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Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography

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Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography

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SPECIAL PROJECT

Developments in Contemporary Landlord-Tenant Law: An Annotated Bihliography

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PART I: THE PRIVATE SECTOR

I. Introduction

The law changes. Sometimes the change is slow, perhaps agonizing, as in the case of labor law. Sometimes the change is swift and amicable as when a uniform code is universally accepted. But sometimes the law appears to stand still. Then, as society undergoes profound evolution, the law lurches and jerks about, trying to dispense justice with outmoded concepts in an alien context. If the legislatures fail to come to the rescue, it then devolves upon the courts to cut the traces and institute reforms. Such has been the case with the law of landlord and tenant.

The massive changes that have been wrought recently in this area—principally by the judiciary—are the result of a number of factors. First, it has become increasingly clear that the conceptual framework of landlord-tenant law, developed in the context of a feudal, agrarian society, cannot be applied satisfactorily to the urban segments of contemporary society. Urban landlords can and do exercise more control over leased property than their rural counterparts. Moreover, severe housing shortages have virtually eliminated the presumed bargaining power of the tenant, particularly the indigent tenant. Secondly, courts have long understood that a lease is in some respects a conveyance of a nonfreehold estate, in other respects a contract. Traditionally, however, the landlord-favoring conveyance concept has predominated. The application of this concept in an urban residential context where rental agreements are primarily contractual in nature produces inequitable, if not absurd, results. Thirdly, the assumption of the landlord role by the government through the development of public housing and the financing of private low-rent housing have added constitutional nuances to old landlord-tenant problems and raised some entirely new issues as well. Finally, some courts have begun to take an activist stance in dealing with contemporary landlord-tenant questions. Adjusting existing concepts and creating some totally new ones, these courts are demonstrating an increasing sensitivity to the needs of tenants. The decisions they have handed down may properly be regarded as revolutionary.

The law schools have been slow to respond to the recent upheaval in landlord-tenant law by offering courses that concentrate on that field. Moreover, texts, treatises, casebooks, and restatements are only beginning to reflect the new character of this area of the law. Recognizing the need of practitioners, teachers, and students for a roadmap through the maze of contemporary landlord-tenant law, the *Vanderbilt Law*

Review offers this annotated bibliography as its Special Project.

Because of its unusual format, a word of explanation is necessary. The Project is divided into two parts, dealing respectively with private and public landlord-tenant law. The private law part is further divided into sections, each of which is devoted to an issue of current significance. Within the sections, the following headings are used:

Development.—Here, the issue with which the section is concerned is identified and the relevant terms defined. The purpose of this subsection is to orient the reader. Thus, only the most general discussion of the issue is offered, with no attempt at analysis. For this reason no authority is cited.

Leading Cases.—The cases of major significance in the area and those discussed in the secondary material are identified and summarized.

Jurisdictions.—One goal of this Project is to identify major trends involving the developments treated. This subsection consists primarily of citations to cases and statutes that represent such trends. Cases and citations are listed in this subsection in alphabetical order by jurisdiction.

Periodicals.—The significant secondary literature commenting on the development under consideration is summarized and annotated in this subsection.

Annotations.—The citations in this subsection are to *American Law Reports* and the Commerce Clearinghouse *Poverty Law Reporter.*

Model Act and Uniform Code.—In recent years, comprehensive statutory reforms of residential landlord-tenant law have been offered. Among the most significant of these are the ABF MODEL RESIDENTIAL LANDLORD-TENANT CODE (1969) (tentative draft) and the UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (1972). The former, a product of the American Bar Foundation, will be referred to in this Project as the Model Code. The latter, drafted and approved by the National Conference of Commissioners on Uniform State Laws, will be referred to as the Uniform Act. Relevant sections of both are summarized throughout Part One of the Project.

On occasion, treatises and model briefs will be cited under appropriate headings.

Throughout the private law portion of the Project, the terms "lease," "lease agreement," and "rental agreement" are used. Often the context will indicate whether a written or oral agreement is being considered. Otherwise the terms are used interchangeably.

Part Two of the Project deals with special problems in landlord-tenant law arising from the public housing and government assisted housing context. Here the relevant cases, statutes, regulations, and commentaries are fewer in number than their private law counterparts. Moreover, since the questions involved in public landlord-tenant law are primarily federal, a discussion of trends is necessarily different from a discussion of trends in a state common law context. Consequently a different format is employed in this part of the Project. The major developments are textually summarized with the bibliographic material presented in footnotes.

One point must be emphasized. This Project is not intended to serve as a final source of substantive law. Reference to an annotated bibliography does not eliminate the need to consult the cited materials directly. Our purpose, rather, is to provide a comprehensive compendium of authoritative statements on modern landlord-tenant law and thereby increase the efficiency of research in this area. We hope that our efforts will prove useful toward this end.

II. Landlord's Remedies

A. *Contract*

1. *Security Deposits*

Development

The tenant's payment of money to the landlord on the execution of a lease raises four basic issues concerning the nature of the payment and the rights of the parties.

Purpose of the payment.—The purpose of the payment depends on the intention of the parties entering the lease agreement and frequently will be given the construction most favorable to the tenant. The payment may be (1) advance payment of rent, (2) consideration for granting the lease, (3) liquidated damages, or (4) a deposit to secure payment of rent or fulfillment of all lease covenants. Only the last of these four is properly described as a security deposit, although modern statutes often treat alike advance payments of rent and security deposits. Consideration for granting a lease seldom causes problems unless an inartfully drawn lease agreement fails to articulate clearly the intentions of the parties. Liquidated damages clauses frequently are subject to challenge as penalties which are disfavored and unenforceable.

Nature of the deposit.—A deposit to secure payment of rent or

performance of covenants may be characterized as a pledge, a trust fund, or a debt. Title and permissible use of the fund depend primarily upon the characterization and purpose of the payment. Ascertaining the nature of the payment is especially important if one of the parties becomes insolvent during the term of the lease. Many state statutes now resolve these questions.

Permissible use of the security deposit.—Statutes or the lease agreement itself may impose limits upon the lessor's use of the security deposit. The lessor may be prohibited from commingling the funds with his own and may be required to pay interest to the lessee.

Disposition of the security deposit.—The landlord may retain the security deposit until the tenant renders the performance secured by the deposit, unless the landlord wrongfully evicts the tenant or misuses the deposit. The money paid as security constitutes a fund upon which the landlord may draw to compensate himself for a tenant's breach of covenants covered by the security. The tenant is entitled to the timely return of the deposit subject only to the rightful claims of the landlord consistent with the lease provisions.

Recently, states have reflected a marked trend toward statutory treatment of the major security deposit questions. Since 1970, thirteen states have initiated regulation of security deposits or have substantially rewritten the security deposit sections in their landlord-tenant codes. These new state statutes generally provide nonwaivable protections to the tenant.

Some of the statutes cover only residential leases. Frequently they broadly define a security deposit to include any payment or deposit of money (including an advance payment of rent), the primary function of which is to secure the performance of a rental agreement or any part of such an agreement. Many statutes state that the tenant's claim to such a deposit shall be prior to the claim of any of the landlord's creditors, although California's law grants a prior claim to a trustee in bankruptcy. All of the new statutes regulate the manner in which the landlord may use or hold the security deposit funds. Some statutes characterize the landlord as a trustee holding for the benefit of tenants, and most prohibit the commingling of such funds. Additionally, some require the payment of interest to the tenant. Finally, most of the new statutes require repayment or itemized justification of the retention of the deposit within a strictly enforced time period ranging from two weeks to forty-five days.

Jurisdictions

The following jurisdictions have statutes regulating security deposits:

CAL. CIV. § 1951.7 (Supp. 1973).
COLO. REV. STAT. ANN. § 58-1-28 (Supp. 1971).
DEL. CODE ANN. tit. 25, § 5112 (Supp. 1970).
FLA. STAT. ANN. § 83.261 (Supp. 1972).
HAWAII REV. LAWS § 521-44 (Supp. 1972).
ILL. REV. STAT. ch. 74, §§ 91-93 (Supp. 1972).
LA. REV. STAT. §§ 9:3251-:3254 (Supp. 1972).
MD. ANN. CODE art. 53, §§ 41-43G (Supp. 1972).
MASS. ANN. LAWS ch. 186, § 15B (Supp. 1972).
MINN. STAT. ANN. § 504.19 (Supp. 1972).
N.J. REV. STAT. §§ 2A:6-43, 46:8-19, -26 (Supp. 1972).
N.Y. GEN. OBLIGATIONS §§ 7-101 to -105 (McKinney Supp. 1972).
PA. STAT. ANN. tit. 68 § 250.512 (Supp. 1972).

Periodicals

Bernstein, *Security Deposits*, 46 TAXES 214 (1968)—discusses the tests for determining when a security deposit is taxable income in the year it is received by the landlord.

Gleick, *Rent Claims and Sccurity Deposits in Bankruptcy*, 18 MO. L. REV. 1 (1953)—studies the provability of claims in bankruptcy for future rent and breaches of covenants to pay rent and the effects of bankruptcy on the parties to a security deposit agreement. In many states these topics are now covered by statute.

Klamen, *Landlord, Tenant, and Lender Lease Security Deposit Problems*, 7 LAW NOTES 123 (1971)—provides a thorough, practitioner-oriented study dealing with commercial lease security deposit problems. Klamen notes the risks to lessees resulting from the use of security deposit funds as working capital by real estate developers/promoters.

Weiss, *Security v. Advance Rent Under the Federal Income Tax*, 42 CONN. B.J. 356 (1968—draws the distinction between advance rent and security deposits, explains the tax consequences of the distinctions, and provides some drafting suggestions.

Wilson, *Lease Security Deposits*, 34 COLUM. L. REV. 426 (1934)—provides an overview of all the basic security deposit considerations, although dated in its citations and references to common practices.

