied against federally owned projects and perhaps even FHA-mortgaged projects. In one case where public housing tenants withheld rent to apply the money toward a painting job, judgment was entered against the tenants for rent due.

Rent withholding, or "strikes" as they are popularly called, have variously been touted as a main weapon in the struggle for decent housing and a sham substitute for regular code enforcement that strains relationships.

The tenant led strike is more a symptom than a cure. It is primarily a weapon of protest rather than an effective device for bringing a lasting solution to the problems of slum housing. When the rent strike arises it indicates the accepted methods of creating an adequate supply of standard low cost housing have broken down.

Rent strikes indicate the need to construct more low income housing and a failure in code enforcement programs. Withholding legislation is useful and allows individual tenants or tenant groups to bypass ineffectual enforcement procedures. The strike can provide an effective measure for checking slight deterioration; abatement is

297. Fossum, supra note 45, at 334.
298. Krumholz has suggested some criteria for determining situations in which withholding might be useful. They include the extent to which the owner has a long term rather than speculative interest, availability of financing resources, the possibility that rent increases from investments necessary for compliance may dislocate poor tenants, availability
even more threatening to landlords because they are not assured of eventually receiving the money. But they are not panaceas for slum housing ailments.

3. Constructive Eviction

Constructive eviction is the result of a breach of the covenant for quiet enjoyment which is implied in all leases according to common law.299 "The origin and development of constructive eviction are closely intertwined with the early common law doctrines on the lessor's responsibility for the condition of the premises and the tenant's liability to pay the stipulated rent."300 It is established when one shows that the landlord has deprived the tenant of the beneficial enjoyment of his interest in the property leased or materially impaired such enjoyment. When constructive eviction occurs, the tenant is no longer liable for rent and has a cause of action against the landlord for breach of covenant.

The first American case declaring constructive eviction to be a breach of the covenant of quiet enjoyment, in 1825, dealt with the lessor's maintenance of a bawdy house.301 The doctrine was used sparingly at first302 and has not come into general use until recent times.303

Most writers on the subject refer to the "fiction" of a constructive eviction, feeling that the same result could more logically and easily be achieved through a recognition of the contractual nature of leases.304

There are two basic elements of a constructive eviction: substantial interference with possession by the landlord and abandonment of the premises within a reasonable time by the tenant.

303. Writing in 1937, Bennett mentioned uses of this doctrine in cases of failure to furnish heat, hot water, and elevator service and even in a case where an upper floor of a dwelling was rented to a college fraternity. Bennett, *supra* note 132, at 66-67.
304. "The desired result could have been easily and logically effected by the application of ordinary contract rules as to independent covenants; but that would not do. It was in the realm of real property that a remedy must be found." Bennett, *id.*, 65. "In order to correct some of the injustices that result from a strict application of the rule of independent lease covenants, the courts developed the fiction of a constructive eviction by the landlord where his breach of a duty imposed by the lease denied the tenant the beneficial use and enjoyment of the premises." Fossum, *supra* note 45, at 313. "Thus another fiction—constructive eviction—was added to the real property museum." Bennett, *supra*, at 65.
The obligation, breach of which by the landlord would constitute substantial interference with possession, may arise out of lease covenants or statutory regulations, chiefly local housing codes. The District of Columbia Housing Regulations require

Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants.

This responsibility lies with the landlord, as does the duty to provide and maintain heating, plumbing, and electricity. The existence of these regulations has been interpreted to create tort liability.

It can be argued that these same regulations have abrogated the common law with respect to making repairs and keeping leased premises habitable. If this be the case, failure to maintain the premises in accordance with the housing regulations will in many instances amount to a substantial interference by the landlord with the tenant's use, enjoyment, and possession.

In fact, the landlord's failure to take some action required by law has been held sufficient interference to constitute eviction.

The substantial interference must be shown to "have been caused by the lessor, or by someone having title paramount to that of the lessor, or by someone who derived authority for his acts from the lessor." The interference may be either an act or an omission.

The second aspect of constructive eviction required by common law is abandonment by the tenant within a reasonable time. The theory is that the landlord's interference with the right of quiet enjoyment must be so severe as to compel the tenant to leave. Presumably if the tenant does not leave, it is because he does not feel the interference is so severe and he thus waives the landlord's breach.

It is this abandonment requirement which is the major difficulty in pleading constructive eviction. The tenant must assume the risk of moving out before adjudication and thus possibly bear the financial

305. Schoshinski, supra note 27, at 529.
306. Washington, D.C. Housing Regulations § 2501 (1955) quoted at id. See also § 2901, reproduced in App. B.
307. See discussion in Section II, § C, at 4, below.
308. Schoshinski, supra note 27, at 530.
312. Schwab, supra note 213, at 927.
burden of an adverse judgment. Further, most metropolitan areas are currently experiencing a housing shortage, especially of low income housing, and tenants may be unable to find suitable accommodations elsewhere. "The scarcity of living accommodations makes the defense of costructive eviction of little practical value unless the requirement of abandonment can be relaxed." 3 13

The Municipal Court of New York City has taken judicial notice of the critical housing shortage there in ruling that abandonment was not necessary to assert constructive eviction.3 14

In Majen Realty Co. v. Glotzer3 15 the tenant’s apartment was damaged by fire, the landlord failed to repair, and thus the tenant was deprived of the use of part of his apartment while he remained in possession. The court allowed the claim of constructive eviction, abating the rent in proportion to diminished use: 3 16

While it is true that in order to sustain the defense of constructive eviction, there must be an abandonment of the premises . . . that rule rests upon the reasoning that if the premises in fact were not fit for occupancy, the tenant would not have retained possession but would have moved elsewhere, and his remaining in the premises belies any claim that they were not fit and habitable. Such a rule should prevail where a market of available apartments of dwelling accommodations exists. However, where there are no living accommodations available elsewhere or there is such a scarcity of them that impels the legislature to declare a public emergency to exist because of such a condition, the reason upon which the rule is based disappears, and the rule should therefore be relaxed.

Because of the very critical housing shortage existing in New York City, of which the court will take judicial notice, it can readily understand why, under the circumstances disclosed in this case, the tenant did not completely give up possession of the premises.3 17

Because of housing shortages across the country, an expansion of this relaxation of the abandonment requirement has been urged by numerous writers.3 18 There simply are not resources available for slum tenants to abandon even grossly deteriorated housing. In a Massachusetts case it was held that if interference with possession was sufficient to justify a claim of constructive eviction, abandonment of the premises was not essential where equitable relief was

313. Schoshinski, supra note 27, at 530.
315. Id.
316. Schoshinski, supra note 27, at 530.
318. Loeb, supra note 279, at 304-305; Schwab, supra note 213, at 928-929; Schoshinski, at id., 530-534.
sought. The tenant was held liable only for the reasonable value of
the use and occupancy from the time he elected to treat the land-
lord's breach as a constructive eviction—the time of filing—until
abandonment.319

Partial constructive eviction is a related theory with no require-
ment of abandonment.320 Actual partial eviction on the part of the
landlord operates as a suspension of the tenant's liability for the
entire rent on the grounds that the landlord may not apportion his
own wrong. Where the landlord takes some positive act that displace-
tes the tenant from part of the leased premises, the courts have declared
partial actual eviction. In a California case, for example, this was the
result where the lessor conveyed a portion of the parcel leased to the
state.321 Although the tenant recognizes the usefulness of the re-
mainng portion of the premises by staying, the deprivation of a part
renders less the usefulness of the remainder. The tenant is allowed to
remain and since no rent is due, he cannot be evicted for non-pay-
ment of rent.

If such an eviction, though partial only, is the act of the landlord, it
suspends the entire rent because the landlord is not permitted to
apportion his own wrong.322

For urban apartment dwellers, the defense of partial actual evic-
tion from a room or group of rooms is best pleaded where the tenant
has both ceased use of the area and has removed his property from it.
If the defense applies where part of the leased premises has been
sold,323 burned down,324 or lost its municipal permit,325 why
should it not apply to a leaking roof in one room, or heating serving
only a portion of the dwelling? The distinction between partial
actual eviction and partial constructive eviction may no longer be
useful.

It has been argued that conditions dangerous to life constitute a
partial constructive eviction or an equitable constructive eviction.
There seems to be no reason why the theory underlying partial actual
eviction cannot be applied where rats so infest an apartment as to
make it unsafe for human beings, or where floors and ceilings are so

cited in Schwab, at id., 929.
320. 1 American Law of Property § 3.52 (A. J. Casner ed. 1952).
note 279, at 305.
322. Justice Cardozo writing in Fifth Avenue Building Co. v. Kernochan, 221 N.Y. 370,
117 N.E. 579 (1917).
dilapidated as to create a hazard to the life and limb of tenants. A 1964 New York case interpreted atrocious living conditions—no heat for four winter months, roaches, holes in the floor—to be partial constructive eviction. The presence of rats and vermin has been held to create a constructive eviction relieving the tenant of liability for rent. Conditions making the premises uninhabitable and constituting housing code violations have also amounted to a constructive eviction. Repeated floodings of commercial office space has been held to amount to constructive eviction; the Supreme Court of New Jersey interpreted a defect existing prior to the leasing as a breach of the covenant of quiet enjoyment, perhaps implying a covenant of fitness into all leases.

These cases represent a new and minority trend. Where the remedy at law is not available a remedy in equity ought to be allowed. Rather than the strict doctrines that constructive eviction requires abandonment and partial actual eviction suspends rent altogether, equity might provide for constructive eviction absent abandonment in scarce housing areas whereby the tenant would pay a sum reflecting the value of the non-conforming premises. Eventual removal ought not to be required where the equitable remedy sought is not termination of the lease but repairs.

Equitable relief ought to be available also for breaches of the covenant of quiet enjoyment which fall short of the standard for constructive eviction. In a suit for rent, a counterclaim should be allowed for the "amount of damages sustained by the interference, the measure of damages being the difference in rental value of the premises in repair and the state of disrepair, or alternatively, the cost of repairs." In a suit for possession based on non-payment the remedy should be recoupment and the same rent reduction.

4. Liability for Damages

The extent to which the lessor is liable for damages to the tenant

326. Schwab, supra note 213, at 932.
332. Schoshinski, supra note 27, at 533.
resulting from the condition of the property is intimately related to
the original responsibility of the lessor regarding maintenance of the
premises. In California the traditional rule of landlord non-liability
has been stated as follows:

[Under] the common law the general rule is that there is no liability
from the landlord either to a tenant or others for the defective
condition of the demised premises whether existing at the time of
the lease or developing thereafter. This rule applies in California in
the absence of: (1) concealment of a known danger, (2) an express
covenant to repair or a promise to repair supported by considera-
tion, or (3) a statutory duty to repair.333

This common law rule of non-liability is prevalent. Its logical
corollary is that where the landlord does have a duty to maintain the
premises, any failure to do so will render him liable for resultant
injuries. The law has been moving toward this latter position. As
mentioned in the discussion of constructive eviction above, many
housing codes imposed this duty of maintenance.333 334

Notwithstanding common lease provisions waiving the landlord’s
normal tort liability for injuries resulting from any cause whatsoever,
jurisdictions are interpreting housing code responsibilities to impose
a non-waivable liability.

In 1952 the U. S. Court of Appeals for the District of Columbia
held that “absent any statutory or contract duty, the lessor is not
responsible for an injury resulting from a defect which developed
during the term.”333 335 After that date the District of Columbia issued
regulations concerning maintenance and repair of residential prop-
erty. In 1960 the same court then held that the Housing Regulations
create a duty in the landlord and prescribe a standard therefor, that
it is not necessary that the landlord actually know of the condition
but only that with reasonable care he should have known.333 336 The
plaintiff, injured by a falling ceiling, was therefore allowed to re-
cover. Later the same court ruled simply that where a landlord leases
parts of a property to different tenants and reserves under his own
control common areas, “he has a duty to all those on the premises of

1970).
334. E.g. supra, note 306.
344 U.S. 935 (1953).
(1960).
The landmark case on this question involved the New York Tenement House Act requiring that "every tenement house and all the parts thereof shall be kept in good repair." In that case Judge Cardozo held that the Act had "changed the ancient rule" and imposed upon landlords a duty that "extends to all whom there was a purpose to protect."

The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by anyone. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers.

This trend of interpreting liability from housing regulations is strong. Some areas have only recognized the duty to repair in common areas over which the landlord retains control. Others have allowed recovery for defects within the leased premises where the rental is of furnished premises for a short term. Still others have declared exculpatory agreements to be against public policy and void. The trend is toward declaring the landlord liable for damages resulting from defects throughout the leased premises.

There is also a duty on the part of the tenant not to contribute to the defective condition. Some have suggested that in the face of dangerous conditions the tenant must vacate or assume the risk of injury. In one recent case the theory that a tenant had assumed the risk by failing to vacate was specifically rejected; otherwise the duties of repair placed upon the landlord by the Housing Regulations would be nullified. The Supreme Court of Pennsylvania has also rejected this argument in a case where the landlord had promised to repair a

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341. Id.
344. Minton v. Hardinger, 438 S.W.2d 3 (Mo. 1968). The Supreme Court of Missouri upheld damages for the death of plaintiff’s husband from burns following a gas explosion caused by a leaking gas heater.
defect existing at the commencement of a lease, taking note of the housing shortage.\textsuperscript{347} No longer does the average prospective tenant occupy a free bargaining status and no longer do the average landlord-to-be and tenant-to-be negotiate a lease on an "arm's length" basis. Premises which, under normal circumstances, would be completely unattractive for rental are now, by necessity, at a premium. If our law is to keep in tune with our times we must recognize the present day inferior position of the average tenant vis-a-vis the landlord when it comes to negotiating a lease.\textsuperscript{348}

Damages have been brought in tort action against landlords for mental distress, as well as injuries, resulting from a failure to comply with the housing code; damages for mental anguish have long been accepted in tort law, but only recently have they been allowed where the injury was a result of such housing code violations.\textsuperscript{349}

Landlord liability for damages resulting from injuries has also been specifically allowed by statute.\textsuperscript{350}

The U.S. Court of Appeals for the District of Columbia has extended the duty of the landlord to use ordinary care and diligence to maintain the common areas\textsuperscript{351} to also require the landlord to use reasonable care to protect tenants from predictable criminal acts by third parties.\textsuperscript{352}

The duty is the landlord's because by his control of the areas of common use and common danger he is the only party who has the

\begin{thebibliography}{99}
\item 348. Id. quoted in Clough, supra note 293, at 590.
\item 350. When the owner "permits unsafe, unsanitary, or unhealthful conditions to exist unabated in any portion of the dwelling, whether a portion designated for the exclusive use and occupation of residents or a part of the common areas, . . . any occupant, after notice to the owner and a failure thereafter to make the necessary corrections, shall have an action against the owner for such damages he has actually suffered as a consequence of the condition." Also the tenant shall have injunctive or other relief where the condition is continuing. Michigan Comp. Laws Ann. \textsection{} 125.536, eff. Nov. 1968. In the District of Columbia, "No owner shall cause to be placed in a lease or rental agreement a provision exempting from liability or limiting the liability of the owner of residential premises from damages for injuries to persons or property caused by or resulting from the negligence of the owner, his agents, servants, or employees in the operation, care or maintenance of the leased premises . . . ." D.C. Housing Regulations, \textsection{} 2906. See App. B.
\end{thebibliography}
power to make the necessary repairs or to provide the necessary protection.353

The landlord is no insurer of his tenants' safety, but he is certainly no bystander.354 ... there is a duty of protection owed by the landlord to the tenant in an urban multiple unit apartment dwelling.355

5. Warranty of Habitability

In addition to the basis of landlord liability just discussed, warranties of fitness constitute a basis for liability for injuries sustained as a result of their breach. They are, of course, related, in that housing codes may be interpreted to create a warranty of habitability.356 A warranty of habitability, express or implied, would create remedies far more satisfactory than, say, defenses of constructive eviction. Tenants who could show a lack of habitability, by whatever standards, would have available the whole array of contract remedies for breach of warranty. In the housing sphere these would allow the tenant to quit the premises without further liability, or have a reduction in rent to a level commensurate with the value of the non-habitable premises. A breach of a warranty of habitability would allow the tenant an action against the landlord for any resulting damages. Because realty remains unique, tenants would also have equitable remedies available.