Report of the Committee on Leases, *Security Deposits and Guaranties Under Leases*, 1 REAL PROP. PROB. AND TR. J. 405 (1966)—offers the most comprehensive recent treatment of modern security deposit problems. This fully documented study gives a detailed analysis of the subject and suffers only from the fact that it was written prior to the recent enactment of security deposit statutes in many states.

Note, *The Rental Security Deposit in California*, 22 HASTINGS L.J. 1373 (1971)—critically analyzes the recently passed California Security Deposit law by comparing the California law with the broader and, it is contended, more effective security deposit laws of New York and New Jersey.

Annotations

Lessor's right, upon bankruptcy, to enforce lien or retain security for future rentals, 22 A.L.R. 1307 (1923), *supplemented by* 45 A.L.R. 717 (1926).

Provision in lease for pecuniary forfeiture where lease is prematurely terminated as one for liquidated damages, 106 A.L.R. 292 (1937).

Right of lessor to retain advance rental payments made under lease terms upon lessee's default in rent, 27 A.L.R.2d 656 (1953).

Model Code

Section 2-401 is similar to many recently adopted state statutes. It defines a security deposit broadly to include all funds paid for the purpose of securing performance of lease agreements. The tenant's claim to the fund is superior to the landlord's creditors, including a trustee in bankruptcy. The landlord is not, however, required to pay interest on the deposit. Willful failure to return the deposit is punishable as a misdemeanor. In the event the landlord absconds with security deposit funds, his successor is not liable for them to the tenant.

Uniform Act

Security is limited in section 2.101 to an amount not in excess of one month periodic rent. If the security is applied to payment of accrued rent and actual damage, itemized written notice of such application together with the amount due must be delivered to the tenant within fourteen days after termination of the tenancy and delivery of possession and demand by the tenant. Noncompliance with this section by the

landlord gives rise to liability to the tenant for damages equal to twice the amount wrongfully withheld, reasonable attorney's fees, and any money properly due the tenant. The holder of the landlord's interest at the time of termination is bound by the section. No provision protects the tenant's interest in the deposit from the claims of other creditors of the landlord. The landlord is not required to pay interest.

2. *Repairs*

Development

The tenant has a limited duty to repair the leased premises for the benefit of the landlord. This duty, raised by an implied covenant said to exist in all tenancies, may be expanded or limited by express covenants or by statute. To the extent that the tenant controls the premises, he impliedly covenants to use them in a tenant-like manner and is obligated to provide for repairs necessitated by his fault, negligence, or misuse of the property. The tenant is not liable for normal wear and tear, nor, in the absence of fault, is he obligated to make major, substantial, or lasting repairs. There is authority, however, for requiring a tenant to take reasonable care to prevent decay or delapidation of the premises.

Modifications of the tenant's duty to repair arising from express covenants and state statutes are treated in detail in the annotations listed below. Express general covenants to repair and repairs required by public authorities have required special statutory and case law alterations of common law rules. *Cf.* Waste, *infra* at 698.

Leading Case

Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 70 Cal. 2d 666, 451 P.2d 721, 75 Cal. Rptr. 889 (1969)—treats the major issues arising under modern constructions of the tenant's duty to repair.

Periodicals

Comment, *Periodic Tenant's Repair Obligation in Absence of Covenant*, 41 MARQ. L. REV. 58 (1957).

Annotations

Extent of lessee's obligation under express covenant as to repairs, 45 A.L.R. 12 (1926), *supplemented by* 20 A.L.R.2d 1331 (1951).

Liability of tenant for damage to the leased property due to his acts or neglect, 10 A.L.R.2d 1012 (1950).

Measure and items of damages for lessee's breach of covenant as to repairs, 80 A.L.R.2d 983 (1961).

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities, 22 A.L.R.3d 521 (1968).

Model Code and Uniform Act

The implied covenant to repair and the tort of waste have been combined in the Model Code and the Uniform Act. For appropriate provisions see *infra* at 699.

B. *Tort—Waste*

Development

Waste is a species of tort arising when the tenant violates his obligation to treat the leasehold in such a manner that it is not damaged and may revert to those holding a permanent interest undeteriorated by any willful or negligent act. Thus, waste is the destruction, misuse, neglect, or alteration of the premises to the detriment of the reversionary interest.

The rules of law constituting the waste doctrine are designed to regulate the tenant's conduct while he is legally in possession of the leasehold. These rules of law rest primarily on common law developments although some states have adopted statutory standards to protect the reversionary interests. Waste issues raise questions of fact concerning the nature of the premises, the local customs, and the reasonableness of the tenant's use.

Court decisions have divided waste into two classes: voluntary and permissive. Voluntary waste results from affirmative acts of the tenant; permissive waste is the consequence of the tenant's failure to act. In most instances, the tenant is liable for voluntary waste. While judicially developed standards vary more widely in regard to the tenant's liability for permissive waste, the tenant's negligence is generally prerequisite to finding permissive waste.

Depending on state statutes and traditional rules, the remedies for waste available to the landlord may include injunction, forfeiture, or damages. In many situations, the tort action for waste provides the landlord with a cause of action additional or alternative to the contract

action for breach of an express or implied covenant to repair. *Cf.* Repairs, *supra* at 697.

The promulgation of housing and building codes and the modern redefining of landlord and tenant remedies may lead to alterations in the concept of waste by placing affirmative duties of maintenance on the tenant. This is suggested by the provisions of the Model Code and Uniform Act discussed below.

Periodicals

Comment, *Periodic Tenant's Repair Obligation in Absence of Covenant*, 41 MARQ. L. REV. 58 (1957).

Annotations

Construction and effect of statutory provisions for double or treble damages against tenant committing waste, 45 A.L.R. 771 (1926).

Right of mortgagee to maintain suit to stay waste, 48 A.L.R. 1156 (1927).

Limitation of action against tenant for years or for life for waste or breach of obligation as to use and care of property, 53 A.L.R. 46 (1928).

Waste, as between landlord and tenant, as including loss or damages due to act or negligence of third person, 84 A.L.R. 393 (1933).

Liability of tenant for damage to the leased property due to his acts or neglect, 10 A.L.R.2d 1012 (1950).

Measure of damages in landlord's action for waste against tenant, 82 A.L.R.2d 1106 (1962).

Model Code

The Model Code substantially alters the common law rules of waste. While at common law the landlord was required to show either damage to his reversion or the tenant's lack of due care, the Code imposes affirmative duties on the tenant and lends statutory support to reasonable regulations that the landlord may choose to implement. Sections 2-303, -311. The Code lists specific tenant obligations in regard to garbage, sanitation, and plumbing and electrical fixtures. Sections 2-303(1)-(4). Furthermore, it incorporates the common law waste prohibition of willful and wanton destruction and holds the tenant liable for such acts committed with his permission. Section 2-303(5). The landlord is provided with an immediate remedy for the tenant's failure to fulfill

his duties of maintenance and care of the premises. If the tenant does not meet his section 2-303 obligations within a reasonable time after written notice, the landlord may remedy such failure and charge the tenant reasonable expenses treating them as rent due. Section 2-304.

The Model Code exempts the tenant from the common law duty of making minor repairs necessary to prevent further damage to the premises, but imposes on him the duty to report to the landlord as soon as practicable the need for such repairs. Section 2-304. The tenant is liable for damage or injury resulting from failure to report defective conditions. Section 2-306.

Whereas the common law rules of waste subjected a tenant to potential liability for making alterations in the property even if the changes increased the value of the property, the Model Code gives a tenant a complete defense to such an action if he has notified the landlord in advance of his intention to make alterations and if the alterations are reasonable in light of the nature and location of the premises. Section 3-401.

Uniform Act

In sections 3.101 and 4.201, the Uniform Act places upon the tenant the following affirmative duties:

(1) compliance with applicable provisions of building and housing codes materially affecting health and safety;

(2) maintenance of the premises in as clean and safe condition as practicable;

(3) disposal of waste in a clean and safe manner;

(4) maintenance of plumbing fixtures in as clean a condition as practicable;

(5) use of facilities and appliances in a reasonable manner;

(6) prevention of deliberate or negligent damage to the premises;

(7) conduct that will not disturb the neighbors' peaceful enjoyment of the premises.

Noncompliance permits the landlord to give notice of termination of the rental agreement after at least thirty days. If the noncompliance is remedied within fourteen days, the rental agreement shall not terminate. Recurrence of substantially the same noncompliance within six months entitles the landlord to terminate the rental agreement upon at least fourteen days notice.

III. Limitations on Landlord's Remedies

A. *Distress*

Development

At common law, the landlord is entitled, upon the tenant's default of the rent, to enter the premises and seize or distrain the tenant's movable property as security for the rent. The modern trend has been to make distress a statutory remedy whereby the landlord obtains a distress warrant and an officer of the court acquires possession of the tenant's property. The statute may provide for judicial sale of this property. The question raised with respect to these statutes is whether the requirement of procedural due process, as defined in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and its progeny, permit such a seizure of the tenant's property without notice and a hearing on the issue of nonpayment of rent.

Leading Cases

Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970)—invalidated as unconstitutional California's Innkeeper's Lien Law, which, in certain types of apartments, permitted distraint of a tenant's movables.

Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970)—held unconstitutional as violative of procedural due process the provision of Pennsylvania's distress statute permitting the sale of the tenant's goods without notice or hearing. The statute was invalidated only as applied to low-income tenants. *Accord*, *Musselman v. Spies*, 343 F. Supp. 528 (M.D. Pa. 1972); *Sellers v. Contino*, 327 F. Supp. 230 (E.D. Pa. 1971).

Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972)—held entire Pennsylvania distress statute unconstitutional on its face.

Holt v. Brown, 336 F. Supp. 2 (W.D. Ky. 1971)—held Kentucky distress statute unconstitutional.

Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971)—held Georgia distress statute unconstitutional.

Jurisdictions

These statutes permit distraint of a tenant's property:

Del. Code Ann. tit. 25, §§ 5501-27 (Supp. 1970).

Ga. Code Ann. §§ 61-401 to -407 (1966).

ILL. ANN. STAT. ch. 80, §§ 16-35 (Smith-Hurd 1966).
KY. REV. STAT. ANN. §§ 383.040-.068 (Supp. 1972).
LA. CIV. CODE ANN. arts. 2705-09, 3218-19 (West Supp. 1973).
MD. ANN. CODE art. 21, §§ 8-301 to -331 (Supp. 1972).
N.J. STAT. ANN. §§ 2A:33-1 to -23 (Supp. 1972).
N.M. STAT. ANN. §§ 61-6-5 to -16 (1960).
PA. STAT. ANN. tit. 68, §§ 250.302-.313 (1965).
S.C. CODE ANN. §§ 41-151 to -165 (1962).
TEX. REV. CIV. STAT. ANN. arts. 5227, 5239 (Supp. 1972).
W. VA. CODE ANN. § 37-6-9, -12, -13 (Supp. 1972).

Periodicals

Comments on *Klim v. Jones*:
49 N.C.L. REV. 763 (1971).
5 U. RICHMOND L. REV. 447 (1971).
28 WASH. & LEE L. REV. 481 (1971).
39 U. CIN. L. REV. 815 (1970).

Comments on *Santiago v. McElroy*:
Note, *Landlord's Distraint and Judicial Restraint: A Look at Santiago v. McElroy*, 44 TEMP. L.Q. 564 (1971).
22 CASE W. RES. L. REV. (1971).

Model Code and Uniform Act

Both the Model Code (section 3-403) and the Uniform Act (section 4.205) abolish the common law right of distress for rent.

B. *Eviction*

1. *Forcible Entry and Unlawful Detainer Statutes*

a. *Exclusivity of Remedy*

Development

Early common law permitted a landlord entitled to possession to regain that possession from the tenant by force. Modern English and American statutes limit the degree of self-help available to the landlord. Every state has such a statute regulating forcible entry. In exchange for this limitation on the landlord's remedies, the statutes provide a summary judicial proceeding that enables the landlord to expeditiously evict a tenant who has defaulted on the rent or who is unlawfully holding over.

The jurisdictions vary as to the degree of self-help permitted as an alternative to the summary judicial proceeding. The spectrum of permissible self-help ranges from reasonable and necessary force to a requirement that possession be regained in a wholly peaceable manner. The modern trend, however, is to make the summary proceeding under the statute the landlord's exclusive remedy, thereby prohibiting any attempt to dispossess the tenant without resorting to legal process.

Leading Cases

Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961)—held that despite the right of re-entry clause in the lease and the absence of actual force or violence in the landlord's entry, the landlord was guilty of forcible entry and detainer under the applicable California statute; a landlord may dispossess a tenant only by means of the summary legal process established in the statute.

Jurisdictions

These jurisdictions make the summary eviction proceeding the landlord's exclusive remedy:

ARIZ. REV. STAT. ANN. §§12-1171 to -1172 (1956).

Jordan v. Talbot, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961).

Larkin v. Avery, 23 Conn. 304 (1854).

DEL. CODE ANN. 25:5517 (Supp. 1972).

Ardell v. Milner, 166 So. 2d 714 (Fla. App. 1964).

Entelman v. Hagood, 95 Ga. 390, 22 S.E. 545 (1894).

French v. Willer, 126 Ill. 611, 18 N.E. 811 (1888).

Louisiana Materials Co. v. Cronvich, 236 So. 2d 510 (La. App.), *cert. denied*, 405 U.S. 916 (1972).

Mosseller v. Deaver, 106 N.C. 494, 11 S.E. 529 (1890).

Coward v. Fleming, 89 Ohio App. 485, 102 N.E.2d 850 (1951).

Price v. Osborne, 24 Tenn. App. 525, 147 S.W.2d 412 (1940).

Chrone v. Gonzales, 215 S.W. 368 (Tex. Civ. App. 1919).

Paxton v. Fisher, 86 Utah 408, 45 P.2d 903 (1935).

Periodicals

Boyer & Gamble, *Reform of Landlord-Tenant Statutes to Eliminate Self-Help in Evicting Tenants*, 22 U. MIAMI L. REV. 800

(1968)—analyzes Florida's decisions and suggests statutory revisions to implement a decisional law prohibition of peaceable, as well as forcible, landlord self-help. This lengthy article provides broad treatment of the self-help question and offers specific statutory revisions.

Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369 (1970)—comprehensively examines summary eviction procedures, the landlord's cause of action for rent or violation of rules, the tenant's right to a hearing, self-help evictions, the landlord's power of distraint, and the indigent tenant's right to representation under the proposed Model Residential Landlord-Tenant Code (*See infra* at 704).

Annotations

Statute prescribing damages for forcibly ejecting or excluding one from possession of real property as applying to possession held by one as servant or employee, 14 A.L.R. 808 (1921).

Dispossession without legal process by one entitled to possession of real property as ground of action, other than for recovery of possession or damages to his person, by person dispossessed, 101 A.L.R. 476 (1936).

Right to use force to obtain possession of real property to which one is entitled, 141 A.L.R. 250 (1942).

Recovery by tenant of damages for physical injury or mental anguish occasioned by wrongful eviction, 17 A.L.R.2d 936 (1951).

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 A.L.R.3d 177 (1966).

Model Code and Uniform Act

See infra at 706.

b. *Limitations on Defenses*

Development

Because of the summary nature of the judicial proceeding under forcible entry and detainer statutes, the litigation concerns only whether the tenant has defaulted in paying rent and whether he is unlawfully holding over. This limitation, which restricts the defenses available to the tenant, is justified by certain theoretical considerations. At common

law, lease covenants are generally independent. Thus, breach of a covenant by the landlord does not relieve the tenant of the obligation to pay rent. (*But see* Covenant of Quiet Enjoyment, *infra* at 718.) Moreover, modern defenses, such as breach of warranty of habitability as an excuse for nonpayment of rent (*infra* at 727) or retaliatory eviction (*infra* at 707), were previously unknown at common law. Current debate concerns the availability of such defenses in a proceeding under the forcible entry and detainer statutes and their effect on the summary nature of the proceeding.

Leading Cases

Lindsey v. Normet, 405 U.S. 56 (1972)— held, *inter alia*, that the provisions of Oregon's forcible entry and wrongful detainer statute, which restricted the triable issues to the tenant's breach of covenant and precluded tenant from raising defenses based on the landlord's breaches, satisfied federal equal proteetion and due process requirements. The Court refused to grant housing the status of a "fundmental interest" for equal protection purposes and found the statute rationally related to the state's legitimate objective of settling possessory suits rapidly and peaceably. In dismissing the tenants' due process challenge, the Court declined to impose on the states the growing doctrine of dependent rental agreement covenants.

Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 91, 90 Cal. Rptr. 729 (1970)—held that a tenant may assert his landlord's retaliatory rent increase and eviction as a defense in a forcible entry and detainer action.

Periodicals

Comment, *New Tenets in Old Houses: Changing Concepts of Equal Protection in Lindsey v. Normet*, 58 VA. L. REV. 930 (1972)—provides a careful analytical critique of the constitutional law basis of the *Lindsey* decision.

Comment, *Retaliatory Eviction as a Defense to Unlawful Detainer—Alternative Approaches*, 22 HASTINGS L.J. 1365 (1971)—eomments on *Schweiger v. Superior Court* and notes that the case fails to recognize the full significance of permitting the defense of retaliatory eviction in a forcible entry and detainer action.

Note, *Unlawful Detainer: Synopsis of California Law and Constitu-*

tional Considerations, 44 S. CAL. L. REV. 768 (1971)—reviews the conflicting policy and legal arguments proposed by landlords and tenants in the continuing dispute over the adequacy of summary dispossessory proceedings in California. Focusing primarily on constitutional issues and California law, this note analyzes the arguments and current state of the law regarding the limited defenses available to tenants in forcible entry and detainer proceedings.

25 VAND. L. REV. 654 (1972)—comments on *Lindsey v. Normet*.

Model Code

The provisions of the Model Code that provide for summary proceedings for possession vary notably in several regards from the law existing in many states today. These differences include:

(1) The action may be brought not only by landlords or owners, but also by "the tenant who has been wrongfully put out or kept out" (section 3-203(3)) and "the next tenant of the premises, whose term has begun" (section 3-203(4)).

(2) The landlord must show proof of a tenant's default if the action is based on holding over or breach of covenant to pay rent (section 3-208), and if the landlord brings an action based on default with regard to the lessee's tenancy, he must demonstrate the necessity and legitimacy of the obligation (section 3-209).

(3) The tenant may assert all legal and equitable defenses and counterclaims (section 3-210).

(4) Nonjury trials are strongly recommended (commentary to section 3-211).

(5) The costs assignable to a tenant who is found to have wrongfully failed to pay rent are limited to 25 dollars. This section is intended to encourage tenants to pursue their right to setoff of rent as a remedy to the landlord's failure to make repairs (section 3-212(4) and commentary thereto).

The summary judicial procedure provided by the Code is the landlord's exclusive remedy for recovering possession, and he is liable for substantial damages for resorting to self-help remedies. Section 2-408.

Uniform Act

The Uniform Act contains no provisions establishing a procedure for evicting a tenant holding over or in default of rent. Section 4.105 permits the tenant to raise defenses and counterclaims in an action for possession based on nonpayment of rent or an action for rent.