At common law the lease is a conveyance of a possessory interest in land. Unless expressly set forth there is no implied covenant that the premises are safe, suitable, or even fit to live in.357

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353. *Id.* slip op., at 6.
354. *Id.* slip op., at 7.
355. *Id.* slip op., at 12.
356. The District of Columbia has specifically legislated that: "There shall be deemed to be included in the terms of any lease or rental agreement covering a habitation an implied warranty that the owner will maintain the premises in compliance with [the housing] Regulations." D.C. Housing Regulations, § 2902.2 (amended 1970).
357. In England, the duty to repair falls upon the tenant and may even go so far as to obligate him to put the premises into repair if they are in disrepair at the commencement of the lease. The tenant's duty to repair, to replace defective parts with something substantially the same, has been interpreted to require the tenant to rebuild an entire front wall. See J. R. Lewis and J. A. Holland, Landlord and Tenant (1968), at 135. Weekly or monthly tenants need not repair but must use the premises in a tenant-like manner including performing such chores as to "cause the chimneys to be swept and mend electric fuses." *Id.* at 99. The landlord can sue the tenant for breach of covenant to repair.

Canada's laws are only somewhat less onerous to the tenant: "Except in the demise of furnished premises there is no implied covenant or warranty that demised premises are fit for the purpose for which they are ... to be used." E. K. Williams, Notes on the Canadian Law of Landlord and Tenant (3rd ed. 1957), at 359. In the absence of an agreement to the contrary, however, the tenant has no duty of repair, only the duty to treat premises in a tenant-like manner. The landlord who has not expressly agreed to repair is not under any liability either to put the premises into repair at the commencement of the lease term or to
In the United States, the covenant of habitability does not exist unless expressly set forth.358 "The reason assigned for this rule is that the tenant is a purchaser of an estate in land, subject to the doctrine of caveat emptor. He may inspect the premises and determine for himself their suitability or he may secure an express warranty."359

There are some narrow exceptions to this rule. The "short-term furnished house exception" stems from the 1843 English case of Smith v. Marrable.360 There the lessee had engaged use of a furnished house at a beach resort for a short time and soon abandoned the place after discovering it was infested with insects. The reason generally given for allowing tenants recovery in such circumstances is that the parties intend immediate occupancy without time to inspect adequately. This exception is widely applied in England and all American states.361

The exception was narrowly defined in decisions subsequent to Smith v. Marrable, limiting the warranty of habitability to situations of furnished premises for a short term on the grounds that the principle ought not to apply to land rented for purposes other than residential.362 Logically, it ought to extend to the renting of an unfurnished house for immediate occupancy. The Minnesota court has so ruled,363 allowing a warranty of fitness in all modern apartment buildings whether furnished or unfurnished and irrespective of repair during the term. Neither is he liable to the tenant for any damage sustained by him on the premises. Id. at 365. Even where the Canadian landlord has agreed to repair, he is not liable to the tenant's family (even his wife!), visitors, guests, customers, or others for any damages sustained, only to the tenant himself.

Scotland has adapted to the realities of modern urban life in implying warranties of fitness into leases. Leased houses, offices, ships, and stores must be reasonably habitable and tenantable and in a wind and watertight condition. Breach of this implied obligation would justify a tenant in refusing to enter, or in claiming a reduction in rent. G. C. H. Paton and J. G. S. Cameron, The Law of Landlord and Tenant in Scotland (1967) at 130. The extent of the obligation varies according to the value and rental, but the landlord is clearly at fault where the drains and water supply are inadequate or where there is an infestation of beetles or cockroaches. Id. Once the tenant is in possession the landlord is bound to repair any defect which makes the premises less than wind and watertight or not in tenantable repair, though this obligation does not extend where the tenant's negligence has caused the defect. Id., at 131-132. It must be established that the landlord was aware of the defect.

359. Id.
lease term. Until 1969 no other decision had been so sweeping.\textsuperscript{364}

A covenant of fitness for the use intended has been implied where the lessee desires the premises for a particular use and the premises are to be altered or constructed for that use.\textsuperscript{365} Apparently this exception rests on the theory that the lessee has no opportunity to inspect the altered or constructed premises before the lease is executed.

Independent of any express or implied covenant the lessor is under a duty to disclose to the lessee known dangerous defects or conditions which are latent or concealed or not otherwise discoverable by a reasonable inspection.\textsuperscript{366} Defects of this nature include vermin infestation, defective wiring, plumbing, or roofing, malfunctioning heating systems. Such inadequacies, if known by the landlord, constitute fraudulent nondisclosure and may give the tenant the right of recission or an action for damages based on deceit.\textsuperscript{367}

A more inclusive implied warranty of habitability has been suggested as implied in housing codes. This theory is similar to that of liability of the landlord for injuries due to code violations, as discussed above. The 1961 Wisconsin decision in \textit{Pines v. Perssion},\textsuperscript{368} though restricted to furnished premises, was widely touted as an important step forward. In that case college students had leased premises on the agreement that they would be cleaned up and ready for occupancy at the start of the school year. When that time came, the premises were not habitable. The lessees spent several days attempting to correct the defects, and then abandoned the premises. They sued for their labor and return of their advance rent payment. The court held that they were liable only for reasonable rent for the few days of occupation and granted them judgment. The decision was based on public policy as expressed in the housing code.

Legislation and administrative rules, such as the safe-place statute, building codes, and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus,

\begin{itemize}
  \item \textsuperscript{364} Lemle v. Breeden and Javins v. First National Realty Corporation are discussed in detail in section II, § C-8.
  \item \textsuperscript{366} 1 American Law of Property § 3.45 at 269 (A. J. Casner ed., 1952).
  \item \textsuperscript{367} Schoshinski, \textit{supra} note 27, at 522. A landlord's non-disclosure of defects that rendered the leased premises uninhabitable, as for example, where the local gas utility refused to make connections for heat because of defective facilities, constituted "fraud in the inducement and rendered the lease void." Goto v. Aragon (Cal. Mun. Ct., Fresno); II Clearinghouse Rev. No. 2, Feb. 1968, at 6, as cited in Poverty Law Reporter, 3321.
  \item \textsuperscript{368} 14 Wis.2d 590, 111 N.W.2d 409 (1961).
\end{itemize}
the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common-law rule obsolete.

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, *caveat emptor*. Permitting landlords to rent "tumble-down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners. 369

Before discussing the implications of warranties based on housing codes, it will be useful to consider express statutory warranties and tenant remedies in the event of such warranties.

Recognizing the real injustice of a lack of the warranty of habitability, several jurisdictions have statutorily provided such a warranty. California provides that the lessor of a building intended for human habitation must place the premises in a habitable condition and keep them in repair, 370 but the provision is waivable. Michigan specifically incorporates compliance with housing codes and health and safety laws into each lease, as well as a covenant that the premises and all common areas are fit for the use intended by the parties; 371 however, the statutory implied covenants can be negated in leases of a year or longer. A more effective statutory warranty, because it is non-waivable, is that provided in the District of Columbia Housing Regulations which apply "to every premises or part thereof occupied, used, or held out for use as a place of abode for human beings." 372 Even England has recently softened its interpretation of the rights of landlord and tenant, showing particular concern for the plight of poorer tenants. 373

369. *Id.* See also Buckner v. Azulai, 251 Cal. App.2d 1013, 59 Cal. Rptr. 806 (1967).
372. The Distrit of Columbia Housing Regulations provide:
§ 2304. "No person shall rent or offer to rent any habitation, or furnishings thereof, unless such habitation and its furnishings are in a clean, safe, and sanitary condition, in repair, and free from rodents or vermin."
§ 2301. "No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations."
§ 2902.2. "There shall be deemed to be included in the terms of any lease or rental agreement covering a habitation an implied warranty that the owner will maintain the premises in compliance with these regulations."
373. The English Housing Act of 1957 provides that for housing rented for up to 80 pounds in the Administrative County of London and 52 pounds elsewhere "there shall,
A warranty of habitability may provide the following remedies:
- the cost of alterations to make the premises habitable or suitable for the uses intended
- damages for any harm resulting from breach of the warranty
- reformation of the lease. Where part of the premises is suitable, and part unsuitable, the reformed lease would exclude the unsuitable portion, and reduce the rent either (a) in the ratio that the unsuitable portion bears to the total footage, if all footage is of equal value or (b) by deducting the difference between the agreed rent and the actual value of the suitable portion. Where the tenant can still use all the premises, but its value is diminished by breach of the warranty, for example, by code violations, the reformed lease should reduce the rental to reflect the lesser value of the premises
- rescission and cancellation of the lease where the breach renders the entire premises totally unsuitable or uninhabitable.

6. Illegal Lease: Brown v. Southall Realty Company

Most jurisdictions have housing codes setting standards for habitability. Some expressly prohibit the occupation of housing that does not meet the specified standards. The District of Columbia Housing Regulations are specific in this regard:

§ 2304. No person shall rent or offer to rent any habitation, or furnishings thereof, unless such habitation and its furnishings are in a clean, safe, and sanitary condition, in repair, and free from rodents or vermin.

§ 2301. No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations.

Other jurisdictions have similar statements or have been urged to adopt them.3 4

374. See Bruno, supra note 150, at 307. The District of Columbia incorporated the results of the Brown decision in Jun. 1970 by adding to the Housing Regulations: "§ 2902.1.(a) Any letting of a habitation which, at the inception of the tenancy is unsafe or unsanitary by reason of violations of these Regulations with respect to the particular habitation let or the common space of the premises, whether or not such violations are the subject of a notice issued pursuant to these Regulations, of which the owner has knowledge or reasonably should have knowledge, shall render void the lease or rental agreement for such habitation."
The implications of such a provision for a violating landlord and a victimized tenant are indeed significant. While some courts have held that the nonhabitable condition of leased premises is not a defense to the landlord's suit for possession based on non-payment of rent, the future trend is clearly in the opposite direction.

Since housing codes have the force of law, where they prohibit occupancy of any dwelling in violation of the code and require the landlord to maintain the premises in good repair, what would be the appropriate sanction upon a landlord who rents housing in violation of the code?

The first case to void a lease contract on the basis of housing code violations existing at the time the lease was made was Adams v. Lancaster. In that lower court decision in the District of Columbia, a prospective tenant brought an action to recover an advance rent payment made under an oral contract to lease the premises. When the landlord refused to return the rent payment after the prospective tenant found more suitable accommodations, the tenant sued on the grounds that occupation by her large family would violate the certificate of occupancy and on grounds that significant code violations existed on the premises. The court found the lease invalid and awarded the plaintiff recovery of the amount paid.

In 1968 the District of Columbia Court of Appeals ruled that the rental of premises in violation of the housing code is illegal and confers no rights upon the landlord. The landmark case of Brown v. Southall Realty Co. deserves particular attention because, though it is only applicable in the District, certiorari was denied by the Supreme Court.

The tenant, Mrs. Lillie Brown, owed $230 in back rent. The landlord brought suit for possession. Prior to the signing of the lease agreement the landlord had been notified of certain housing code violations—an obstructed commode, a broken railing, and insufficient ceiling height in the basement. Up to the time of the trial these

\[\text{At the same time the amended regulations were made to include the next logical step so that violations making a habitation unsafe or unsanitary following the inception of the tenancy also render the lease void. § 2902.1(b). See App. B.}\]

375. Peters v. Kelly, 98 N.J. 441, 237 A.2d 635 (1968). “We recognize the social problem involved. Tenants in substandard housing should have some reasonably direct and workable means of compelling a landlord to correct conditions in and about the premises that threaten health and safety. However, this is not a judicial function.” Id., 237 A.2d 635, at 636.


conditions had not been corrected. An inspector for the Housing Division of the District of Columbia Department of Licenses and Inspections testified that the basement violations prohibited the use of the entire basement as a dwelling place. The owner of the premises, a Mr. Penn, testified that he had submitted a sworn statement to the Housing Division on December 8, 1964 "to the effect that the basement was unoccupied at that time and would continue to be kept vacant until the violations were corrected."\(^3\)\(^7\)\(^9\) Yet the realty company representative admitted that he told Mrs. Brown after the lease had been signed that the back room of the basement was habitable despite the housing code violations. Sometime after the tenant took possession the house was reinspected. Mrs. Brown was told of the violations and ordered to cease using the basement as sleeping quarters. At the trial she testified that she withheld the rent because of the landlord's failure to correct the violations and because she felt the house would be condemned.

The court found that the violations, known by the lessor to exist, were such as to make the dwelling unsafe and unsanitary.

The lease contract was, therefore, entered into in violation of the Housing Regulations requiring that they be safe and sanitary and that they be properly maintained.\(^3\)\(^8\)\(^0\)

The court further found that the Housing Regulations intended to regulate the rental of housing and the condition of the housing, that to uphold the lease would be contrary to the public policy considerations stated in the regulations. The general rule is that an illegal contract made in violation of a statutory provision is void. The lease was held to be void and to confer no rights upon the landlord, the wrongdoer.

In recognition of the importance of this decision to the multitudes of slum tenants, several journals have issued comments on its possible ramifications.\(^3\)\(^8\)\(^1\) To claim the Brown defense, violations must probably be of a magnitude to render the dwelling unsafe and unsanitary, although the precise standards are not spelled out in the Brown decision.\(^3\)\(^8\)\(^2\) The holding at first was thought to only apply where a

\(379.\) Id., 237 A.2d 834 at 836.

\(380.\) Id.


\(382.\) Picadio, id., 136-137.
determination of violation had been made by the housing authorities and where the landlord had knowledge of this determination. However, the same court in 1969 held that where substantial violations of the housing regulations existed and where the landlord knew of such violations the lease was void and unenforceable even though the landlord did not receive notice of the existence of the violations from the city. The court did specify that "a technical or minor violation would not render the lease void." With implications for the future, the jury made a finding that the landlord "actually knew or should have known of the existence" of the violations.