2. *Retaliatory Eviction*

Development

At common law a landlord may evict a periodic tenant or a tenant at sufferance for any reason or for no reason, upon service of timely notice to quit. Forcible entry and unlawful detainer statutes have further strengthened the landlord's right to control his property by providing summary eviction procedures which deny the tenant who does not relinquish possession after receiving notice of eviction any opportunity to raise defenses to the action. *See* Limitations on Defenses, *supra* at 704. Faced with the prospect of summary eviction in retaliation for their efforts, tenants have been reluctant to seek enforcement of housing and sanitary code provisions or other legal rights arising under the lease or the laws of the municipal, state, or federal government. Accordingly, the effort to eliminate substandard conditions and uninhabitable dwelling units from the urban housing market has been seriously inhibited. Until recently, however, courts and legislatures have been reluctant to alter the traditional landlord-tenant relationship and provide the tenant with relief from landlord reprisals.

The modern trend permits tenants to raise retaliatory motive as a defense to an action for eviction brought by the landlord. The courts have generally justified this defense on two grounds. First, the use of the state courts to evict a tenant in retaliation for exercising his first amendment rights of speech and to petition government for redress of grievances constitutes state action denying the tenant due process in violation of the first and fourteenth amendments to the United States Constitution. Secondly, public policy and statutory interpretation prohibit reprisals against a tenant who helps enforce housing codes or asserts other legal rights designed to alleviate the shortage of habitable housing.

Jurisdictions vary as to what rights are protected from retaliation and where in the judicial process the defense may be raised. *See* Limitations on Defenses, *supra* at 704.

Leading Case

Edwards v. Habib, 397 F.2d 687 (D.C. Cir.), *cert. denied*, 393 U.S. 1016 (1968)—upheld the defense of retaliatory eviction asserted by a tenant evicted for reporting housing code violations. The case discusses the constitutional implications of the defense, but rests

its holding on grounds of public policy and interpretation of the housing code.

Jurisdictions

The following cases have upheld the defense of retaliatory eviction on constitutional grounds (parentheticals indicate the specific right protected):

McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971) (participation in tenants' organization; fact that housing was government financed sufficient to find state action).

Bowles v. Blue Lake Development Corp., [1968-1971 Transfer Binder] CCH Pov. L. Rep. ¶ 12,920 (S.D. Fla. 1971) (complaints to county zoning and sanitary officials concerning substandard conditions in mobile park and the failure of the landlord to comply with the plot plan).

E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 544 (1971) (participation in tenants' organization); *Engler v. Capital Management Corp.*, 112 N.J. Super. 445, 271 A.2d 615 (1970) (participation in tenants' organization); *State v. Field*, 107 N.J. Super. 107, 257 A.2d 127 (1969) (reporting violations of health and housing codes to officials).

Hosey v. Club Van Cortlandt, 299 F. Supp. 501 (S.D.N.Y. 1969) (organizing tenants' union); *Tarver v. G.C. Construction Corp.*, No. 64-2945 (S.D.N.Y. Nov. 9, 1964) (reprinted in E. Jarmel, Problems In the Legal Representation Of the Poor § 12.08, at 12-203 (1972)) (reporting housing code violations); *Church v. Allen Meadows Apartments*, 69 Misc. 2d 254, 329 N.Y.S.2d 148 (Sup. Ct. 1972) (participation in tenants' organization). *But see Mullarkey v. Borglum*, 323 F. Supp. 1218 (S.D.N.Y. 1970) (institution of state court eviction proceeding in retaliation for tenant's organizing activities does not constitute state action violating tenant's first and fourteenth amendment rights).

Bergdoll v. McKinney, [1968-1971 Transfer Binder] CCH Pov. L. Rep. ¶ 11,360 (E.D. Pa. 1970) (reporting housing code violations).

The following cases have upheld the defense of retaliatory eviction on grounds of public policy and statutory interpretation:

Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970) (tenant exercising statutory repair and deduct remedy

protected against retaliatory rent increase or eviction).

F.W. Berens Sales Co. v. McKinney, 41 U.S.L.W. 2303 (D.C. Super. Ct., Nov. 21, 1972) (class action challenging retaliatory rent increases); *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972) (extended the holding in *Edwards v. Habib* to proteet from retaliatory eviction a tenant who successfully asserted her legal defenses in a prior eviction proceeding); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968) (reporting housing code violations).

Riley v. Willette, [1968-1971 Transfer Binder] CCH Pov. L. Rep. ¶ 12,263 (Mich. Dist. Ct. 1968) (complaining to landlord about electrical wiring defect); *Watts v. Lyles*, [1968-1971 Transfer Binder] CCH Pov. L. Rep. ¶ 9,028 (Mich. Cir. Commissioners Ct. 1968) (reporting housing code violations).

Botko v. Cooper, [1968-1971 Transfer Binder] CCH Pov. L. Rep. ¶ 11,549 (Minn. Mun. Ct. 1970) (reporting housing code violations).

State v. Field, 107 N.J. Super. 107, 257 A.2d 127 (1969) (upheld as permissible exercise of police power a state statute proscribing retaliatory eviction for reporting health and housing code violations); *see also Alexander Hamilton Savings and Loan Assn. v. Whaley*, 107 N.J. Super. 89, 257 A.2d 7 (Dist. Ct. 1969) (held that statute prohibits retaliatory eviction for reporting violations of any ordinance, law, or regulation that has as its objective the regulation of rental premises).

Markese v. Cooper, 333 N.Y.S.2d 63 (Monroe County Ct. 1972) (reporting housing code violations; since summary eviction proceeding is in derogation of common law, the statute must be strictly construed against the landlord); *Portnoy v. Hill*, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (Binghamton City Ct. 1968) (reporting housing code violations; defense equitable in nature).

Dickhut v. Norton, 173 N.W.2d 297 (Wis. 1970) (reporting housing code violations; court found that retaliation was sole purpose for thc eviction).

In the following cases, the tenant failed to assert successfully the defense of retaliatory eviction:

LaChance v. Hoyt, 6 Conn. Cir. 207, 269 A.2d 303 (1969).

Wilson v. John R. Pinkett, Inc., 265 A.2d 778 (D.C. Ct. App. 1970).

Wheeler Terrace v. Sylvester, [1968-1971 Transfer Binder) CCH Pov. L. Rep. ¶ 10,371 (D.C. Ct. Gen. Sess. 1969).
Wilkins v. Tebbetts, 216 So.2d 477 (Fla. Dist. Ct. App. 1968).
Evans v. Rose, CCH Pov. L. Rep. ¶ 2325.06 (N.C. Ct. App. 1971).
Motoda v. Donohoe, 1 Wash. App. 174, 459 P.2d 654 (1969).

The following statutes and administrative provisions establish the defense of retaliatory eviction and generally create a rebuttable presumption of retaliatory motive for an eviction sought within a specified period after the tenant has asserted a protected right:

Dept. of Treasury, IRS, Price Commission Rulings 1972-204, -205, Cost of Living Council Rulings 1972-74, -75, 37 Fed. Reg. 13648 (July 12, 1972) (protects tenant against retaliation for reporting illegal rent increases to the IRS or for his exercise of any other rights under the Economic Stabilization Act of 1970, Pub. Law No. 92-210, 85 Stat. 743).
Cal. Civ. Code § 1942.5 (West Supp. 1973).
Conn. Gen. Stat. Rev. § 19-375a (Supp. 1971).
Del. Code Ann. tit. 25, § 5516 (Supp. 1972).
Housing Regulations of the District of Columbia § 2910 (*amended*, June 12, 1970) (reprinted in Indritz, *The Tenants' Rights Movement*, 1 New Mexico L. Rev. 1, 139 (1971)).
Hawaii Rev. Laws § 666-43 (Supp. 1972).
Ill. Ann. Stat. ch. 80, § 71 (Smith-Hurd 1966).
Me. Rev. Stat. Ann. tit. 14, § 6001 (Supp. 1973).
Mass. Ann. Laws ch. 186, § 18, ch. 239, § 2A (Supp. 1972), *as amended*, arts. 1972, ch. 99, §§ 1, 2.
Mich. Stat. Ann. §§ 27A.5646(4),(5) (Supp. 1972).
Minn. Stat. Ann. § 566.03 (Supp. 1973).
N.H. Rev. Stat. Ann. §§ 540:13-a, -b (Supp. 1972).
N.J. Stat. Ann. §§ 2A:42-10.10, .11, .12 (Supp. 1973).
N.Y. Unconsol. Laws §§ 8590, 8609 (McKinney Supp. 1973).
Pa. Stat. Ann. tit. 35, § 1700-1 (Supp. 1973).
R.I. Gen. Laws Ann. §§ 34-20-10 to -11 (1969).

Periodicals

Bross, *Law Reform Man Meets the Slumlord: Interactions of New Remedies and Old Buildings in Housing Code Enforcement*, 3 Urban Law 609, 618 (1971)—argues for extending the protection against retaliatory rent increases and evictions currently available

to tenants reporting housing code violations to cover tenant organizing and collective bargaining.

Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966)—studies problems associated with housing code enforcement, including the inadequacy of the criminal sanctions, and recommends a new civil remedy that may be more appropriately tailored to the violation.

Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287 (1970)—suggests that the ineffectiveness of current tenants' remedies demands broad reformation, including (a) modified unlawful detainer procedures providing the tenant with a hearing, adequate time to prepare for trial, and the right to offer counterclaims and cross-complaints relating to the lessor's performance of his duties; (b) limitation of landlord's lien and execution on an unlawful detainer judgment; (c) the expansion and clarification of California's repair and deduct remedy; (d) new remedies, including explicit statutory warranties of habitability, more extensive code enforcement provisions, and damages for breach of landlord's obligations; (e) statutory proscription of retaliatory evictions or rent increases, including a prescribed time period following the tenant's exercise of any protected activity during which any eviction or rent increase would be prima facie retaliatory.

McElhaney, *Retaliatory Evictions: Landlords, Tenants, and Law Reform*, 29 MD. L. REV. 193 (1969)—argues that current legislative and judicial approaches to the problem of retaliatory eviction are ineffective in attacking slum housing.

Moskovitz, *Retaliatory Eviction—A New Doctrine in California*, 46 CAL. STATE BAR J. 23 (1971)—analyzes California's anti-retaliatory eviction statute. The study traces legislative, judicial, and constitutional origins and bases of the defense and suggests that evidentiary problems may be solved by analogy to labor relations situations.

Moskovitz, *Retaliatory Eviction—The Law and the Facts*, 3 CLEARINGHOUSE REV. 4 (1969)—offers a general survey of developments and discusses legislative and judicial approaches and applications to practice.

Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CAL. L. REV. 670 (1966)—contends that although judicial reliance both on the implied affirmative obligations im-

posed upon the landlord and on the doctrine of substantial performance have provided some relief for the indigent faced with substandard housing, a significant adjustment of the landlord-tenant relationship facing the urban poor may be realized only if judicial efforts are supplemented by a uniform statutory lease that would secure for the indigent tenant the legal incidents of leaseholding.

Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 541-42 (1966)—proposes alternative bases for the defense of retaliatory eviction, including (a) violation of the first amendment right to petition the government for redress of grievances, (b) violation of the constitutional right of citizens to report violations of laws to the authorities, (c) common law tort of abuse of process, or (d) prima facie tort.

Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969)—argues that the development of the concept of a lease from a conveyance of an interest in land to a primarily contractual arrangement requires a reevaluation of the landlord-tenant relationship, including the recognition of implied warranties and viable tenants' remedies.

Trends in Landlord-Tenant Law Including Model Code, 6 REAL PROP. PROB. AND TRUST J. 550 (1971)—surveys recent developments including the defense of retaliatory eviction and its treatment in the Model Code (see *infra*, at 715).

Note, *Emerging Landlord Liability: A Judicial Reevaluation of Tenant Remedies*, 37 BROOKLYN L. REV. 387 (1971)—discusses the landlord's increased liability for safety and habitability reflected in the establishment of new tenant remedics by legislative and judicial action.

Comment, *Tenant's Remedies in the District of Columbia: New Hope for Reform*, 18 CATH. U.L. REV. 80 (1968)—argues that while *Edwards v. Habib* has made the landlord's retaliatory motive a theoretical defense to summary eviction, the trial courts must make it effective by drawing from circumstantial evidence or presumptions reasonable inferences regarding the landlord's motives.

Note, *The Use of the Federal Remedy to Bar Retaliatory Eviction*, 39 U. CIN. L. REV. 712 (1970)—observes that recourse to the federal courts provides the tenant with an additional weapon against retaliatory eviction when state remedies fail to protect him.

Note, *Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code*, 56 GEO. L. REV. 920, 933-36 (1968)—contends that a ban on the landlord's retaliatory acts is required for the effective operation of the illegal contract defense.

Note, *Retaliatory Eviction and the Reporting of Housing Code Violations in the District of Columbia*, 76 GEO. WASH. L. REV. 190 (1967)—examines sections 1250 and 1251 of proposed H.R. 257, 90th Cong., 1st Sess. (1967), which generally prohibited eviction of a tenant for nine months following the tenant's report of housing code violations.

Note, *California Unlawful Detainer Procedure—A Proposed Legislative Change*, 21 HASTINGS L.J. 491 (1970)—attacks the current unlawful detainer procedure as failing to serve the requirements of the tenant in that (a) affirmative defenses and counterclaims are usually not allowed, (b) no exemption of the tenant's property remaining in the premises from seizure and storage is provided, (c) service of process is inconsistent, and the time to prepare an effective response is inadequate, and (d) a writ of possession may issue in favor of the landlord prior to the unlawful detainer action.

Note, *Retaliatory Eviction as a Defense to Unlawful Detainer—Alternative Approaches?*, 22 HASTINGS L.J. 1365 (1971)—discusses the conjunction between California's retaliatory eviction statute and emerging judicial remedies (e.g., *Schweiger v. Superior Court*) that give the tenant a broad retaliatory eviction defense.

Comment, *Recent Developments in Illinois Landlord-Tenant Law*, 1972 U. ILL. L.F. 589, 594—critizes the Illinois retaliatory eviction statute because it prohibits retaliatory eviction, but fails to prescribe penalties for violators or prohibit retaliatory rent increases.

Note, *Retaliatory Eviction in California: The Legislature Slams the Door and Boards up the Windows*, 46 S. CAL. L. REV. 118 (1972)—observes that the California statute deliberately places only minimal restrictions on retaliatory evictions and affords the tenant his exclusive remedy against landlord reprisals; additionally, the tenant is protected from retaliation only for specified acts and only within sixty days of their occurrence.

Note, *Retaliatory Eviction: A Study of Existing Law and Proposed Model Code*, 11 WM. & MARY L. REV. 537 (1969)—contends that by clearly defining the landlord-tenant relationship in regard to retaliatory eviction, by proscribing retaliatory rent increases as well as retaliatory evictions, and by providing treble damages

against the offending landlord, the ABF's Model Residential Landlord-Tenant Code, see *infra*, at 715, more effectively serves the goal of achieving higher quality housing than do current legislative and judicial attacks on retaliatory eviction.

20 BUFFALO L. REV. 317 (1970)—comments on *State v. Field*, restates the theories on which courts have relied in the absence of statutes to support the defense of retaliatory eviction, and urges other state legislatures to protect tenants from landlord reprisals.

22 CASE W. RES. L. REV. 592 (1971)—comments on *Schweiger v. Superior Court*. The author argues that the court erred in placing the burden of proving the retaliatory motive on the tenant because (1) the burden is inconsistent with the public policy of enabling tenants to receive full benefit of housing statutes, (2) it ignores the fact that the landlord is in a better position to inform the court of his motivations, and (3) it is inconsistent with the Model Code and recent statutes that impose a presumption of retaliation if the landlord's action occurs within a specific time following the tenant's complaint or repairs.

1971 WISCONSIN L. REV. 939—comments on *Dickhut v. Norton*. The author suggests that the strict burden of proof placed on the tenant, requiring him to demonstrate by clear and convincing evidence that a condition existed which in fact violated the housing code, that the landlord knew that the tenant had reported the condition to the enforcement authority, and that the landlord sought to terminate the tenancy for the sole purpose of retaliation, may render the defense of retaliatory eviction meaningless.

Comments on *Edwards v. Habib*:

23 ARK. L. REV. 122 (1969).

3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 193 (1967)—comments on the lower court opinion (227 A.2d 388 (D.C. Mun. Ct. App. 1967)) that rejected the retaliatory eviction defense. The comment suggests several bases that support the tenant's position, including constitutional theories, public policy considerations, abuse of right, abuse of process, and prima facie tort.

82 HARV. L. REV. 932 (1969)—approves the result, but questions the court's first and fourteenth amendment analysis and suggests that the landlord's interest in the management of his property may be more substantial than the court allows. Furthermore, the Comment argues, permitting a private party's mere invocation of the

aid of the court to constitute state action transforms traditionally private concerns into public matters and goes beyond the intent of the framers of the Constitution.

48 NEB. L. REV. 1101 (1969).

44 N.Y.U.L. REV. 410 (1969).

44 NOTRE DAME LAW. 286 (1968)—predicts only limited acceptance of the defense.

Annotations

Landlord's retaliatory motive provides tenant with defense to summary procedures, CCH POV. L. REP. ¶ 2325 (1972).

Retaliatory eviction of tenant for reporting landlord's violation of law, 40 A.L.R.3d 753 (1971).

Model Code

Subject to certain limited "fairness" exceptions, section 2-407 protects a tenant not in default of rent from eviction, increase in rent, or decrease in services for six months after he has, in good faith, reported housing or sanitary code violations to the body charged with enforcement of such codes, or such body has filed a notice or complaint of such violation, or the tenant has, in good faith, requested repairs. A tenant who has been unlawfully evicted in violation of this section is entitled to three months rent or treble damages, whichever is greater, plus the cost of suit and reasonable attorney's fees.

Uniform Act

Under section 5.101, eviction is proscribed if in retaliation for reporting housing or building code violations, for complaining to the landlord of a violation of section 2.104 (Landlord's duty to maintain the premises), or for organizing or becoming a member of a tenants' organization. Evidence of a complaint within one year of the alleged act of retaliation raises a presumption of retaliatory motive unless the complaint was made after notice of a proposed rent increase or diminution of services.

Notwithstanding any of the above, a landlord may evict a tenant if the tenant is responsible for the code violation, is in default of rent, or if compliance with the code requires alteration, remodeling, or demolition which would effectively deprive the tenant of the use of the premises.

In addition to serving as a defense in an action for eviction, a landlord's retaliatory conduct entitles the tenant under section 4.107 to treble damages or an amount equal to three months rent, whichever is greater, plus reasonable attorney's fees.

IV. Tenant's Rights

A. *Contract*

1. *Landlord's Duty to Mitigate Damages—Abandonment*

Development

Abandonment occurs when a tenant relinquishes possession of the rented premises and ceases to pay rent as it falls due. This situation may be viewed as an offer by the tenant to surrender the duration of his estate to the landlord. If the offer is accepted by the landlord, then the estate and rental agreement is terminated. In the absence of a valid surrender, the jurisdictions are split as to the rights of the parties. The conflict turns on the characterization of the rental agreement as a conveyance of an estate or as a contract. Under the conveyance view, as long as the landlord does not interfere with the tenant's possession (see Quiet Enjoyment, *infra* at 718), the tenant is obligated to pay rent whether or not he remains in physical possession of the premises. Accordingly, the landlord is under no obligation, in the event of an abandonment, to seek a new tenant and thereby mitigate the original tenant's damages. The contract view, however, in accord with general contract theory, places on the landlord such a duty to exercise a reasonable effort to mitigate the tenant's damages.