In the Brown case the tenant entered into the lease unaware of the code violations. The opinion cited a case where the defense of illegal contract was asserted despite full knowledge of illegality on the part of the defendant. It seems that a landlord cannot prevent assertion of the Brown defense by informing a prospective tenant of code violations.

Mrs. Brown vacated the basement apartment before the case was finally decided, but if she had remained what might be her obligations after the landlord corrected the deficiencies? "The parties to an illegal contract cannot validate it by a subsequent ratification ... so long as there has been no such change ... in the facts as would cause the bargain to be valid ..." But where the landlord does abate the violations, the tenant's remaining would seem to reactivate the tenant's duty to pay rent and the landlord's right to receive rent.

The Brown decision refers only to leases entered into in violation of the Housing Regulations. The question of the effect of defects arising subsequent to the lease commencement were not dealt with until the Javins decision.

Under the rule of law that the innocent party to an illegal contract can repudiate and recover any performance which he has rendered thereunder, it has been suggested that a tenant occupying premises under an illegal "Brown" lease should not only be free from rent liability but should actually be able to recover any rent paid since the beginning of the tenancy. This was actually the result in a March, 1970, District of Columbia case, Slade v. Davis. Judge Murphy of Slade v. Davis (D.C. Court of Gen. Sess. 15818-68, Mar. 1970). See also Jensen v. Salisbury (Conn. Cir. Ct., Manchester, No. CV-12-6806-1934, Sept. 9, 1968) cited in Poverty Law Reporter, 3321.
the D.C. Court of General Sessions granted summary judgment for a plaintiff asking a refund from the landlord of all rent paid on a unit illegally rented with code violations. The lease was entered into at a time when the premises were being maintained, knowingly, in violation of the Housing Regulations and was therefore void and unenforceable. Arguing that the wrongdoer ought not to be able to retain the fruits of an illegal bargain, the tenant's Neighborhood Legal Services attorney succeeded in securing a return of the total $690 rent paid in the six month tenancy.

Over eight million families live in substandard housing, most of them in cities with housing codes. The decisions concerning the illegality of leases entered into in violation of the housing code, to the extent they are followed, will affect the rights of many of these families. The further ramifications of the cases are still not altogether clear. On a motion for reconsideration of the Slade case, Judge Murphy discussed some of the effects. Where a tenant has successfully defended a suit for possession on a Brown defense, and has not voluntarily vacated, what would be the status of the tenant? Might he stay forever? Coupled with the Edwards decision a Brown defense might allow a tenant to stay by convincing a jury that any eviction was retaliatory. Judge Murphy's opinion, not binding on other judges, notes that "since most tenants are low-income and judgment-proof, the law effectively deprives the landlord not only of his property, but money he might be entitled to." Thus, he reasons that the tenant with a Brown defense has a peculiar status he calls a "Tenancy Sufferance by Operation of Law" whereby the landlord may seek possession after a 30 day notice and the tenant is free to raise appropriate defenses in the next action. The landlord may then raze his building, or if he seeks to re-rent the premises he must first correct all deficiencies and offer the last tenant first option to rent the restored premises. Moving costs were not ruled upon.

The usual practice in courts granting a stay of an eviction order pending appeal on a Brown defense has been to grant the stay on condition that the petitioner pay rent from the date of judgment into the court registry. Tenants who request leave to appeal in forma pauperis are allowed to do so only by complying with the order to make the rent prepayments. Such orders are clearly designed to protect landlords during the period of litigation and may work a hardship on indigent tenants. In line with a series of cases enhancing

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391. See Picadio, supra note 381, at 139-147.
392. See part II, C-7 below.
394. Id., at 4.
"the opportunities for indigents to participate meaningfully in the judicial process," the U.S. Court of Appeals for the District of Columbia decided on June 18, 1970, that tenants need not always make such rent prepayments.

... although the court may, in the exercise of its equitable jurisdiction, order that future rent be paid into the registry of the court as it becomes due during the pendency of the litigation, such prepayment is not favored and should be ordered only in limited circumstances, only on motion of the landlord, and only after notice and opportunity for a hearing on such a motion.

Certainly such a protective order represents a noticeable break with the ordinary processes of civil litigation, in which, as a general rule, the plaintiff has no advance assurance of the solvency of the defendant.

Most other jurisdictions have not yet followed the Brown doctrine, but it remains a strong and significant decision. A vigorous application of the combined Brown and Slade doctrines might serve as a potent weapon of justice for the poor and a powerful deterrent to landowners renting extremely substandard housing.

7. Retaliatory Eviction

Voiding a lease as illegal and thus abating the tenant's duty to pay rent will be of little practical value to the poor tenant if he can then be summarily evicted. Any repairs made by a landlord subsequent to notice of code violations will be of little practical use to the tenant who reported the violations if he can then be summarily evicted. Any benefits of collective tenant action will be negated (or precluded altogether) where tenants who attempt to organize their fellow tenants can be summarily evicted.

Raising the Brown defense, reporting Housing Code violations, tenant organizing, and infinite other legally permissible tenant acts may incur the displeasure of the landlord. The landlord may retaliate by evicting the tenants, terminating the lease at its expiration, raising the rents, shutting off utilities; only the landlord's imagination limits the range of retaliatory acts he can undertake. Where the tenants have withheld rent the landlord may distrain the tenants' property.

395. Lee v. Habib, 424 F.2d 891 (D.C. Cir. 1970), held that an indigent must be furnished a free transcript in civil cases raising a question the substantial resolution of which requires a transcript. Other decisions cited in Bell v. Tsintolas Realty Co., 430 F.2d 474, at 480.


397. Id., 479.

398. Judge Murphy's opinion in Slade v. Davis is not binding on any other judges, not even on other D.C. General Sessions Court judges.
utilize warrant of attorney and confession of judgment lease clauses to appear before a magistrate and obtain a money judgment or writ of possession. The term “retaliatory eviction” is new in the landlord-tenant law, but only because in the past such evictions were not challenged.¹⁹⁹

Recently some states have statutorily declared retaliatory evictions to be illegal. A 1964 Illinois law declares it to be

against the public policy of the state for a landlord to terminate or refuse to renew a lease or tenancy of property used as a residence on the ground that the tenant has complained to any government authority of a bona fide violation of any applicable building code, health ordinance, or similar regulation.⁴⁰⁶

New Jersey law creates a rebuttable presumption that an eviction within 90 days of making report of a violation is retaliatory.⁴⁰¹ Rhode Island creates an absolute defense to such an eviction action.⁴⁰² Massachusetts law provides that anyone threatening reprisals against a tenant for reporting any health or building code violations, whether reprisals be in the form of termination notice, or rent increase, or any substantial alteration in the terms of tenancy, will be liable for damages of not less than one month’s rent or more than three months’ rent, or actual damages, whichever is greater, plus costs.⁴⁰³ The Michigan law is also comprehensive, protecting against retaliatory rent increases as well as evictions for reporting code violations, attempting to secure or enforce rights under a lease or contract, or “for any other lawful act arising out of the tenancy”; protection is also provided against termination without cause in public housing.⁴⁰⁴ The District of Columbia enacted similar protections in June, 1970.⁴⁰⁵

The judicial landmark in tenant protection against retaliatory eviction is a 1968 District of Columbia decision, Edwards v. Habib.⁴⁰⁶ It relies not on constitutional but rather on public policy grounds in allowing the tenant to introduce evidence that the attempted eviction is in retaliation for reporting code violations.

Mrs. Edwards rented housing from Mr. Habib on a month-to-month basis. She complained to the Department of Licenses and

⁴⁰⁵. District of Columbia Housing Regulations, § 2910.
Inspections of sanitary code violations which her landlord had failed to remedy. The ensuing inspection uncovered more than 40 violations which the Department ordered the landlord to correct. Habib then gave Mrs. Edwards 30-day statutory notice to vacate and obtained a default judgment for possession. She was able to have the motion reopened, but lost at trial and again on appeal to the intermediate level appellate court.\textsuperscript{407} Pending appeal to the higher court she was granted a stay. On May 13, 1968, the U.S. Court of Appeals for the District of Columbia reversed.

Judge J. Skelly Wright's decision discusses the constitutional rights of a person to petition the government for redress of grievances, to engage in free speech, and to be free from governmental (judicial) action enforcing private contracts resulting in loss of constitutional rights.\textsuperscript{408} He cited an early injunction issued against a retaliatory rent increase on constitutional grounds.\textsuperscript{409}

The decision was based squarely on the grounds of public policy as expressed in the purpose of the housing code.

The housing and sanitary codes, especially in light of Congress' explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live. Effective implementation and enforcement of the codes obviously depend in part on private initiative in the reporting of violations.\textsuperscript{410}

Nearly a third of the cases handled by the Department of Licenses and Inspections for fiscal year 1966 arose from private complaints.

To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington. . . . we have the responsibility to consider the social context in which our decisions will have operational effect. In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing condi-

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\textsuperscript{407} The District of Columbia Court of Appeals stated the general rule that under D.C. law a landlord is free to evict a month-to-month tenant for any reason or for no reason at all. It acknowledged three lines of cases in which the landlord's right to terminate a tenancy has been limited. First, where a governmental body is the landlord, the constitutional requirement of due process prevents it from evicting arbitrarily. Second, emergency rent control legislation limits the rights of landlords to evict. Third, statutes prohibiting interference with voters prevent landlords from evicting tenants as retaliation for the tenants' registering to vote or actually voting.

\textsuperscript{408} Shelley v. Kraemer, 334 U.S. 1 (1948) holding racially restrictive covenants unenforceable.


\textsuperscript{410} Edwards v. Habib, 397 F.2d 687, at 700.
tions, we do not hesitate to declare that retaliatory evictions cannot be tolerated. There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction under the circumstances of this case would not only punish appellant for making a complaint which she had a constitutional right to make, a result which we would not impute to the will of Congress..., but also would stand as a warning to others that they dare not be so bold, a result which, from the authorization of the housing code, we think Congress affirmatively sought to avoid.411

Thus,

...while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted.412

Since the Edwards ruling, courts in Wisconsin413 and New York414 have relied upon it in similar fact situations to achieve the same result. In a Florida case the court acknowledged the Edwards decision but since no county code violation was alleged the court refused to take judicial notice of municipal ordinances.415

While the trend is for courts to hear evidence of retaliatory eviction in eviction actions, courts are inclined not to enjoin landlords from bringing eviction proceedings,416 particularly where the tenant will probably be able to show retaliation in his defense.

In Hosey v. Club Van Cortlandt, a federal court declared that state courts may not constitutionally evict a tenant in retaliation for the tenant's attempts to organize his co-tenants to complain to public officials about health and safety building code violations in the buildings.

A retaliatory eviction would be judicial enforcement of private discrimination; it would require the application of a rule of law that would penalize a person for the exercise of his constitutional rights... the 14th amendment prohibits a state court from evicting...

411. Id., at 700-701.
412. Id., at 699.
415. Wilkins v. Tebbetts, 216 So.2d 477 (Fla. 1968).
a tenant when the overriding reason the landlord is seeking the eviction is to retaliate against the tenant for an exercise of his constitutional rights.\textsuperscript{417}

Although \textit{Edwards v. Habib} has been hailed as a "breakthrough in tenant rights,"\textsuperscript{418} questions remain about its scope and effect. The effect of private law is unclear. The landlord might draw up a lease agreement in which the tenant waives any rights gained under this decision. The tenant may of course argue in court that he cannot waive the protection of the Housing Regulations, but this has not yet been tested.\textsuperscript{419}

How long might the tenant stay? Judge Wright foresaw this question and stated in the opinion

\begin{quote}
This is not, of course, to say that even if the tenant can prove a retaliatory purpose she is entitled to remain in possession in perpetuity.\textsuperscript{420}
\end{quote}

But the question is not settled—must the landlord have an affirmative reason to evict at a later date? And for how long should the protection exist? Clough suggests that there should be a legislative protection against eviction for a specified time after certification of fitness in the event of rent withholding or after the reporting of code violations. The mechanism might be a rebuttable presumption in favor of the tenant when the eviction is attempted within the set time.\textsuperscript{421}

Retaliatory rent increases are not so clearly prohibited, but where the retaliatory intent can be established the practice has been enjoined\textsuperscript{422} or declared disorderly.\textsuperscript{423}

Landlords may perceive tenant organizing as potentially costly and therefore threatening. Tenant threats of a legal rent strike unless the

\textsuperscript{417} Hosey v. Club Van Cortlandt, 299 F. Supp. 501, at 506.


\textsuperscript{419} The weight of authority is that a tenant may waive the right to process (Annot., 6 A.L.R. 3rd 177, at 194-99) except in California (Jordan v. Talbot, 55 Cal.2d 597, 361 P.2d 20, [1961]).

\textsuperscript{420} Edwards v. Habib, 397 F.2d 687 at 702.

\textsuperscript{421} Clough, \textit{supra} note 293, at 596. Such a rebuttable presumption already exists in Massachusetts, \textit{supra} note 403.


\textsuperscript{423} State of New Jersey v. Michael Field, 257 A.2d 127 (N.J. 1969), upheld the conviction of a landlord as disorderly for attempting to take reprisals against a tenant for reporting a housing code violation. The landlord had raised the tenant's rent from $117.50 per month to $175.00 per month. However, New Jersey has not yet ruled that such illegal punitive action can be raised as a defense in a summary eviction proceeding. See Bruno, \textit{supra} note 150, at 305.
landlord makes improvements in the housing conditions and corrects code violations have resulted in retaliatory evictions. In a case where a public housing tenant received an eviction notice after being elected president of a tenant’s organization, the violation of First Amendment rights and of due process rights was alleged. A District of Columbia case where the landlord sought to evict the principal organizers of a tenants’ council was distinguished from the Edwards case. The tenants had reported housing code violations, but the landlord alleged that his dominant reason for desiring the eviction was that the tenants’ council sought eventual acquisition of the property through economic pressures. The court held that the law does not protect from eviction organizers and active officers of a tenants’ union which has as one of its basic objectives the eventual acquisition of a landlord’s property by economic pressure; the eviction was allowed as a protection of the ownership interest.

Arguments against retaliatory actions have been advanced on other than constitutional or public policy grounds. The theory of “unclean hands” suggests that, in the case of housing code violations, the landlord is not entitled to rent, and the court should not assist him by removing tenants, where the property violates code standards. Particularly in the case of organizing, the giving of statutory notice to quit or raising the rent, although lawful in themselves, may be tortious because of their malicious motivation. Schoshinski suggests that where the landlord can be shown to have intentionally and maliciously caused damage to the tenant, the tenant might sue for his injuries including the increased cost of similar housing elsewhere, moving costs, and mental distress on a theory of prima facie tort. This finding would be strongly influenced by considerations of public policy, for the interests of society are closely identified with tenants attempting to better their living conditions and thus improve slum conditions.