Leading Cases

Wright v. Baumann, 239 Ore. 410, 398 P.2d 119 (1965)—adopted the rule that the landlord must make a reasonable effort to mitigate an abandoning tenant's damages. This case offers an excellent analysis of the relevant issues.

Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968)—held that a showing of diligence in reletting the abandoned premises is an essential element of plaintiff-landlord's cause of action, which plaintiff must, therefore, plead and prove.

Jurisdictions

The following jurisdictions expressly or by implication recognize

the rule that a landlord must make a reasonable effort to mitigate the abandoning tenant's damages:

Hinde v. Madansky, 161 Ill. App. 216 (1911). *Contra, Rau v. Baker*, 118 Ill. App. 150 (1905).

Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968); *Friedman v. Colonial Oil Co.*, 236 Iowa 140, 18 N.W.2d 196 (1945).

Gordon v. Consolidated Sun Ray, Inc., 195 Kan. 341, 404 P.2d 949 (1965); *Lawson v. Callaway*, 131 Kan. 789, 293 P. 503 (1930).

Fox v. Roethlisberger, 350 Mich. 1, 85 N.W.2d 73 (1957).

Novak v. Fontaine Furniture Co., 84 N.H. 93, 146 A. 525 (1929).

Weinstein v. Griffin, 241 N.C. 161, 84 S.E.2d 549 (1954).

Wright v. Baumann, 239 Ore. 410, 398 P.2d 119 (1965).

United States Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403 (1956).

Meyer v. Evans, 16 Utah 2d 56, 395 P.2d 726 (1964).

Martin v. Siegley, 123 Wash. 683, 212 P. 1057 (1923). *Contra, California Bldg. Co. v. Drury*, 103 Wash. 577, 175 P. 302 (1918).

St. Regis Apartment Corp. v. Sweitzer, 32 Wis. 2d 426, 145 N.W.2d 711 (1966).

Annotations

When landlord's reletting or efforts to relet after tenant's abandonment or refusal to enter deemed to be acceptance of surrender, 3 A.L.R. 1080 (1919), *supplemented by* 52 A.L.R. 154 (1928), 61 A.L.R. 773 (1929), 110 A.L.R. 368 (1937).

Model Code

A tenant who abandons the premises is liable under section 2-308(4) for the entire rent or the difference between the rent and the fair rental value, whichever is less. If the tenant is liable for the latter amount, he must also pay all rent accrued during the period reasonably necessary to re-rent the premises plus a reasonable commission for the renting of the premises.

Uniform Act

Under section 4.203(c), the landlord is obligated to make reasonable efforts to re-rent abaondoned premises at a fair rental. Failure to do so, or acceptance of the abandonment as a surrender, terminates the rental agreement as of the date the landlord has notice of the abandonment.

2. *Quiet Enjoyment*

a. *Possession*

Development

Ordinarily, the lessee has a right to take possession of the property on the date fixed in the lease. The lessor has a corresponding implied obligation to deliver possession of the demised premises to the lessee at the beginning of the term. The general rule is that the ordinary lease raises an implied covenant of quiet enjoyment of the leased premises to which the lessor, one claiming under him, or one asserting paramount title is bound. This covenant is breached if possession is withheld from the lessee. Thus, all authorities agree that if a prior tenant rightfully remains on the premises past the date fixed for the commencement of the new tenancy, the lessor will be liable to the second lessee for a breach of the implied covenant.

The landlord, however, assures the tenant of quiet possession only as against all who rightfully claim through or under the landlord. After the date of delivery, the lessor has no duty to protect his lessee against trespassers. If a former tenant *wrongfully* holds over or a trespasser is on the land on the date the new lessee is to take possession, the issue is whether the landlord has a duty, in the absence of an express covenant, to put the tenant in actual possession of the demised premises.

The English rule, followed by a majority of American jurisdictions, implies a covenant requiring the lessor to put the lessee in actual possession of the premises on the first day of the term. Under the English rule, this covenant is included within the covenant of quiet enjoyment. If the lessee is prevented from obtaining possession by someone holding over, whether rightfully or wrongfully, then the covenant is violated, and the lessee is entitled to recover damages from the lessor. The lessee, without agreement to the contrary, is under no duty to oust the tenant who wrongfully holds over; this duty falls upon the lessor.

Under the American rule, to which a minority of jurisdictions subscribe, the implied covenant to deliver possession is merely a corollary to the covenant of quiet enjoyment. The landlord is not bound to put the tenant into actual possession, but is bound only to put him into legal possession so that no superior right to possession will preclude his taking actual possession. The tenant, then, assumes the burden of enforcing his right of possession against all persons wrongfully in possession.

Therefore, the new tenant's remedy lies against the person wrongfully in possession and not against the landlord.

Neither rule applies in the case of the parties that have expressly convenanted otherwise. Under both rules, the covenant to deliver possession is breached when the lessee is prevented from taking possession by acts of the lessor, or when the lessor fails to deliver a valid legal right to possession.

Failure of the lessor to give the required possession gives rise to an action for damages for breach of an express or implied covenant to give possession, breach of the covenant of quiet enjoyment, and/or anticipatory breach of the lease.

Leading Cases

King v. Reynolds, 67 Ala. 229 (1880)—adopted the English rule; illustrates the rationale behind the rule, that one who accepts a lease expects to enjoy the property, not acquire a lawsuit.

Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930)—adopted the American rule; the court examined both rules and concluded that since the lessee has the right under Virginia statutes to bring a summary action for unlawful detainer against a tenant holding over, and since the lessor had conveyed his possession, the tenant is the proper party to bring this action.

Jurisdictions

The following jurisdictions adhere to the English rule:

King v. Reynolds, 67 Ala. 229 (1880).

Chesire v. Thurston, 70 Ariz. 299, 219 P.2d 1043 (1950). *But see* *Taylor v. Stanford*, 100 Ariz. 346, 414 P.2d 727 (1966).

Williams v. Petty, 168 Ark. 642, 271 S.W. 9 (1925); *Thomas v. Croom*, 102 Ark. 108, 143 S.W. 88 (1912).

Cohn v. Norton, 57 Conn. 480, 18 A. 595 (1889).

Baxley v. Davenport, 75 Ga. App. 659, 44 S.E.2d 388 (1947); *see also*, *Kokomo Rubber Co. v. Anderson*, 33 Ga. App. 241, 125 S.E. 783 (1924).

Taylor v. Phelan, 69 N.E.2d 145 (Ind. Ct. App. 1946); *Cleveland, C.C. & St. L. Ry. Co. v. Joyce*, 54 Ind. App. 658, 103 N.E. 354 (1913).

Dilly v. Paynesville Land Co., 173 Iowa 536, 155 N.W. 971 (1916).

Stewart v. Murphy, 95 Kan. 421, 148 P. 609 (1915).

Mattingly's Executor v. Brents, 155 Ky. 570, 159 S.W. 1157 (1913).
Mullins v. Brown, 87 Ohio App. 427, 94 N.E.2d 574 (1950).
Herpolsheimer v. Christopher, 76 Neb. 352, 111 N.W. 359 (1907).
Adrian v. Rabinowitz, 116 N.J.L. 586, 186 A. 29 (1936).
Barfield v. Damon, 56 N.M. 515, 245 P.2d 1032 (1952).
N.Y. REAL PROP. LAW § 223a (McKinney 1968).
Dieffenbach v. McIntyre, 208 Okla. 163, 254 P.2d 346 (1952).
Obermeier v. Mattison, 98 Ore. 195, 192 P. 283 (1920).
Bloch v. Busch, 160 Tenn. 21, 22 S.W.2d 242 (1929).
Whitfield v. Gay, 253 S.W.2d 54 (Tex. Civ. App. 1952).
Huntington Easy Payment Co. v. Parsons, 62 W. Va. 26, 57 S.E. 253 (1907).
Shreiner v. Stanton, 26 Wash. 563 (1901).
Gross v. Heckert, 120 Wis. 314 (1904).

The following jurisdietions follow the American rule:
Playter v. Cunningham, 21 Cal. 229 (1862); *Lost Key Mines v. Hamilton*, 109 Cal. App. 2d 569, 241 P.2d 273 (1952).
Judd v. Ladd, 1 Hawaii 17 (1847).
People v. Mattingly, 106 Ill. App. 2d 74, 245 N.E.2d 647 (1969); *Gazzolo v. Chambers*, 73 Ill. 75 (1874).
Rice v. Biltmore, 141 Md. 507, 119 A. 364 (1922).
Snider v. Deban, 249 Mass. 59, 144 N.E. 69 (1924).
Ward v. Hudson, 199 Miss. 171, 24 So. 2d 329 (1946).
Pendergast v. Young, 21 N.H. 234 (1850).
Cozens v. Stevenson, 5 S. & R. 421 (Pa. 1819). *But see Dougherty v. Thomson*, 313 Pa. 287, 169 A. 219 (1933) (dictum supporting the view that there is an implied covenant of the lessor regarding the delivery of possession); *Rice v. McGarvey*, 70 Pitts. Leg. J. 1055 (Pa. C.P. 1922) (falls somewhere between English and American rule).
Underwood v. Birchard, 47 Vt. 305 (1875).
Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930).

Model Code

Under section 2-202, failure of the landlord to put the tenant in possession entitles the tenant to give notice of termination of the rental agreement and, if inability to enter is caused wrongfully by the landlord, to expenses reasonably necessary to obtain adequate substitute housing for one month in an amount of up to one-half of the agreed monthly

rent. If inability to enter results from a prior tenant's wrongful holding-over, the tenant may maintain a summary proceeding for possession against the occupant and recover from the landlord the expenses of such proceeding, reasonable attorney's fees, and substitute housing expenses.