424. In one such case tenants alleged that their First Amendment rights to freely associate with other citizens to redress grievances had been violated. Smith v. Fox (Cal. Mun. Ct., Los Angeles Co. No. 505172, 1968); II CEB Legal Services Gazette, No. 9, Jun. 1968, at 170 cited in Poverty Law Reporter, 3137.

425. The Supreme Court decided the case on other grounds and therefore did not consider the constitutional questions. Thorpe v. Housing Authority of the City of Durham, 386 U.S. 670 (1967).


428. Schoshinski, supra note 27, at 548.
TENANTS' RIGHTS MOVEMENT

It should be noted that theories of retaliatory eviction can be useful in preventing eviction or in restoring possession, but only where the tenant does not vacate voluntarily; a voluntary surrender of the premises pending appeal renders the case moot although an involuntary surrender does not.429

8. Toward Contract: Lemle and Javins

The American law of landlord and tenant has been slowly evolving from the rigid position that the leasing of a dwelling is a conveyance of a possessory interest in land establishing independent covenants between the parties. Constructive eviction is a fiction which acknowledges the duty of the landlord to provide quiet enjoyment of a habitable dwelling. In Brown v. Southall Realty Co.,430 the court held leases not to be treated any differently than other contracts. Housing codes have been held to imply into lease agreements warranties of habitability and liability for damages resulting from non-habitable conditions. Some courts early in the century even asserted the principle of dependent covenants in leases.431

But it remained for a modern court of superior jurisdiction to hold outright that a lease of real estate is a contract, complete with an implied warranty of habitability and fitness for use intended. On December 17, 1969, and on May 7, 1970, the Supreme Court of Hawaii and the United States Court of Appeals for the District of Columbia, respectively, so decided.432 The District decision is based


431. In Brady v. Brady, 140 Md. 403, 117 A. 882 (1922) the court declared, "...whether such a covenant [to repair, etc.] on the part of the landlord is to be considered as independent or dependent upon the lessee's covenant to pay rent depends upon the intention of the parties. And if they are interdependent [which they were held to be]...then the non-performance by the landlord is a defense to the claim for rent, while it is otherwise if the stipulations are independent. This is merely an application of the general principles applicable to all contracts or instruments containing exculpatory stipulation by both parties." The court quoted in part from 1 Tiffany, Landlord and Tenant (1910), 1236. Cited in Bennett, supra note 132, at 69. See also United Cigar Stores v. Hollister, 185 Minn. 534, 242 N.W. 3 (1932).

on implications of the housing code; the Hawaii decision is more broad-based.

In Lemle v. Breeden, the lessee of a dwelling sued to recover the deposit and rent payment totalling $1,190 while the lessor counterclaimed for damages for breach of the rental agreement. Lemle rented a furnished, six-bedroom, six-bath house in Diamond Head, Honolulu, for immediate occupancy at $800 per month after a half-hour inspection. After the daylight inspection, during which Lemle saw no evidence of rodent infestation, a lease for several months was executed. The next day the Lemle family occupied the premises; that night it became clear that there were rats within the main house and on the corrugated iron roof. For the first three nights the family was sufficiently apprehensive of the rats to sleep together in the living room, vacating their individual bedrooms. After being informed of the rodents, the realty agent secured extermination services. The plaintiff also set traps to supplement those of the exterminator, but the effort was unsuccessful. Three days after first occupying the premises, the Lemles vacated and sued for return of their money on grounds of a breach of implied warranty of habitability and fitness.

In a cogent and insightful opinion, the court considered the historical origins of landlord-tenant theories.

At common law when land was leased to a tenant, the law of property regarded the lease as equivalent to a sale of the premises for a term. The lessee acquired an estate in land and became both owner and occupier for that term subject to the ancient doctrine of caveat emptor. Since rules of property law solidified before the development of mutually dependent covenants in contract law, theoretically once an estate was leased, there were no further unexecuted acts to be performed by the landlord and there could be no failure of consideration. 6 Williston, Contracts § 890 (3d ed. 1962). Predictably enough, this concept of the lessee's interest has led to many troublesome rules of law which have endured far beyond their historical justifications. . .

The rule of caveat emptor in lease transactions at one time may have had some basis in social practice as well as in historical doctrine. At common law leases were customarily lengthy documents embodying the full expectations of the parties. There was generally equal knowledge of the condition of the land by both landlord and tenant. The land itself would often yield the rents and the buildings were constructed simply, without modern conveniences like wiring or plumbing. Yet in an urban society where the vast majority of tenants do not reap the rent directly from the land but bargain primarily for the right to enjoy the premises for living purposes, often signing standardized leases as in this case, common law concep-
tions of a lease are no longer viable. As one authority in the field of Landlord-Tenant law has said:

Obviously, the ordinary lease is in part a bilateral contract, and it is so regarded by the civil law. There is no reason why it could not be recognized for what it is, both a conveyance and a contract. But the doctrine that a lease is a conveyance and the rules based thereon were established before the development of the concept of mutual dependency in contracts, and the Anglo-American courts have been slow to apply the doctrine to the contractual provisions of leases. Lesar, ["Landlord and Tenant Reform," 35 N.Y.U.L. Rev. 1279, at 1281 (1960)]. 433

Exceptions to the rule of no implied warranty of habitability in cases of a furnished dwelling merely recognize the injustice of the caveat emptor rule in the case of immediate occupancy. Because the premises involved in this case were furnished and rented for immediate occupancy, the court could have relied upon that narrow doctrine to achieve the same result. Instead it chose to declare the deficiencies of the "furnished house" rule and attack the "admitted judicial fiction" of constructive eviction as well.

Some courts have creatively allowed for alternatives to the abandonment requirement by allowing for a declaration of constructive eviction in equity without forcing abandonment. Charles E. Burt, Inc. v. Seven Grand Corporation, 340 Mass. 124, 163 N.E.2d 4 (1959). Other courts have found partial constructive eviction where alternative housing was scarce, thus allowing the tenant to remain in at least part of the premises. See Barash v. Penn. Terminal Real Estate Corp., 31 A.D.2d 342, 298 N.Y.S.2d 153 (1969); Johnson v. Pemberton, 197 Misc. 739, 97 N.Y.S.2d 153 (1950); Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (Mun. Ct. 1946). In spite of such imaginative remedies, it appears to us that to search for gaps and exceptions in a legal doctrine such as constructive eviction which exists only because of the somnolence of the common law and the courts is to perpetuate further judicial fictions when preferable alternatives exist. 434

The court therefore declared that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness.

The application of an implied warranty of habitability in leases gives recognition to the changes in leasing transactions today. It affirms the fact that a lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship. From that contractual relationship an implied warranty of

434. Id., at 475.
habitability and fitness for the purposes intended is a just and necessary implication. It is a doctrine which has its counterparts in the law of sales and torts and one which when candidly countenanced is impelled by the nature of the transaction and contemporary housing realities. Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house, such as in this case, there is an implied warranty of habitability and fitness for the use intended.

By adopting the view that a lease is essentially a contractual relationship with an implied warranty of habitability and fitness, a more consistent and responsive set of remedies are available for a tenant. They are the basic contract remedies of damages, reformation, and rescission. These remedies would give the tenant a wide range of alternatives in seeking to resolve his alleged grievance.

The importance of this decision to the field of landlord-tenant law cannot be overemphasized. The supreme court of a state has expressly declared leases to be contracts, with all contractual remedies available. If followed in other states, it would significantly alter the legal relationship of landlord and tenant, even though the tight housing market remains.

Whether it would indeed be followed in other states is questionable. Private property rights are very deeply entrenched in American law. Even the liberal U.S. Court of Appeals for the District of Columbia reached the result of an implied warranty of habitability on somewhat narrower grounds.

The issue in Javins v. First National Realty Corporation was whether housing code violations which arise during the term of a lease have any effect upon the tenant’s obligation to pay rent. In the three cases consolidated under Javins, three tenants leased separate apartments in a large slum complex, often reputed to be among the worst in Washington. The landlord filed actions on April 8, 1966 for possession based on non-payment of rent for April. The tenants admitted non-payment but alleged numerous violations of the housing code, offering to prove 1500 such violations at the complex. The lower court rejected the offer on the grounds that the violations had arisen since the term of the lease; this result was confirmed on appeal to the District of Columbia Court of Appeals.

Like the Hawaii court, the U.S. Court of Appeals for the District of Columbia felt the need to discuss the feudal nature of landlord-tenant law.

435. Id., at 474-475. (Emphasis added.) In Lund v. MacArthur, 462 P.2d 482 (Hawaii, 1969), the same court held that the Lemle doctrine of implied warranty of habitability applies in unfurnished as well as furnished dwellings.

Since, in traditional analysis, a lease was the conveyance of an interest in land, courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases. However, as the Supreme Court has noted in another context, "the body of private property law, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed. As we have said before, "The continued vitality of the common law depends upon its ability to reflect contemporary community values and ethics."

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance. The court acknowledged that to reach results more in accord with the legitimate expectations of the parties and community standards, courts generally have been introducing more modern standards of contract law in interpreting leases, but have been doing so in a piecemeal, confusing way. The opinion analyzed the extent of implied warranties in the sales of goods and services, noting the continued expansion of product liability and the expansion of that trend into real estate. New homes have been held to be included under such a warranty. Hawaii and New Jersey had declared some form of implied warranty of quality in leased real estate.

... the old no-repair rule cannot co-exist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability. In the

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District of Columbia, the standards of this warranty are set out in the Housing Regulations.

In our judgment the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition. This conclusion is compelled by three separate considerations. First, we believe that the old rule was based on certain factual assumptions which are no longer true; on its own terms, it can no longer be justified. Second, we believe that the consumer protection cases discussed above require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest. Third, we think that the nature of today's urban housing market also dictates abandonment of the old rule.\textsuperscript{439}

The common law was designed for rural situations and exceptions have been allowed for immediate occupancy and similar situations. The exception ought to be expanded to apply to all urban leases. Tenants in multiple dwellings are not interested in the land but only in the living space and services. Most are not capable of specialized repair and will not remain long enough to enjoy the fruits of repair. The burden of repair ought to be on the landlord; it is he who is in a better financial position to make repairs and it is he who has the really substantial financial interest in maintaining the quality of the dwelling. The tenant may legitimately expect that the dwelling will be fit for habitation during the period of his lease. Further the tenant has little bargaining power with which to compel habitability.\textsuperscript{440}

Common law rules imposing the obligation to repair upon the lessee were never really intended to apply to residential urban leases, the court reasoned.

The court traced through the implications of its decisions in \textit{Whetzel v. Jess Fisher Management Co.} (holding that the housing code altered the common law rule and imposed a duty to repair upon the landlord, and created a right of action in a tenant injured by the landlord's breach of duty) and its finding in \textit{Brown v. Southall Realty Co.} (that the basic validity of every housing contract depends


\textsuperscript{440} "The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum." \textit{Id.} at 1079-1080.
upon substantial compliance with the housing code at the beginning of the lease term). Logically the Brown doctrine does not cease after the lease has been signed; rather the landlord has a continuing obligation to the tenant to maintain the premises.

...the housing code must be read into housing contracts... Any private agreement to shift the duties would be illegal and unenforceable.441

...leases of urban dwellings should be interpreted and constructed like any other contract.442

The court therefore held that

a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwellings covered by those Regulations.443

The Supreme Court denied certiorari in the Javins case on November 23, 1970.444

9. Contracts of Adhesion

The tremendous imbalance in bargaining power between urban landlords and urban tenants, especially poor tenants, has been emphasized. Numerous contributory causes include a low supply of housing relative to demand, a tight mortgage market facing would-be homeowners, racial discrimination, high costs of construction, and standardized form leases. Prospective tenants as a class, are in a "take it or leave it" situation.

Other classes in a position lacking bargaining power have been protected from exploitation. Courts have not permitted public utilities to relieve themselves by contract of liability for negligence to their customers.445 Employers have not been permitted to exculpate themselves from liability toward an employee.446 In the area of real estate leases, however, court decisions have not been consistent. Clauses where a tenant waives statutory 30-day notice to quit have been upheld.447 On the other hand, clauses negating a statutory

441. Id., at 1081-1082.
442. Id., at 1075.
443. Id., at 1072-1073. Two months later the District of Columbia legislated this same warranty. See App. B.
duty imposed upon a landlord have been voided as against public policy.\textsuperscript{448} The \textit{Javins} decision specifically stated that any lease provision negating the implied warranty of habitability would be illegal and unenforceable.\textsuperscript{449} A non-lease liability waiver required to obtain use of an apartment swimming pool has been held to be invalid as against public policy.\textsuperscript{450} It could well be argued that the usual harsh provisions of a standard form lease used almost monopolistically in a metropolitan area constitute a contract of adhesion. Ehrenzweig defines contracts of adhesion as agreements in which one party's participation consists in his mere "adherence," unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise.\textsuperscript{451}

Contract provisions have been deemed to be "unconscionable" when they have been inconspicuously placed on a standard form, when they would not ordinarily be expected, and when the provision is particularly onerous.\textsuperscript{452} Where there is a particular inequality of bargaining power, unconscionable provisions have been voided as accepted by the party with less bargaining power only by adhesion. This was the case of a disclaimer of implied warranty of merchantability in an automobile sale; the auto was considered a necessary item and the producers of all American cars used the same disclaimer of warranty.\textsuperscript{453}

The theory of adhesion certainly ought to be applied to unconscionable provisions in contracts for the most basic necessity, shelter. All the elements of adhesion contracts and characteristic circumstances surrounding their execution exist in the case of a lease by an indigent tenant. Most landlords use a standardized form of lease or at least standardized language. The landlord is the draftsman and the terms strongly favor him. The tenant has no choice but to adhere by signing the lease or to reject the entire transaction and remain homeless.\textsuperscript{454}

\textsuperscript{448} 3175 Holding Corp. v. Schmidt (N.Y. City Mun. Ct. 1934) 150 Misc. 853.
\textsuperscript{451} A. A. Ahrenzweig, \textit{Adhesion Contracts in the Conflict of Laws}, 53 Col. L. Rev. 1072, (1953).
\textsuperscript{453} Henningessen v. Bloomfield Motors, Inc., \textit{id}.
\textsuperscript{454} Schoshinski, \textit{supra} note 27, at 555-556.
Waiver of process clauses, confession of judgment clauses, and waiver of liability clauses could be attacked as elements in a contract of adhesion and struck down as unconscionable. The average tenant does not expect such onerous provisions; often they are in tiny print on a long form. The poor tenant of limited education frequently does not read the contract or, if he does, does not understand the meaning of such terms as "notice to quit," "confession of judgment," or "waiver of liability." Even if the tenant does understand, there is practically nothing he can do to find housing without accepting such onerous terms.

It would be a very blind court, indeed, which did not recognize that an indigent tenant has no bargaining power. This is especially true when there is a shortage of rental units. In the absence of a housing shortage, the contract may still be adhesive if most of the landlords in the area use the same lease.

A great many urban leases should be declared contracts of adhesion and their unconscionable provisions voided.