Uniform Act

Section 2.103 places upon the landlord the duty to deliver possession of the premises. The landlord is authorized to bring an action for possession against any person wrongfully in possession, and he may recover damages in the amount of not more than three months' rent or treble actual damages, whichever is greater, and reasonable attorney's fees. Breach of the landlord's obligation to deliver possession abates the new tenant's rent until possession is delivered. Section 4.102. Moreover, the tenant is entitled under section 4.102 to demand performance of the rental agreement and maintain an action for possession and damages against the landlord and anyone wrongfully in possession. Breach of the landlord's obligation that is willful and not in good faith entitles the tenant to damages in the amount of not more than three months' periodic rent or treble actual damages, whichever is greater, plus reasonable attorney's fees.

b. *Eviction*

Development

At common law, every rental agreement contains an implied covenant that neither the landlord nor anyone acting through him or under claim of paramount title will materially interfere with the tenant's possession of the leased premises. Breach of this covenant of quiet enjoyment gives the tenant an action for damages and relieves him of the duty to pay rent. This result represents a notable exception to the traditional rule that lease covenants are independent.

Because *possession* is the key element protected by the covenant of quiet enjoyment, breach of the covenant requires an act by the landlord, or his failure to perform an act that he has a duty to perform, that so interferes with the tenant's possessory interests that the tenant's occupation of the premises is precluded. (The act may also prevent him from *obtaining* possession. *See* Quiet Enjoyment: Possession, *supra* at 718).

Any actual, unlawful eviction of the tenant from the leasehold, therefore, constitutes a breach of the covenant of quiet enjoyment. By analogy, a breach occurs when there is a constructive eviction. Here,

although the landlord does not physically evict the tenant, he does create or permits to be created a condition that so interferes with the tenant's enjoyment and occupation of the premises that the tenant is forced to abandon—as when the landlord permits another part of the premises to be used for prostitution or, more recently, allows the condition of an urban residential dwelling to so deteriorate that the building becomes uninhabitable.

Actual eviction from just a portion of the demised premises has been held to relieve the tenant of his entire rental obligation on the theory that the landlord cannot apportion his wrong. The courts have been reluctant to accept the analogous theory of partial constructive eviction and permit the tenant who removes from only part of the premises to retain possession of the remainder while claiming release from, or reduction of, his rent payments.

Recognizing the harshness of the requirement of abandonment of the premises in the context of an urban housing shortage, some courts have found a constructive eviction even when the tenant remains in possession.

Leading Cases

Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (N.Y. Mun. Ct. 1946)—apparently recognized constructive eviction without abandonment, but emphasized that the tenant had abandoned a portion of the premises. However, the current law in New York rejects the theory of constructive eviction without abandonment. *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970), *reversing* 31 App. Div. 342, 298 N.Y.S.2d 153 (1969); *Gombo v. Martise*, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (App. T.), *reversing per curiam* 41 Misc. 2d 475, 246 N.Y.S.2d 750 (Civ. Ct. N.Y. 1964).

East Haven Associates, Inc. v. Gurian, 64 Misc.2d 276, 313 N.Y.S. 2d 927 (Civ. Ct. N.Y. 1970)—recognized partial constructive eviction. *Contra, Zweighaft v. Remington*, 66 Misc.2d 261, 320 N.Y.S.2d 151 (Civ. Ct. N.Y. 1971)—refused to follow the theory of partial constructive eviction on facts identical to those in *East Haven*.

Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969)—extended the doctrine of constructive eviction to latent conditions existing prior to the execution of the lease. Landlord's breach of his implied warranty of habitability (see *infra* at 727) forced ten-

ant to vacate the premises and supported tenant's claim of constructive eviction.

Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969)—rejected the doctrine of constructive eviction in favor of the theory of breach of warranty of habitability on grounds of public policy and the contractual nature of a lease. *See* Habitability: Implied Warranty, *infra* at 727.

Periodicals

Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Covenants)*, 16 TEXAS L. REV. 47, 65-67 (1937)—characterizes constructive eviction as a fiction developed by the courts to circumvent the common law's refusal to recognize dependent covenants.

Indritz, *The Tenants' Rights Movement*, 1 NEW MEXICO L. REV. 1, 78-82 (1971)—summarizes cases and problems.

Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 HASTINGS L.J. 287, 304-05 (1970)—argues that since the housing shortage precludes abandonment, the courts should recognize that the failure to abandon within a reasonable time no longer represents a waiver of the landlord's breach of the covenant of quiet enjoyment. Courts should permit tenants to assert partial constructive eviction and assert rights accruing under a breach of the covenant of quiet enjoyment without requiring compliance with the abandonment doctrine of constructive eviction.

Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 231-39 (1969)—asserts that the doctrine of partial constructive eviction recognizes that in the modern urban setting possession is no longer the entire consideration for the rent and makes the tenant's rent obligation dependent on the landlord's performance of both his service covenants and his covenant of quiet enjoyment.

Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DE PAUL L. REV. 69 (1951)—recognizes that constructive eviction is based on the theory that a serious interference with the beneficial enjoyment of the incident of possession effects the same breach of the covenant of quiet enjoyment as physical expulsion. The scope of the remedy has expanded to provide relief when the landlord has failed to maintain habitability of the premises.

Rapacz, *Theories of Defense When Tenants Abandon the Premises*

Because of the Condition Thereof, 4 DE PAUL L. REV. 173 (1954)— offers alternative theories supporting the tenant's abandonment: failure of consideration; doctrine of dependent covenants; "general intent of the parties"; failure to perform conditions precedent; fraudulent concealment and representation; nuisance; and the intolerable conditions doctrine.

Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 529-34 (1966)—contends that the housing shortage prevents the abandonment prerequisite to reliance on strict constructive eviction. Courts should recognize the emerging doctrines of constructive eviction without abandonment, partial constructive eviction, and equitable constructive eviction to provide relief for the indigent tenant faced with uninhabitable premises.

Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572, 576-78 (1966)—advocates a merger of partial eviction and constructive eviction. Considered independently, neither the doctrine of partial eviction, with its unlikely fact situation, nor the doctrine of constructive eviction, with its abandonment requirement, offers much assistance to slum dwellers faced with substandard housing. If the courts recognize that the tenant deprived of essential services is damaged as severely as the tenant actually ousted from a small portion of the premises, they may merge the doctrines and permit the tenant to remain rent-free until the landlord has remedied the situation.

Trends in Landlord-Tenant Law Including Model Code, 6 REAL PROP., PROB. & TRUST J. 550, 557-63 (1971)—contends that the Model Code remedies (see *infra* at 726), which attempt to create a right similar to constructive eviction, provide at best a stop-gap repair-and-deduct procedure that precipitates retaliatory eviction.

Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CAL. L. REV. 304 (1965)—criticizes the abandonment requirement, which, although feasible for large commercial tenants with substantial financial leverage, leaves constructive eviction an illusory alternative for the slum tenant. The theory implicit in the rejected doctrine of constructive eviction without abandonment, that a tenant should not be required to pay rent while his apartment remains in a dangerous or unhealthy condition, is recognized in the rent withholding statutes.

Note, *Partial Constructive Eviction: The Common Law Answer in the*

Tenant's Struggle for Habitability, 21 HASTINGS L.J. 417 (1970)—argues that a synthesis of the doctrines of constructive eviction and partial eviction, permitting the total and automatic suspension of rent, independent of removal, following a landlord's material interference with the tenant's use and enjoyment of the premises, would guarantee either adequate living conditions or effective legal alternatives and would force the landlord to repair despite any common law leniency or statutory waiver.

Note, *Landlord's Lament: New Tenant Remedies in Florida*, 24 U. FLA. L. REV. 769, 771 (1972)—criticizes the abandonment requirement and proposes that the application of the doctrine of public nuisance to landlord-tenant law now provides the best remedy for tenants facing substandard housing conditions.

Note, *The Indigent Tenant and the Doctrine of Constructive Eviction*, 1968 WASH. U.L.Q. 461—notes that with its risks of determining material interference and reasonable time, the lack of any place to go, and the disparity of bargaining power between landlord and tenant that prevents the tenant from bargaining for rent-free occupation until defects are corrected, the abandonment requirement leaves constructive eviction an empty remedy for the indigent or low-income tenant. Legislative remedies, including housing codes, repair-and-deduct statutes, receivership, and rent withholding are needed to successfully attack the problems of slum housing and to provide the tenant with adequate remedies to force improvement of conditions.

38 FORDHAM L. REV. 818 (1970)—comments on *Lemle v. Breeden.*

32 U. PITT. L. REV. 228 (1971)—comments on *East Haven Associates, Inc. v. Gurian.*

31 U. PITT. L. REV. 138 (1969)—comments critically on *Reste Realty Corp. v. Cooper*: the court's expansion of the covenant of quiet enjoyment to include an implied warranty of habitability, to permit a tenant to rely on constructive eviction to gain rescission where the uninhabitable condition antedates the lease, and to further erode the caveat emptor doctrine is not supported by the case law on which the court stands.

Annotations

Acts of insurance company or public authorities to protect property after fire as constructive eviction of tenant, 29 A.L.R. 1361 (1924).

Acts of other tenants as chargeable to landlord, 38 A.L.R. 250 (1925), *supplemented by* 45 A.L.R. 1126 (1926), 58 A.L.R. 1049 (1929).

Failure of landlord to make, or permit tenant to make, repairs or alterations required by public authority as constructive eviction, 63 A.L.R. 432 (1929).

What amounts to constructive eviction which will support action for breach of covenant of warranty or for quiet enjoyment, 172 A.L.R. 18 (1948).

Tenant's or subtenant's right to damages for claimed constructive eviction or breach of covenant based upon notice to tenant to vacate or other termination notice, 14 A.L.R.2d 1450 (1950).

Breach of covenant for quiet enjoyment in lease, 41 A.L.R.2d 1414 (1955).

Implied covenant or obligation of lessor to furnish water or water supply for business needs of lessee, 65 A.L.R.2d 1306 (1959).