D. Where the Government Is The Landlord: Public Housing

Public housing tenants have special problems and a frustrating lack of ability to solve them. By definition they have the least bargaining power of any renters in the housing market; they must be defined as failures in order to enter public housing. If they cannot then maintain whatever standards, often arbitrary, that exist in public housing, they will be evicted. And evicted public housing tenants, exceedingly poor, often of minority race, and labeled as undesirable by even an institution designed for failures, have nowhere else to go. Many have large families or are receiving public assistance, thus making them unwelcome in the private housing market.

Public housing was designed, in the Housing Act of 1937, to accomplish social goals of providing decent shelter for the poor. Unhappily, some projects have developed into publicly owned slums. Tenants cite incompetent and unsympathetic management; authorities point to rising costs of labor, services, and materials and excessive misuse of the units. Originally local housing authorities received subsidies for construction and were supposed to recoup operating costs from rents. This policy has simply not worked.

455. This argument was made unsuccessfully in Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. App. 1969).
Tenant remedies for poor maintenance are limited to organizing for collective action in order to arouse public concern, and affirmative action suits. It has been suggested that tenants can initiate review of Housing Assistance Administration inaction on grounds that they are third party beneficiaries injured by the substandard nature of their housing, precisely the evil that public housing was designed to prevent.\(^4\) In jurisdictions where an implied warranty of habitability has been declared, it would certainly apply to public housing as well. Also a tenant organization can help provide the community spirit to prevent tenant-caused deterioration.

Many problems arise from the day-to-day management of public housing. Federally-issued guidelines are few and unclear.\(^5\) Tenants resent what they feel are arbitrary and unfair practices: assessments for repairs when no tenant culpability has been established, repair charges added to rent which subject a tenant who cannot pay to eviction, frequent invasions of privacy, security deposits, fines or penalties charged against tenants for infractions of the rules,\(^6\) attempts to control tenants’ sexual morality, personal hygiene, living habits, and family size.\(^7\) Guidelines on management from the Department of Housing and Urban Development are restricted to income limits, rents, eligibility, bookkeeping standards and recently lease provisions. The chief responsibility falls on local project managers. It has been contended that tenants are entitled to a judicial determination of liability for damages, and can attack fines as punitive and contrary to the legislative purpose.\(^8\) But the practices remain.

As tenant organizations have formed, they have attempted to share in policy-making and enforcement through the creation of tenant review boards or advisory groups. Only 20 of 2,975 housing authorities include tenants, but in some cases tenants actually control the public housing commission.\(^9\)

In August, 1970, HUD announced a new policy of encouraging tenant participation in housing authority governing boards. Assistant Secretary Lawrence M. Cox declared

\(^4\) Id., at 410-411.
\(^5\) Id., at 456.
\(^6\) This has been challenged on the grounds that tenants have no opportunities to confront witnesses or defend themselves and that their rights to due process are thus violated. Lockman v. New York City Housing Authority (D.C. N.Y.S.D., Civ. No. 4414/67) cited in Poverty Law Reporter, 3068.
\(^7\) Tenants also resent evictions for being over-income, requirements to report income increases, and the resultant rent increases. Schoshinski suggests yearly income reporting only.
\(^8\) Schoshinski, Public Landlords and Tenants, supra note 457, at 460-461.
\(^9\) See part I, § B,-c, above.
The rapidly mounting desire by tenants of low-rent public housing to make their voices heard, to share in the decision-making process, and to achieve a feeling of belonging, and the sharp discrepancy between the background, interests, and socio-economic characteristics of present local housing authority commission members and those of the tenants... argue strongly for local communities to give serious and immediate consideration to providing for tenant representation.

The new policy, hailed by the National Tenants Organization as a "big step forward" is only a recommendation to local authorities, and calls for appointment of tenants "acceptable to the tenants," rather than selection of representatives by the tenants themselves.

Leases in public housing units are frequently as unconscionable and as adhesive as private housing leases. The tenant has no voice in determining the lease provisions, if indeed, with his usually limited education, he can understand them.

He approaches the transaction with hat-in-hand and, feeling that he is a fortunate recipient of governmental largess, is not disposed to question the terms of his tenancy as dictated by the Authority. There is no opportunity for him to negotiate the terms of his lease. Many Authorities neither inform the tenant of, nor make available to him, the incorporated rules and regulations which comprise a substantial portion of his agreement.

Leases often contain harsh provisions, such as waivers of liability. In one case, a court declared it contrary to public policy as expressed by the legislature to allow a public housing authority to exempt itself from liability to its tenants for its own negligence.

Finally, pressured by increased activism of public housing tenants, HUD "ordered deleted from public housing leases certain provisions which have the effect of undermining the legal rights of tenants."

465. Id.
466. In February, 1970, HUD announced a $30,000 grant to a private real estate management firm in Washington, D.C. to "undertake a demonstration of tenant participation in the management and operation of two low-rent public housing projects in the District of Columbia." HUD News, HUD-No. 70-111, Feb. 24, 1970. It will train tenants for management positions and involve a 15 to 25 member executive board at each housing project involved at a committee level on all aspects of project maintenance from security to rent collection.
467. Schoshinski, Public Landlords and Tenants, supra note 457, at 462-463.
In a policy directive dated August 10, 1970, to local housing authorities HUD prohibited the following types of lease clauses: confession of judgment, distraint for rent or other charges, exculpatory clauses, tenant's waiver of legal notice prior to actions for eviction or money judgments, waiver of legal proceedings, waiver of jury trial, waiver of right to appeal judicial error in legal proceedings, and tenant agreements to bear legal costs regardless of the case outcome.  

The most conspicuous source of tenant irritation, and the most litigated issue of public housing tenancies, concerns the right of tenancy itself. What standards of eligibility, for admission and for eviction, may the housing authority use?

Many Local Authorities have established grounds for eviction and denial of admission which are without statutory bases, are inconsistent with the overall objectives of our public housing and anti-poverty programs and are often unconstitutional.

The only standard that Congress has set is low income. Other categories are granted priorities, but most determination is left to local authorities. Waiting lists are long and tenants seldom know whether they are excluded or why. A local housing authority’s policy of denying admission to unwed mothers with illegitimate children was declared unlawful by a federal trial court on the ground that it was inconsistent with the basic purposes of the low rent housing program. Many similar rules are never challenged in court.

Prospective tenants denied admission rarely litigate; tenants being evicted are only slightly more likely to do so. Most public housing leases call for only one month’s notice to quit and no statement of reason for termination. Such a clause has been held not to apply in public housing. In Vinson v. Greenburgh Housing Authority, a New York court held, 3 to 2, that public housing tenants cannot be evicted without a reason. The public law defines the relationship between the housing authority and the tenant and controls the interpretation of the lease. Low-rental housing is a governmental function and is subject to the requirements of due process; thus the housing authority may not, although acting under the terms of the lease, arbitrarily deprive the tenant of continued occupancy. The court found the housing to be permanent and the tenancy dependent only

470. Id.
471. Schoshinski, Public Landlords and Tenants, supra note 457, at 418.
on income requirements and observance of reasonable regulations. And the reason must be a reasonable one. A New York court quashed a termination notice because "to evict tenants from a public housing project on the sole ground that their adult son is a drug addict exceeds any reasonable requirement for the peaceful occupancy of the project and for the preservation of property." Because of widespread complaints of arbitrary eviction practices, and because of the beginnings of litigation on the matter, the Department of Housing and Urban Development on February 7, 1967, issued a mandatory circular requiring that no tenant be evicted without the local authority's giving a reason for the eviction and without the tenant's having an opportunity, in a private conference or other appropriate setting, to explain. The circular does not spell out appropriate grounds for eviction. Despite this circular, HUD does recommend that authorities adopt the month-to-month lease to facilitate necessary evictions. Also the circular does not apply where, as in the Vinson case, no federal funds are involved. The United States Supreme Court considered the question of eviction from public housing in the case of Thorpe v. Housing Authority of the City of Durham. In that case a tenant had been given an eviction notice, without any reason stated, on the day after her election as president of the tenants' organization. The local authority obtained judgment of ejection, which was upheld by North Carolina county and state courts. The U. S. Supreme Court vacated the judgment below without considering the constitutional issues of First and Fourteenth Amendment rights regarding rights of association in order to petition the government for redress of grievances or due process rights. Because the 1967 HUD directive had been issued prior to the Supreme Court argument (although after the original eviction notice), the Court remanded the case in light of that directive. The North Carolina Supreme Court, upon remand, affirmed the evic-

477. Holmes v. News York City Housing Authority, 398 F.2d 262 at 263 (2d Cir. 1968) states that only half of the 152 projects in New York City, which house close to half a million people, receive federal money.
tion, and the tenant brought certiorari. On January 13, 1969, the Supreme Court held that a tenant of a federally assisted housing project could not be evicted prior to notification of reasons for the eviction and without opportunity to reply to those reasons, where such procedure was provided for in the Department of Housing and Urban Development circular. This holding applies to eviction proceedings begun before or after the issuance of the circular, so long as the tenant was still residing in the project after the circular was issued. The court did not consider the constitutional claim that tenant organizing is protected free speech, or the claim that it would violate due process for the housing authority to evict a tenant arbitrarily.

The procedural safeguards granted public welfare recipients prior to the termination of their benefits in Goldberg v. Kelly have been extended to public housing tenants by the Courts of Appeals of the Second and Fourth Circuits. These are:

(1) timely and adequate notice detailing the reasons for a proposed termination, (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses, (3) the right of a tenant to be represented by counsel provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests, and (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth, and (5) an impartial decision maker.

Protection from arbitrary eviction from public housing can also result from state law. Massachusetts law prohibits eviction of public tenants without cause and without reasons given to the tenant in writing; except in non-payment of rent cases, the tenant may request a hearing within fifteen days prior to the termination. Michigan law prohibits a tenancy from being terminated except for just cause and states what those causes may be.

Some housing authorities do provide for hearings before evictions, but often they do not provide for due process at those hearings. The

487. Id.
New York City procedure, for example, considered “liberal,” admits hearsay and does not allow the tenant to confront adverse witnesses.\(^4\)\(^9\)\(^0\) One of the demands of public housing tenants’ organizations has been the revision of eviction procedures.\(^4\)\(^9\)\(^1\)

When tenants are subjected to unreasonable and irrelevant standards for admission and eviction, the public housing system perverts its reason for being . . . . Unfair management practices and unconscionable lease terms are cruel deceptions of those who often are without any effective bargaining power. The inability of the poor to utilize the tools of the marketplace is exacerbated when the power of the state lies behind an inequitable contract . . . . These injustices must be corrected.\(^4\)\(^9\)\(^2\)

**PART III: FUTURE DIRECTIONS OF THE TENANTS’ RIGHTS MOVEMENT**

Aside from some non-profit low income dwelling construction and management ventures and a few altruistic private landlords, an owner of rental property is motivated to maximize profits restrained only by the law of supply and demand, the militancy of present and prospective tenants, and municipal, state and federal laws and regulations. Unorganized urban tenants in the market for low income urban housing are by definition impoverished and by implication and in fact undereducated, alienated, and of minority race or nationality.\(^4\)\(^9\)\(^3\)

There can be no question that the average urban tenant is getting a “raw deal” on his living quarters. That this situation is always the fault of an exploitative landlord is not at all clear. The available published figures on the ratio of income to investment in rental property are not conclusive, but many commentators and several isolated examples indicate that the return on slum property is very

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\(^4\)\(^9\)\(^0\). For a detailed comment on the New York City procedure, see Schoshinski, *Public Landlords and Tenants*, supra note 457, at 449-452.

\(^4\)\(^9\)\(^1\). The St. Louis authority, following the long strike in 1969, adopted rules governing the grounds for eviction. Tenants are granted the right to a hearing at which they can be represented by counsel. See *Poverty Law Reporter*, 3146-3151. For further discussion of the problems facing public housing tenants and problems relating to the lack of safeguards against unjust evictions, see Schoshinski, *id.*; *Public Landlords and Private Tenants: The Eviction of 'Undesirables' From Public Housing Projects*, 77 Yale L. J. 988 (Apr. 1968); *Eviction Procedures in Public Housing*, 73 Dick. L. Rev. 307 (1969); and John Clay Smith, Jr., *Due Process in Public Housing* in Howard University School of Law, The District of Columbia Housing Research Committee Report, 22-36.

\(^4\)\(^9\)\(^2\). Schoshinski, *id.*, at 474.

\(^4\)\(^9\)\(^3\). Garrity, *supra* note 26, at 697.
good indeed.\textsuperscript{494} One critic has stated that a 30 percent annual return on the landlord's original investment is not unusual.\textsuperscript{495} Another economic study of slum ownership found the average rate of return in 48 properties to be 19.8 percent, with a quarter of those surveyed showing a return of greater than 25 percent.\textsuperscript{496} Eminent domain proceedings have brought an average ratio of acquisition price to seller's investment capital of 2.89.\textsuperscript{497} However, other writers suggest a lower rate of return.\textsuperscript{498} Many landlords are themselves poor and ignorant of management practices. The stereotypical old widow landlady who ekes her own living from renting the upstairs flat does indeed exist. Some slum houses, former family homes and leftovers of European ethnic group migration to the suburbs, are still owned by the past residents. While it is fairly clear that owner-occupied buildings are better maintained than absentee-owned buildings,\textsuperscript{499} it does not follow that all absentee owners are rich slumlords milking their buildings and exploiting their tenants.\textsuperscript{500}

A. Tenant Action

The fact remains that many tenants, poor and not so poor, perceive themselves as being exploited. Any prospective tenant who inquires after prices for rental housing in an urban area or reads the proffered lease cannot but feel his lack of bargaining power.

At the same time consumers across the country are beginning to take an interest in changing their weak positions. A buyer of, say, a breakfast cereal (1) has little opportunity to affect the giant manufacturer and (2) can easily switch to buying another brand or another product. A renter of housing might more easily pressure his landlord, has a more basic interest in his place of residence, and has less choice of consumption because he has to live somewhere and is usually restricted by employment and family ties. Thus he is more likely to attempt action in regard to his apartment than to his breakfast cereal. This is not to say that changing the terms of his leasing is easy—far from it. It is only possible.

\textsuperscript{494} Fossum, \textit{supra} note 45, at 320. See Seligman, \textit{The Enduring Slums}, in The Exploding Metropolis (1968), 120; \textit{Slum-Makers are Shadowmen}, 14 J. Housing 232 (1957).

\textsuperscript{495} Schorr, Slums and Social Insecurity 94 (1963).


\textsuperscript{497} Id.

\textsuperscript{498} George Sternlieb, the Tenement Landlord (1969).

\textsuperscript{499} Id., at 173-76, 228.

\textsuperscript{500} For an analysis of ownership practices see id. and Cotton, \textit{supra} note 97, at 1379-1383.
Poor tenants lack organizational skills and legal resources; middle class tenants often lack the will to protest. But protest is on the increase across the country. One observer wrote in 1965 that tenant rent strikes "are likely to continue to appear throughout the country as tactics of protest within the civil rights movement." Rent strikes have been occurring at a geometrically increasing pace. They are precisely a tactic of protest; they can sometimes be economically pressuring but for the most part rent strikes are political tools designed to build organizations which can then command their own power or designed to "change the political consciousness of people, or to gain short run goals in a potentially sympathetic political environment."

In most jurisdictions the success of a rent strike will depend primarily upon its "nuisance value" and its ability to create public interest in the needs of the slum areas. The latter effect of a rent strike can be of considerable importance. A good deal of publicity depicting the squalor and deterioration of the slums usually accompanies a rent strike and may result in increased pressure on the landlords from the code enforcement agencies and the legislature.

Mild public interest is not enough to create change. Rent strikers want to see repairs and dramatic improvements, whereas the wider public could be satisfied with the appearance of reform.

Even a few courts are becoming sensitive to the political value of collective action by tenants. In Dorfmann v. Boozer the court denied an injunction which would have compelled payment of a strike escrow fund to the landlord, declaring:

The struggle here between the rent strikers and the landlord involves a variety of closely balanced legal and tactical approaches; the preliminary injunction quickly and unwarrantedly destroyed that balance.

Collective tenant action is on the upsurge. The publicity of small successes encourages other less radical or less frustrated tenants to organize. Striking and bargaining can be effective in middle or upper income housing where (1) the owner believes he will be hurt by adverse publicity, (2) the owner has the resources to make repairs, (3) deterioration is slight and the building is economically worth

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501. Fossum, supra note 45, at 331.
502. Lipsky, supra note 47, at 15.
503. Fossum, supra note 45, at 332.
504. Lipsky, supra note 47, at 15.
maintaining, and (4) the tenants have the will and resources to follow through on their actions.

The more cohesive and spirited the tenant group is, the more likely it is to achieve its goals; the radicalized poor, organized students, and affluent liberals are likely to display these qualities.

Collective tenant action can also effect some improvements for poor tenants, but only where the owner feels the building is economically worth saving. Where repairs needed are moderate and the owner has the requisite resources, a union can often force the landlord to upgrade the property. The resultant cost increase might then be absorbed through tenant "sweat-rent" methods or tenant assistance in reducing the cost of operation. Tenants can help to reduce costs of vandalism, frequent moves, rent skips, and children's wear and tear. "The existence of grievance machinery may break the vicious circle in which the tenant vandalizes his apartment in retaliation against the landlord's refusal to make repairs, and the landlord makes no repairs because the tenant vandalizes his apartment."507

But tenant unions cannot render economically profitable a truly decayed building. By organizing for better services and pressuring for stricter housing code enforcement, they may in fact remove marginal slum housing from the market.

To speak of redressing inequality of bargaining power by tenants' councils or unions and by tenant-initiated remedies sanctioned by legislation or precedent seems really to beg the question both in terms of realistic remedies for the overwhelming proportion of slum tenants unorganized or unorganizable and unwilling or unable to stand the strain of litigation. True bargaining equality results from economic power and in this case such power presupposes available alternatives. These alternatives are either substitute housing which is not available and will not be for the foreseeable future or additional income to expand one's access to other available housing. . . . The only effective and immediate alternative is government intervention to reform landlord-tenant concepts to conform to contemporary urban needs.508

B. Governmental Response

To create a fair and just legal framework for the rental of housing, there must be a fundamental revision in the antiquated landlord-tenant law. The vast majority of legislatures and courts have taken no

506. Some landlords allow a tenant a month's free rent if he cleans his own apartment when he moves in. Several tenant groups have contributed their labor to repair efforts so as not to have rent increases.
507. Cotton, supra note 97, at 1375.
508. Garrity, supra note 26, at 721.
steps in this direction at all. Even among the legal writers this need is not universally perceived. 509

Legislative bodies rarely respond to questions of justice or injustice alone; they respond to political pressure. It has been the political pressure of tenant activity that has brought about such legislative changes of the 1960's as rent withholding, repair-and-deduct, and receivership legislation. More politicians are coming to recognize tenants, in their roles as tenants, as a political interest group. Legislative intervention is needed on a broad scale to rectify conditions of occupancy—responsibility for essential utilities and heating, summary dispossession, security deposits, appeal bonds. Recodification of the terms of tenancy are meaningless without strict provisions for non-waivability. Means toward revising the terms of rental are complete recodification of the law such as proposed in the Model Residential Landlord-Tenant Code or adoption of a model lease with negotiable minor provisions to be executed by all landlords and residential tenants. 510

More drastically, all privately owned rental housing might be designated as a public utility, subject to regulation by municipal or state commissions. 511 Slum properties might be declared contraband and confiscated. 512 Most importantly, if the current system of private ownership of rental housing remains, leases must be recognized as contracts with implied warranties of fitness and habitability; contractual remedies must be available.

Legislatures must also recognize that legal remedies are usually after-the-fact defenses. Massive amounts of money must be poured into ameliorating the low income housing market situation. It must be done with care and thought, so as not to replicate the impersonal atrocity of high rise public housing. Scattered site family housing, advanced housing technology, and income maintenance programs are necessary.

Enforcement agencies must do their jobs vigorously. Physical injury or even death can come from violations of housing codes. Mental distress to those who are forced to live in squalor is immeasurably great. And moral decay results from showing the community

509. "... there has been no general reform legislation in landlord and tenant law; there has been no need for it. Nor does there seem to be any great need at present..." Hiram H. Lesar, Landlord and Tenant Reform, 35 N.Y.U.L. Rev. 1279, at 1286 (1960).
510. "[The model lease] solution borrows from Retail Installment Sales Acts which have been uniformly adopted and minutely regulate an area as subject to abuse as low-income housing." Garrity, supra note 26, at 717.
511. See Lawrence K. Frank in J. of Housing (1963), No. 5, at 271, cited in Withholding Rent: New Weapon Added to Arsenal for War on Slumlords, supra note 47, at 72.
that some laws, laws to protect the poor, are not enforced. Licensing of rental dwellings must be strictly pursued, occupancy codes and health regulations enforced. Enforcement means inspection, ^{13}^{13}^\text{reinspection, especially strong prosecution, judicial sentencing of individual violators,}^_{14}^\text{and judicial action to correct violations in buildings.} \text{In rem} \text{proceedings should allow for cumulative civil penalties, mandatory injunctions to repair, and receivership proceedings. Where buildings are structurally unsound, landlords should be required to pay tenants' moving costs and municipal demolition costs. Primary reliance on tenant remedies is an acknowledgment of governmental failure. The municipality must not yield its responsibilities to the uncertainty of private initiative. }

The judicial branch of government has been the slowest to respond to the urban housing crisis. Courts for the most part have failed to correct the injustice of applying principles formulated in the sixteenth and seventeenth centuries to modern urban housing rental. Certainly there is a need for attorneys to press for the revision of the antiquated landlord-tenant law. Given the mood of increasing tenant militancy, it is safe to say there will be no lack of opportunity for the growing cadre of interested lawyers. But it is the judges who must dig through the morass of precedent to truly provide equal justice under law. The weight of traditional landlord-tenant law has thus far combined with the political implications of radical change to perpetuate a harsh and oppressive order. The injustice of allowing landlords to summarily evict tenants without reason while forbidding tenants to cite rats and crumbling walls as defenses cannot be tolerated. This same legal system has created "reforms" such as constructive eviction, cumbersome and difficult to prove. Judge J. Skelly Wright, in an article "The Courts Have Failed the Poor," wrote

^{513}\text{"If it would be too difficult and expensive to devise, staff, and implement a program to regularize the initial and subsequent periodic inspection for code compliance of the perhaps millions of dwelling units in a large city, then the urban crisis has become the urban disaster."} Garrity, \textit{supra} note 26, at 714.

^{514}\text{Gribetz and Grad draw the traditional distinction in the criminal law between} \textit{malum in se}, the "wrong in and of itself" like murder or robbery, \textit{and malum prohibitum}, wrong only because it has been prohibited by law, such as the unintentional failure to observe a traffic sign. The former category is characterized generally by a guilty mind whereas the latter involves a neglect to comply with some positive requirement of the law. \textit{See} Gribetz and Grad, \textit{supra} note 119, at 1279.

They argue forcefully for the abolition of criminal penalties for housing code violations and the substitution of civil penalties. It seems to this author, though, that both might well be used. For housing code violations are not only crimes against property, but really more crimes against people, against the people whose children are bitten by rats, whose lives are depressed by the squalor of the conditions in which they eat, sleep, and live.

^{515}\text{See id.}
The fact that [Edwards v. Habib] is a landmark case shows that the courts have preyed upon the poor. Until now, the courts in every jurisdiction have not merely refused to intercede to halt retaliatory evictions, but have actually placed their imprimaturs on such evictions by enforcing them.\(^5\)

Suggestions have been made to by-pass the courts through some forms of arbitration,\(^5\) but equitable arbitration can occur only under situations of relatively equal power. So long as there exists both an acute shortage of decent, low-cost housing and a legal system heavily weighted in favor of the owner, arbitration cannot but reinforce the current inequities. Reform in the courts is absolutely vital.

Though our most pressing social, moral, and political imperative is to liberate the urban poor from their degradation, the courts continue to apply ancient legal doctrines which merely compound the plight of the poverty-stricken.\(^5\)

By providing orderly, effective, and accessible means of redress, the government may be able to avert more militant expressions of protest. As John F. Kennedy stated it, “Those who make peaceful revolution impossible will make violent revolution inevitable.”

C. Alternatives to a Landlord-Controlled, Private Rental Housing Market

For property is inseparable from power, and rented property is inseparable from power over other people’s lives...\(^5\)

1. The Tenant’s Vested Interest

Anglo-American law has always defended the rights of the propertied. The landowner may do with his property as he pleases, subject to the minimal controls deemed absolutely necessary for the public good. Thus, zoning controls are new to the history of cities. Landlords may reject any prospective tenant, without reason, except

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\(^5\) 519. Audrey Harvey, *Tenants in Danger* at 7 (1964).
that in some areas he may not lawfully discriminate by race. Once a tenant has settled himself, despite faithful adherence to the lease provisions, he can easily be evicted at the end of the term. The only exceptions to the landlord's freedom to evict are those imposed by rent controls or public ownership and restraints against retaliation for exercising voting rights or for reporting law violations.

This latitude for landlords is at variance with protections afforded consumers in other areas of vital concern. As job and status replace older forms of property as a source of livelihood, the courts have increasingly protected the valuable interest of the individual in his profession, public employment, college education, and social security benefits. Franchises and licenses are recognized as important forms of property.

Conflicts are inherent in the private control of other people's living quarters; the property rights of the owner and the personal rights of the renter require governmental protection so as to achieve a just balance. As private property has grown, so have abuses resulting from its use.

... most property does not consist in things but in power over other men ... the real basis of the attacks on property is the evils of the irresponsible power it bestows.

"The time has come for us to remember what the framers of the Constitution knew so well—that 'a power over a man's subsistence amounts to a power over his will.'"

The non-availability of suitable alternative low income housing and the need for an individual's control over his own home requires a suspension or modification, indeed an abolition, of the old rule sanctioning unchecked landlord discretion to terminate tenancies. The urban landlord is in a profit making business. It follows logically that he should be required to do business with all customers absent a showing of strong objectionableness and that he should have no aversion to allowing the continuation of occupancy by orderly and non-destructive tenants who pay their rent. If a new rule creating a tenant vested interest in continuing occupancy is adopted, landlords

must be prevented from subterfuge via arbitrary and excessive rent increases. Regulations controlling unreasonable spiraling of rentals may be necessary for the duration of the low-income housing crisis.\textsuperscript{5} \textsuperscript{2} \textsuperscript{6}

Further, tenants should be protected against evictions caused by one unfortunate event beyond their control: evictions where public assistance or social security benefits are delayed, or where a tenant has been temporarily laid off and is unable to secure assistance immediately, ought to be prohibited. In a summary dispossession for non-payment, perhaps a valid defense would be non-payment caused by some intervening factor precluding payment because of absence of funds.\textsuperscript{5} \textsuperscript{2} \textsuperscript{7} Continuation in occupancy conditioned on repayments of rent due by either the tenant himself or a welfare agency might be an appropriate result.

A less stringent proposal modifying the absolute rule of discretion to evict might require a landlord who terminates a tenancy without adequate reason to find suitable alternative housing and bear the costs of relocating the dispossessed tenant.\textsuperscript{5} \textsuperscript{2} \textsuperscript{8} This burden ought to fall on the landlord where he has either refused to renew the tenancy without cause or where the tenant is displaced because the landlord’s negligence has resulted in a loss of the building’s certificate of occupancy.

Certainly such proposals will meet resistance from realtors. Every attempt to impose obligations as a condition of the tenure of property has met resistance. Opposition in the name of private property rights has been forceful against factory legislation, against housing reform, against interference with the adulteration of goods, against compulsory sanitation of private homes.\textsuperscript{5} \textsuperscript{2} \textsuperscript{9}

But there must be room within our legislative, executive, and judicial branches of government to remould economic institutions and practices to meet changing economic needs and social demands.

2. Massive Government Subsidy . . . or Chaos

The failure of the private unsubsidized market to provide new housing for the poor, the marked increase of rents after rehabilitation, the drop in real estate values in the face of serious code enforcement, all suggest what has by now become widely recognized: Standard housing for the poor, adequately maintained,

\textsuperscript{526} Garrity, \textit{supra} note 26, at 711.
\textsuperscript{527} \textit{Id.}, at 720.
\textsuperscript{528} \textit{Id.}
Vigorous code enforcement is likely only to contract the supply of low-income housing. Large scale owners, caught simultaneously by a tight money market and greater enforcement of housing codes are finding it advisable to liquidate their holdings. As society sets out to clamp down on the high-risk, high-profit slumlord, alternatives must be provided.

The need for an adequate amount of shelter in the face of low vacancy rates and high maintenance and service costs requires the continual repair and use of millions of buildings that have become wholly uneconomical. When the owners of such buildings can no longer be persuaded or compelled to repair and maintain because it no longer pays them to do so, the efficacy of all sanctions comes to an end. The municipalities themselves will, inevitably, be compelled by justified tenant demands to assume the burden of maintaining slum housing.

... cities will become the landlords of a great mass of uneconomical, deteriorated buildings. Maintenance and repair of such buildings will be justified not on economic grounds but solely because the dwellings are urgently needed to house a segment of the population.531

This public ownership-by-default pattern of slum ownership is occurring in major urban centers to the degree that there is severe economic pressure on landlords. It has especially been precipitated by step-ups in code enforcement and by massive tenant action.

Piven and Cloward have even advocated massive rent strikes as a purposeful tactic to precipitate a crisis of such magnitude that the municipality will be forced to take action. This could be accomplished, they say, by urging tenants to simply withhold their rent, using the money for their own needs, not putting it in escrow. The resulting chaos would be enormous. Many landlords would have to abandon their buildings, leaving thousands of tenants within a single neighborhood without services or even minimal maintenance. "As health hazards multiplied and the breakdown of landlord-tenant relations threatened to spread, the clamor would mount for governmental action to solve the crisis."532 A truly large scale rent strike with tenants keeping (spending) their own money would

530. Sax and Hiestand, supra note 269, at 869.  
531. Gribetz and Grad, supra note 119, at 1290.  
532. Piven and Cloward, supra note 47, at 3.
TENANTS' RIGHTS MOVEMENT

preclude the chaos of mass evictions through "raising the specter of large-scale violence."

It is unlikely that thousands, or even hundreds, of families would be put out on the streets, especially on the streets of ghettos whose growing and turbulent populations politicians can no longer afford to antagonize flagrantly. Furthermore, mass evictions would be viewed by many in the wider public as an even greater disorder than the breakdown of slum property relations. . . . public officials would have to use their powers to forestall mass evictions or risk a major threat to political stability.533

In a truly disruptive massive rent strike, literally thousands of buildings within a city would be abandoned, eventually passing into public ownership through foreclosures, tax delinquencies, and tenant demands for services. (Just a modest upsurge in code enforcement in New York City resulted in well over a thousand slum buildings coming into city ownership.)

No city government wants to be the owner of extensive slum residences—it is expensive, and politically infeasible as both tenants and other taxpayers would find fault with the city's operation. Piven and Cloward suggest that municipalities might well move to sell or lease slum buildings to large scale private corporations that would receive federal subsidies or tax benefits. They speculate that federally subsidized corporate rehabilitation will result in better housing but will subject tenants to "the hegemony of an alliance of national corporations and federal bureaucracies" on which the leverage of the vote will have little impact. However,

under a system of national corporate ownership, . . . tenants would confront large-scale landlords with ample resources to be conceded at the bargaining table. Tenant organization would then be comparable to the organization of workers in the factory system or in that sector of agriculture controlled by large corporations. Thus rent strikes could be mobilized to demand partial control of management policies and lower rents. . . .534

Whatever the particulars of future market mechanisms for supplying housing to the poor, it is clear that if there is to be decent low-income housing the government must subsidize it. Direct government ownership, subsidized non-profit corporations, below-market interest rates, programs for cooperative ownership,

533. Id.
534. Id., at 4.
rehabilitation efforts, income maintenance, whatever—all must be funded by federal, state, or local governments. The government "must" because otherwise it will face civil disruption. Now is a period when the rules of normative conduct are weakened and unrest is prevalent. The rhetoric of black militancy has freed many of the poor from subservience to established institutions; the rhetoric of student power and of the anti-war movement have similarly freed many others. What the more radical tenants achieve through organizing, the more conservative will want. Thus far only a tiny fraction of the dissatisfied tenants have organized; future collective tenant action is potentially explosive.
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APPENDIX A

A Model Negotiated Lease

AGREEMENT BETWEEN LANDLORD AND TENANT ACTION COUNCIL AT "OLD TOWN GARDEN APARTMENTS."*

RECITALS

It is the general purpose of this Agreement to provide a means of communication between the Landlord and the Union, representing members who are Tenants in building owned, managed, controlled or operated by the Landlord, to assure a continuous harmonious relationship and a method of resolving differences that will result in an improved and more stable tenancy and in a better community;

The Landlord recognizes the necessity for enlisting the cooperation of his Tenants and recognizes their interest in the preservation and maintenance of the building owned, managed, controlled or operated by it and desires to retain the Tenants and to have them renew their leases and maintain their tenancy;

The Union and the Landlord recognize that only through a regular and organized means of communication will the parties be able to present and remedy their grievances and further their mutual interests in improving the conditions of tenancy and their community;

NOW THEREFORE in consideration of the promises and mutual agreements hereinafter stated, IT IS AGREED AS FOLLOWS:

ARTICLE I

"BUILDING" AND "TENANT" DEFINED

Section 1. When the word "building" is used in this Agreement, it shall mean the structure or a part thereof owned or controlled by the Landlord or his agents and known presently as the "Old Town Garden Apartments," located in the block bounded by Blackhawk Street, Hudson Avenue, Evergreen Avenue and Sedgwick Street in the City of Chicago, State of Illinois.

Section 2. The term "tenant" shall mean any person occupying the building or a part thereof for housing purposes only.

ARTICLE II

RECOGNITION

Section 1. The Landlord recognizes the Union as the sole collective bargaining agent of its tenants in all matters relating to the conditions of the building as set out in the provisions of this Agreement.

Section 2. The Landlord agrees that he will in no way discriminate against the Union or its members and that he will take no action in the form of reprisal for a tenant's activity on behalf of or in support of the Union or pursuant to a clause in this Agreement. Any Tenant whose lease has expired prior to this Agreement, and who is presently living on a month to month tenancy, shall be given the opportunity to execute the lease herein attached. No tenant shall be prevented from executing such lease because of participation in the Union or in Union sponsored activities. Such activity by a Tenant pursuant to this Agreement, shall constitute a defense to any legal action to evict him because of said activity.

Section 3. The Landlord agrees that he will not, for ninety (90) days, take any action to evict or to regain possession of the premises for a Tenant's non-payment of rent from ____________ to the date of execution of this Agreement, provided that this Section shall not be construed to apply to any Tenant who is in arrears for a period prior to ____________, nor to any rentals falling due after ____________, it being understood that current rents falling due as of the said date are immediately due and payable by the Tenants.

ARTICLE III
UNION SECURITY

Section 1. It shall be a condition of tenancy that all Tenants of the Landlord, covered by this Agreement, who are not members of the Union in good standing on the date of the execution of this agreement, shall on or before the thirtieth (30th) day following the date of execution of this agreement become and remain members in good standing in the Union.

Section 2. The Landlord agrees to deduct from the rent of each Tenant covered by this agreement, the Tenant's dues for membership in the Union which dues shall not exceed one dollar per month.

Section 3. The Landlord agrees that by the fifteenth (15th) of each month, he will by registered mail deliver to the Union the membership dues from all tenants.

ARTICLE IV
BUILDING CONDITIONS

Section 1. Within ninety (90) days from the effective date of this Agreement, the Landlord will complete all repairs necessary in order to comply with all ordinances, codes, statutes, regulations, and requirements of the City of Chicago, the State of Illinois, and all City or State agencies or departments having some jurisdiction over the building, and will thereafter maintain such building in such condition. At the end of said ninety (90) day period, the Union shall be entitled to a full explanation by the Landlord, including inspection of relevant repairs, income and accounting records for the said building.

Section 2. The Landlord will undertake the following immediately:
(a) Institute and maintain an extermination service for the building.
(b) Paint all hallways and apartments with interior nonlead base paint where necessary.
(c) Institute and maintain daily supervisory, janitorial or caretaker services for the building, so that the premises may be clear of accumulations of refuse or debris and maintain a condition of order, cleanliness and safety, including the emptying and disposal of all accumulations in the dumbwaiters and the basement at least twice each and every day, including Saturdays, Sundays and holidays.
(d) Maintain garbage cans with sufficient lids to provide adequate garbage storage and removal.
(e) Install and maintain a closed circuit TV system in all public ways, including but not limited to all hallways, entranceways, and laundry rooms.
(f) Completely rewire the entire building so that the electrical installations meet the requirements of the electrical code of the housing code of the City of Chicago for buildings constructed in 1966, and meet the requirements of all other ordinances, codes, statutes, regulations, requirements of the City of Chicago, State of Illinois and all other City and State agencies.
(g) Install and maintain an intercom system so that each apartment is connected with the entranceway and which permits two-way conversation between each apartment and the entranceway.
(h) Institute and maintain a guard service twenty-four (24) hours a day, seven (7) days a week, provided that between the hours of 6:00 p.m. and 2:00 a.m. seven days per week, a minimum of 6 guards shall be on duty.

(i) Install and maintain locks on all doors leading from the entranceway into the hallway, and on the doors of all common areas including the rooftops, laundry rooms, and all basement exits.

(j) Replace any and all locks (1) whenever a key to any lock has been lost or stolen, or (2) whenever any tenant vacates his apartment, or (3) when otherwise necessary.

(k) Provide landscaping, snow removal service and adequate lights in all common grounds and areas.

(l) Initiate a thorough tuck pointing program which will bring the building in compliance with all ordinances, codes, statutes and regulations and requirements of the City of Chicago, State of Illinois and all City or State agencies or departments having some jurisdiction over the building.

(m) Provide and install screens and window shades which are in good condition for all windows in each apartment in the building.

(n) Maintain full time supervisor for the playground and support a regular recreation program.

(o) Replace or repair broken or rotten tile which has been placed in any apartment by either former management or tenant's.

Section 3. The Landlord shall furnish to each Tenant running hot and cold water at all times for all tubs and sinks during the terms of this Agreement and shall maintain in all units a minimum temperature of sixty-eight (68) degrees between the hours of 7:00 AM and 11:00 PM if the weather and temperature require it, but never less than the times and quantities required by applicable laws, codes and ordinances, provided further that the Landlord shall not disrupt electrical service for any reason whatsoever.

Section 4. The Landlord agrees to completely redecorate the interior of all apartments in each building as needed, but at least every two (2) years and before each new tenancy.

Section 5. The Landlord agrees to redecorate all hallways, stairwells, and all common appurtenances as needed.

ARTICLE V

TENANT'S INJURIES

Section 1. In any action against the Landlord by a Tenant, it shall not be a defense that the Tenant takes the premises as he finds them.

Section 2. The Landlord agrees that he is responsible for his or his agent's negligent maintenance of the premises, whether active or passive, and agrees to pay Tenant or his guest for any damage sustained.

The Landlord shall notify the Tenant or his guest or invitee of his right to sue in a court of competent jurisdiction for such damage in lieu of payment tendered by Landlord, and that such right is relinquished upon acceptance of said payment.

Section 3. If the Landlord offers to compensate Tenant for injuries, the Landlord shall:

(a) Make such offer in writing that includes the terms of the agreement that he proposes to make to compensate the party for the injury;

(b) Give a copy of such writing to the injured party;

(c) Send, by certified mail, a copy of such writing to the Union; and

(d) Refrain from consummating such agreement until after the lapse of thirty (30) days from the date that the Union received the copy.
No agreement involving compensation for the injuries suffered, or a release or settlement with the Landlord for such injuries shall be effective unless:

(a) The agreement is in writing and signed by the Tenant and the injured party; and

(b) The agreement embodies all the same terms as that sent by the Landlord to the Union, as provided above in Section 3(d) of this Article; and

(c) The Agreement was consummated after the lapse of thirty (30) days from the date it was received by the Union, unless the Landlord has received from the Union prior to that time a written authorization stating that the Union agrees that the Landlord and Tenant and injured party may consummate the agreement whenever they desire.

ARTICLE VI
LEASE

Section 1. It is hereby agreed between the parties that each Tenant and the Landlord, as a condition precedent to occupancy of an apartment in the building shall sign the lease attached hereto, which is incorporated by reference thereto as a part of this agreement, which shall be the sole lease agreement entered into between the Landlord and the Tenant; provided that no tenant who presently holds an unexpired written lease shall be required to substitute the new lease; provided further that each such tenant may elect at any time to substitute the new lease for his present lease. Upon the expiration of any lease the only lease to be entered into by the parties hereto shall be the lease attached.

Section 2. Unless otherwise agreed to in writing by the Union, no lease shall be effective for a period longer than two (2) years.

Section 3. No agreement or lease between the Landlord and Tenant shall be effective to the extent that it contradicts the provisions of this Agreement, and no provision of this lease shall be construed in contradiction to this Agreement.

Section 4. Neither the lease nor any of its provisions nor the rules and regulations appended thereto shall be abrogated, changed, or deleted by any party without the prior written consent of the Union and the Landlord.

ARTICLE VII
RENTS

Section 1. The following rent schedule shall be instituted immediately and shall be posted in all entranceways. A copy of the rent schedule shall be given to each Tenant

<table>
<thead>
<tr>
<th>Floor</th>
<th>Rooms</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>First floor</td>
<td>Four (4) rooms</td>
<td>$100.00 per month</td>
</tr>
<tr>
<td>First floor</td>
<td>Five (5) rooms</td>
<td>$110.00 per month</td>
</tr>
<tr>
<td>First floor</td>
<td>Six (6) rooms</td>
<td>$120.00 per month</td>
</tr>
<tr>
<td>Second floor</td>
<td>Four (4) rooms</td>
<td>$95.00 per month</td>
</tr>
<tr>
<td>Second floor</td>
<td>Five (5) rooms</td>
<td>$105.00 per month</td>
</tr>
<tr>
<td>Second floor</td>
<td>Six (6) rooms</td>
<td>$115.00 per month</td>
</tr>
<tr>
<td>Third floor</td>
<td>Four (4) rooms</td>
<td>$90.00 per month</td>
</tr>
<tr>
<td>Third floor</td>
<td>Five (5) rooms</td>
<td>$100.00 per month</td>
</tr>
<tr>
<td>Third floor</td>
<td>Six (6) rooms</td>
<td>$110.00 per month</td>
</tr>
<tr>
<td>Fourth floor</td>
<td>Four (4) rooms</td>
<td>$85.00 per month</td>
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<tr>
<td>Fourth floor</td>
<td>Five (5) rooms</td>
<td>$95.00 per month</td>
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<tr>
<td>Fourth floor</td>
<td>Six (6) rooms</td>
<td>$105.00 per month</td>
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<td>Fifth floor</td>
<td>Four (4) rooms</td>
<td>$80.00 per month</td>
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<td>Fifth floor</td>
<td>Five (5) rooms</td>
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<td>Fifth floor</td>
<td>Six (6) rooms</td>
<td>$100.00 per month</td>
</tr>
<tr>
<td>First floor</td>
<td>Three (3) rooms</td>
<td>$90.00 per month</td>
</tr>
<tr>
<td>Second floor</td>
<td>Three (3) rooms</td>
<td>$85.00 per month</td>
</tr>
</tbody>
</table>

Garage Rent $10.00 per month
Section 2. The Landlord shall not increase rentals on unfurnished apartments in the building covered by this Agreement. Furthermore, at the end of six months from the date of the execution of this Agreement either the Landlord or the Union may reopen discussions and negotiations over the question of the upward or downward revision of rentals in the building covered by this Agreement.

Section 3. The Landlord shall require from each Tenant a security deposit equal to but not exceeding one month's rent. The deposit will be returned by the Landlord to the Tenant at the termination of the lease together with interest on said deposit at the rate of four and one half (41/2) percent per annum.

Section 4. If the Tenant is a regular recipient of funds from any public agency or any private welfare agency, and said funds have been withheld for any reason whatsoever, or the Tenant is engaged in a duly authorized work stoppage called by a labor organization, the Landlord agrees that he will take no action against the Tenant for a period of ninety (90) days from the date upon which rent is or becomes due. Thereafter, the Landlord may elect to upon the Tenant demanding payment of rent within five (5) days, and upon termination of the period, Tenant's right to possession of the demised premises shall end and the Landlord may repossess said premises by an action of forcible entry and detainer, or other appropriate action.

Section 5. The Landlord agrees to provide apartments which are clean and ready for occupancy according to the terms of the lease provided that if said conditions are not met the Tenant may reduce his rent by one-fifteenth (1/15th) for every day late.

Section 6. The Landlord will furnish the Union and maintain current a list of all tenants of the building, the number of occupants per apartment and the rent per apartment.

ARTICLE VIII

BUILDING INSPECTIONS

Section 1. The Union shall have the right to examine all premises immediately prior to or after the beginning of a new occupancy by a Tenant.

Section 2. In order to facilitate the Union's fulfillment of its desire to aid the Landlord by making such examinations and keeping independent records, the Landlord shall inform the Union of the name and present address of all Tenants in the building and the date upon which occupancy commenced.

Section 3. Upon occupancy by a Tenant or immediately after the repairs outlined in Article III, Sections 1, 2 and 4, have been completed, whichever comes sooner, the Landlord warrants and guarantees that the premises are suitable for human habitation, and will so remain for the duration of this Agreement.

Section 4. The Landlord shall notify the Union before making any structural changes within any apartment in the building, or before installing any equipment, appliances or fixtures within any apartment in the building which are furnished wholly or in part by the Landlord. The Union shall have a right to examine any apartment where such changes or installations are planned, provided that such examination shall take place only after reasonable notice to the Tenant of such apartment. Nothing in this article shall relieve the Landlord of any obligation in any other section of this Agreement.

ARTICLE IX

LANDLORD DEFAULT AND TENANT REMEDY

Section 1. Upon failure of the Landlord to comply with any provision of this Agreement, the Tenants may, upon approval of the Union, deposit their rents due thereafter with a Third Party.

Section 2. The Third Party provided for herein shall be
whichever the Union shall choose.

Section 3. The Third Party shall retain the deposited rental funds until such time as the Union and the Landlord inform him in writing that the grievances leading to the default have been resolved.

Section 4. Until the grievances are resolved, the Third Party shall not release the deposited rental funds except as follows: (1) Upon written approval by the Union, the Third Party shall pay the Landlord only those funds which are necessary to pay repair bills where such bills were incurred to cure the default; (2) upon written request of the Union, in the case of repairs which are necessary to safeguard the health or safety of Tenants, the Third Party shall pay to the Union sufficient funds for such repairs.

Section 5. In addition to the rights set forth in other provisions of this Article, the Union shall have the right to sue on behalf of the Tenants in order to compel the Landlord to repair building.

ARTICLE X
NOTICES

Notice to be given under the terms of this Agreement shall be written in triplicate and served in person or mailed by certified or registered mail to each party at his last known address.

ARTICLE XI
ADJUSTMENT OF GRIEVANCES

Section 1. The purpose of this section is to provide a means for the Landlord and the Union to file grievances concerning the obligations of the Landlord and of the Tenants and the Union under this Agreement and the attached lease.

Section 2. The term "grievance" as used in this Agreement shall mean any and all disputes involving the interpretation, application or the subject matter of this Agreement including any dispute concerning the rental policies of the Landlord or any action taken by the Landlord which may affect the welfare of the Tenants.

Section 3. (a). Any Tenant who has a grievance shall first present that grievance to the Landlord by himself or through his Union Steward.

(b) In the event there is no settlement as a result of the first step of the grievance procedure, the Union will state the grievance procedure, the Union will state the grievance in writing and present it to the Landlord.

(c) A meeting shall take place between the Landlord and the Grievance Committee on the first Monday of every month beginning on the fifteenth (15th) day of August, 1966, at the offices of the Landlord, where all outstanding grievances that have been processed as provided in section 3 (b) above shall be discussed and attempts made to resolve them.

(d) Where the grievance concerns a condition immediately threatening to a Tenant's health and/or safety, as determined by the Union or the Landlord, an emergency meeting shall be held immediately between the Union representative and the Landlord and every effort made to resolve the grievance immediately.

(e) In the event there is no settlement as a result of the grievance procedure as set forth above, either party may appeal to a Fact Finding Panel. Said Panel shall be composed of four (4) members, two (2) of each appointed by the Landlord and Union respectively, who shall appoint a fifth (5th) member to serve as Chairman without compensation. In the event that said four (4) Panel members are unable
within two (2) weeks to agree upon a Chairman, the Chairman will be
appealed, and shall make recommendations for their resolution.

Section 4. The Landlord may present his grievance to the Union at any grievance meeting between the Landlord and the Union, and these grievances will be discussed in accordance with the provisions of this grievance procedure.

Section 5. The Landlord shall recognize a Grievance Committee selected by the Union for the purpose of meeting with the Landlord for the discussion and correction of grievances.

ARTICLE XIII
UNION RESPONSIBILITIES
The Union will make every reasonable effort to:
(a) Advise tenants of the proper procedures to be followed for garbage disposal, package deliveries, etc.
(b) Advise tenants and attempt to obtain correction of violations of the Rules and Regulations dealing with such matters as noise, obstruction or misuse of the common area.
(c) Advise tenants and attempt to obtain compliance with provisions of this agreement dealing with needed upkeep or improper use of apartments.
(d) Explore methods of enhancing the relationship of Old Town Garden Apartments with its surrounding community.
(e) Promote communication and cooperation between Landlord and Tenants.
(f) Sponsor meetings and programs to encourage Tenant's feeling of pride in responsibility toward the Old Town Garden Apartments as a place to live.
(g) Instruct Tenants on how to express their grievances through the procedure outlined in this Agreement, so that Tenants will feel that they have a part in making the decisions which affect their living conditions.

ARTICLE XIV
CUMULATIVE REMEDIES
The rights and remedies hereby created and those created under the lease attached hereto are cumulative, and the use of one remedy shall not be taken to exclude or waive the right to the use of another.

ARTICLE XV
SEVERABILITY
If any provision of this agreement is found invalid by any Court of Law, it shall not in any way affect any other part of this Agreement.

ARTICLE XVI
TERMINATION
This Agreement shall remain in full force and effective until ____________________________ 19.

Signed this ____________________________ of ____________________________ , 1966,
UNION

LANDLORD
APPENDIX B:
Model Statutory Provisions

Article 290
and
Article 260, section 2602

Housing Regulations of the
District of Columbia
amended June, 1970

RULES AND REGULATIONS

HOUSING REGULATIONS OF THE DISTRICT OF COLUMBIA—Amended
Order of the Commissioner No. 70-220 June 12, 1970

ORDERED:
The District of Columbia City Council having passed a Regulation on second reading and
the Commissioner having signed such Regulation on June 12, 1970, the Housing Regulations
of the DISTRICT OF Columbia, as amended, are hereby further amended as follows:
The Housing Regulations of the District of Columbia are hereby amended to provide an
Article 290 as follows:

Section 2901. Statement of Policy Regarding Civil Enforcement of Regulations.

2901.1 The maintenance of leased or rental habitations in violation of these regulations,
where such violations constitute a danger to the health, welfare, or safety of the occupants,
is hereby declared to be a public nuisance.

2901.2 It is further declared that the abatement of such public nuisances by criminal
prosecution or by compulsory repair, condemnation and demolition alone has been and
continues to be inadequate.

2901.3 It is further declared that such public nuisances additionally cause specific,
immediate, irreparable and continuing harm to the occupants of these habitations.

2901.4 It is further declared that such public nuisances damage the quality of life and
the mental development and well-being of the occupants, as well as their physical health and
personal property, and thus such harm cannot be fully compensated for by an action for
damages, rescission or equitable set-off for the reduction in rental value of the premises.

2901.5. It is the intention of this Section to declare expressly a public policy in favor of
speedy abatement of such public nuisances, if necessary, by preliminary and permanent
injunction issued by Courts of Competent jurisdiction.

Section 2902. Failure to Comply with Regulations

2902.1. (a) Any letting of a habitation which, at the inception of the tenancy, is unsafe
or unsanitary by reason of violations of these Regulations with respect to the particular
habitation let or the common space of the premises, whether or not such violations are the
subject of a notice issued pursuant to these Regulations, of which the owner has knowledge
or reasonably should have knowledge, shall render void the lease or rental agreement for
such habitation.

(b) Any letting of a habitation which, following the inception of the tenancy, becomes
unsafe or unsanitary by reason of violations of these regulations with respect to the particular habitation let or the common space of the premises, whether or not such violations are the subject of a notice issued pursuant to these Regulations, which violations have not resulted from the intentional act or negligence of the tenant or his invitees, and which violations are not corrected within the time allowed therefor under a notice issued pursuant to these Regulations, or, if such notice has not been issued, within a reasonable time after the owner has knowledge or reasonably should have knowledge of such violations, shall render void the lease or rental agreement for such habitation.

2902.2. There shall be deemed to be included in the terms of any lease or rental agreement covering a habitation an implied warranty that the owner will maintain the premises in compliance with these Regulations.

Section 2903. Deficiency Notice to Tenants

(a) After an inspection of a habitation by the Department of Economic Development, the Department shall provide the tenant of the habitation a copy of any notification with respect to such habitation issued to the owner pursuant to these Regulations. Such notification shall state plainly and conspicuously that it is only for the tenant’s information or if the notice places duties on the tenant, it shall so state.

(b) In any instance where a violation of these Regulations directly involves more than one habitation, the Department of Economic Development shall post a copy of any notification issued to the owner pursuant to these Regulations for a reasonable time in one or more locations within the building or buildings in which the deficiency exists. Such locations shall be reasonably selected to give notification to all tenants affected. No person shall alter, modify, destroy or otherwise tamper with or mutilate such a posted notification. Upon request to the Department, any tenant directly affected by such violation shall be sent a copy of such posted notification.

(c) This Section shall not be subject to any notice requirement of these Regulations.

Section 2904. Informing Tenants of Remedies and Responsibilities.

2904.1. The Department of Economic Development, within 90 days from the effective date of this Article, shall make available copies of this Article.

2904.2. One hundred and twenty (120) days after the enactment of this Article, the owner shall at the commencement of any tenancy provide the tenant with a copy of this Article and shall also provide such copies to existing tenants.

Section 2905. Signed Copies of Agreements and Applications.

In every lease or rental of a habitation entered into after the effective date of this Article, the owner shall provide the tenant upon execution or within seven days thereof with an exact, legible, completed copy of any agreement or application which the tenant signs.

This Section shall not be subject to any notice requirement of these Regulations.

Section 2906. Waiver of Liability.

No owner shall cause to be placed in a lease or rental agreement a provision exempting from liability or limiting the liability of the owner of residential premises from damages for injuries to persons or property caused by or resulting from the negligence of the owner, his agents, servants or employees, in the operation, care or maintenance of the leased premises or any portion of, or facility upon, the property of which the leased premises are a part.

This Section shall not be subject to any notice requirement of these Regulations.

Section 2907. NO Waiver of Jury Trial, Fees, or Confession of Judgment.

No owner shall cause to be placed in a lease or rental agreement a provision waiving the right of a tenant of residential premises to a jury trial, or requiring that the tenant pay the owner’s court costs or legal fees, or authorizing a person other than the tenant to confess judgment against a tenant. This Section should not be interpreted to preclude a court from assessing court or legal fees against a tenant in appropriate circumstances.
This Section shall not be subject to any notice requirement of these Regulations.

Section 2908. Security Deposits.

2908.1 For all monies paid to the owner by the tenant as a deposit or other payment made as security for performance of the tenant's obligations in a lease or rental of property, the owner shall clearly state in the lease or agreement or on the receipt for the deposit or other payment the terms and conditions under which such a payment was made.

2908.2. The owner shall tender payment to the tenant without demand and within thirty days of the termination of the tenancy or within thirty days after the owner has or should have knowledge of the termination of the tenancy—whichever occurs later—any security deposit and any other similar payment paid by the tenant as a condition of his tenancy in addition to the stipulated rent; or within such thirty-day period the owner shall notify the tenant in writing to be delivered to the tenant personally or by certified mail at the tenant's last known address of owner's intention to withhold and apply such monies toward defraying the cost of expenses properly incurred under the terms and conditions of the security deposit agreement: The owner, within thirty days after notification to the tenant pursuant to the requirements of this Section, shall tender a refund of the balance of the deposit or payment not used to defray such expenses and at the same time give the tenant an itemized statement of the use to which such monies were applied.

2908.3. This Section shall not be subject to the notice requirements of any other Section of these Regulations.

Section 2909. Written Receipts

In every lease or rental of a habitation, the owner shall provide written receipts for all monies paid to him by the tenant as rent, security or otherwise, unless the payment is made by personal check. Each such receipt shall state the exact amount received, the date the monies are received, and the purpose of the payment.

In addition, each receipt shall state any amounts still due attributable to late charges, court costs or any other such charge in excess of rent. When payment is made by personal check and there is a balance attributable to late charges, court costs or any other such charge in excess of rent, the owner shall provide a receipt stating such and the amount due.

This Section shall not be subject to any notice requirement of these Regulations.

Section 2910. Retaliatory Acts

No action or proceeding to recover possession of a habitation may be brought against a tenant, nor shall an owner otherwise cause a tenant to quit a habitation involuntarily, nor demand an increase in rent from the tenant, nor decrease the services to which the tenant has been entitled, nor increase the obligations of a tenant, in retaliation against a tenant's:

(a) good faith complaint or report concerning housing deficiencies made to the owner or a governmental authority, directly by the tenant or through a tenant organization.

(b) good faith organization of or membership in a tenant organization.

(c) good faith assertion of rights under these Regulations, including rights under Sections 2901 or 2902.

Section 2911. Pre-Inspection

Following a judicial determination that a lease or rental agreement is void or that the owner has breached the implied warrant of habitability applying to the premises, the owner shall prior to the next reletting of the habitation obtain a certificate from the Department of Economic Development that such habitation is in compliance with these Regulations.

Section 2912. Waiver Prohibited
Any provision of any lease or agreement contrary to, or providing for a waiver of, the terms of this Article shall be void and unenforceable. No person shall cause any of the provisions prohibited by this Article to be included in a lease or agreement respecting the use of the property in the District of Columbia, or demand that any person sign a lease or agreement containing any such provisions.

This Section shall not be subject to any notice requirement of these Regulations.

Section 2913. Provision Not Exclusive.

The rights, remedies, and duties set forth in this Article shall not be deemed to be exclusive of one another unless expressly so declared or to preclude a court of law from determining that practices, acts, lease provisions and other matters not specifically dealt with herein are contrary to public policy or unconscionable or otherwise unlawful.

Section 2914. Severability

If any provision or clause of this Article or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable.

Article 260 of the Housing Regulations of the District of Columbia is amended as follows:

Section 2602A. Tenant Responsibility

In addition to the tenant's responsibility under Section 2601 and 2602 the tenant shall specifically be responsible for the following:

2602A.1. Keeping that part of the premises which he occupies and uses as clean and sanitary as the conditions of the premises permit;
2602A.2. disposing from his dwelling unit all rubbish, garbage, and other organic or flammable waste, in a clean, safe and sanitary manner;
2602A.3. keeping all plumbing fixtures as clean and sanitary as their condition permits;
2602A.4. properly using and operating all electrical, gas, plumbing and heating fixtures and appliances.
2602A.5. not permitting any person on the premises with his permission to willfully or wantonly destroy, deface, damage, impair, or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.