Time within which tenant must yield or abandon premises after claimed constructive eviction, 91 A.L.R.2d 638 (1963).

Infestation of leased dwellings or apartment with vermin as entitling tenant to abandon premises or as constructive eviction by landlord, in absence of express covenant of habitability, 27 A.L.R.3d 924 (1969).

Constructive eviction based on flooding, dampness, or the like, 33 A.L.R.3d 1356 (1970).

Constructive Eviction, CCH POV. L. REP. ¶ 2330 (1972).

Treatises

1 AMERICAN LAW OF PROPERTY § 3.51 (A.J. Casner ed. 1952).

2 R. POWELL, REAL PROPERTY ¶ 230[3] (1971)—concludes that the housing shortage, which precludes the tenant's abandonment, has severely limited the utility of constructive eviction as a weapon for the tenant to force the landlord to fulfill his obligations.

J. RASCH, NEW YORK LANDLORD AND TENANT §§ 920-47 (1971).

Model Code

Section 2-205 expands the concept of quiet enjoyment to include conditions that deprive the tenant of a substantial part of the benefit of the premises without requiring abandonment. The landlord must be given written notice of the condition and one week to correct it before the lease may be terminated, unless the dwelling is uninhabitable or

unsafe. Willful or negligent acts by the landlord give the tenant an action for damages, including reasonable costs of securing adequate substitute housing.

Section 2-206 gives the tenant a limited repair and deduct remedy for minor defects. *See infra* at 740.

Where the landlord fails to provide hot water and the building is equipped for that purpose, the tenant may terminate the lease or abate one-fourth of the rent. Where the landlord fails to provide heat or a reasonable amount of water, the tenant may terminate the lease or abate the rent and procure adequate substitute housing. The landlord is liable for any additional expenses incurred by the tenant up to one-half of the actual rent. Section 2-207

Where enjoyment is impaired by fire or other casualty not caused by the tenant, he may terminate the lease or, when continued possession is lawful, vacate any part of the premises rendered unusable and be liable for rent no greater than the fair market value of the portion he continues to occupy. Section 2-208.

Uniform Act

Under Sections 4.104 and 4.107, willful ouster or diminution of services by the landlord entitles the tenant to recover possession or terminate the rental agreement. Moreover, the tenant may recover an amount equal to treble damages or three months rent, whichever is greater, and reasonable attorney's fees. If the rental agreement is terminated, the tenant is entitled to the security recoverable under section 2.101 and to all prepaid rent. *Cf.* Uniform Act provisions for warranty of habitability, *infra* at 743.

3. *Habitability*

a. *Implied Warranty*

Development

The common law traditionally recognized no implied warranty of habitability, warranty of fitness for intended use, or warranty to repair on the part of the landlord in a lease of real property. Because the leasehold was considered an interest in the realty for a term during which the tenant assumed all benefits, obligations, and liabilities of ownership, the doctrine of caveat emptor applied, and the tenant accepted the property as he found it at the inception of the lease. Moreover, the tenant's obligation for rent was dependent solely on his posses-

sory interest in the real estate, and the landlord's breach of any express covenant for services included in the lease gave the tenant only an independent action for breach of contract. Unless the landlord materially interfered with his possession, the tenant could neither abandon nor suspend his rental payments. *See* Quiet Enjoyment: Eviction, *supra* at 721.

The modern urban tenant, however, seeks not merely possession, but habitable possession, and the law has struggled to satisfy his expectations. The judicial doctrine of constructive eviction, with its inflexible abandonment requirement, offers little relief to the tenant faced with the current housing shortage. *See* Quiet Enjoyment: Eviction, *supra* at 721. Similarly, the "furnished dwelling" exception, which has held the landlord liable for the condition of a furnished dwelling leased for a short term, fails to address the problems of the low-income tenant. Furthermore, the municipal housing and sanitation codes, which impose affirmative repair and maintenance obligations on landlords, often provide only criminal sanctions and have been generally ineffective in their application. Additionally, while courts have increasingly recognized the contractual nature of modern leases, many jurisdictions have extended dependent construction only to express covenants.

Recognizing the need to provide effective, flexible remedies to combat the problems of substandard urban dwellings, some jurisdietions have recently developed the theory of an implied warranty of habitability and fitness for purpose.

Leading Cases

Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961)—held that where the premises were in severe disrepair and evidenced substantial housing code violations, a tenant-defendant in his landlord's action for rent was liable only for the reasonable rental value during the time of actual occupancy; the landlord's implied warranty of habitability and the tenant's covenant to pay rent are mutually dependent.

Brown v. Southhall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968)—declared lease void and unenforceable where substantial housing code violations existed at the inception of the lease. Essentially an application of the illegal contract theory, this defense is available to defeat a landlord's action for possession for nonpayment of rent.

Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970)—held that a warranty of habitability,

measured by standards of the District of Columbia Housing Regulations, is implied by law in leases of urban dwelling units covered by those regulations. The warranty covers both violations existing at the inception of the lease and those arising during the term. Remedies for a landlord's breach of this warranty include damages, rescission, and reformation.

Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970)—found a warranty of habitability implied in the language of a lease expressly limited to use as a dwelling. The warranty applies to latent defects existing at the inception of the lease or conditions arising during the term. The landlord's breach entitles the tenant to repair and deduct.

Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969)—held that breach of an implied warranty of habitability resulting in the tenant's vacation of the business premises supports the tenant's claim of constructive eviction.

Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969)—rejected the doctrine of constructive eviction in favor of the theory of breach of warranty of habitability on grounds of public policy and the contractual nature of leases.

Lindsey v. Normet, 405 U.S. 56 (1972)—upheld the constitutionality of that portion of Oregon's forcible entry and wrongful detainer statute that denies tenants the right to assert the defense of breach of warranty of habitability at the summary eviction proceeding.

Jurisdictions

The following jurisdictions have recognized in their case law an implied warranty of habitability in leases:

Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); *Buckner v. Azulai*, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967).

Quesenbury v. Patrick, CCH Pov. L. Rep. ¶ 15,803 (Colo. County Ct. March 1972); *Bonner v. Beechem*, [1968-1971 Transfer Binder] CCH Pov. L. Rep. ¶ 11,098 (Colo. County Ct., 1970).

Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Brown v. Southhall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968) (illegal lease theory).

Givens v. Gray, 126 Ga. App. 309, 190 S.E.2d 607 (1972).

Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) (furnished dwellings); *Lund v. MacArthur*, 51 Hawaii 473, 462 P.2d 482 (1969) (unfurnished dwellings).

Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Gillette v. Anderson*, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972); *Longenecker v. Hardin*, 130 Ill. App. 2d 468, 264 N.E.2d 878 (1970).

Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

Reed v. Classified Parking System, 232 So. 2d 103 (La. App. 1970).

Boston Housing Authority v. Hemmingway, 41 U.S.L.W. 2518 (Mass., Mar. 5, 1973).

Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972).

Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (warranty implied in language of lease expressly limiting use of premises to dwelling); *Berzito v. Gambino*, 114 N.J. Super. 124, 274 A.2d 865 (Dist. Ct. 1971).

Mannie Joseph, Inc. v. Stewart, CCH Pov. L. Rep. ¶ 15,945 (N.Y.C. Civ. Ct. Aug. 4, 1972); *accord*, *Morbeth Realty Co. v. Rosenshine*, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971) (rent abated); *Amanuensis, Ltd. v. Brown*, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. 1971) (rent abated); *Ianacci v. Pendis*, 64 Misc. 2d 178, 315 N.Y.S.2d 399 (N.Y.C. Civ. Ct. 1970) (tenant entitled to return of security deposit); *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d 937, 314 N.Y.S.2d 215 (N.Y.C. Civ. Ct. 1970) (tenant entitled to repair and deduct). *Contra*, *Graham v. Wiseburn*, 39 A.D.2d 334, 334 N.Y.S.2d 81 (1972) (no implied warranty of fitness for occupancy of residential premises in absence of statute or express agreement).

Glyco v. Schultz, 289 N.E.2d 919 (Ohio Mun. Ct. 1972).

Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (warranty of habitability implied from applicable housing codes); *Earl Millikin, Inc. v. Allen*, 21 Wis. 2d 497, 124 N.W.2d 651 (1963). *Contra*, *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970) (municipal housing code provides its own regultory procedures and does not reflect congressional intent that it be implied into leases and made an implied covenant mutually dependent on tenant's obligation to pay rent).

The following jurisdictions have expressly rejected the theory of an implied warranty of habitability or fitness for purpose:

Thomas v. Roper, 162 Conn. 343, 294 A.2d 321 (1972) (warranty of habitability).

Pointer v. American Oil Co., 295 F. Supp. 573 (S.D. Ind. 1969) (warranty of fitness for purpose).

Parris v. Sinclair Refining Co., 359 F.2d 612 (6th Cir. 1966) (Tennessee does not recognize warranty of fitness for purpose).

Cameron v. Calhoun-Smith Distributing Co., 442 S.W.2d 815 (Tex. Civ. App. 1969) (warranty of fitness for purpose).

Teglo v. Porter, 65 Wash. 2d 772, 339 P.2d 519 (1965) (warranty of fitness for purpose).

Periodicals

ABA COMMITTEE ON LEASES, *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROP. PROB. & TRUST J. 550 (1971)—surveys current judicial and legislative efforts towards reform in landlord-tenant law, with extensive discussion of the landlord's obligation to provide services and to repair under the Model Code.

Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971)—provides extensive economic analysis of slum housing markets, and the effect on them that rigorous code enforcement may have.

Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Covenants)*, 16 TEXAS L. REV. 47 (1937)—concludes that abandonment of old feudal concepts of the independence of lease covenants merely recognizes the reality of the contractual aspect of leases.

Bixby, *Implied Warranty of Habitability: New Right for Home Buyers*, 6 CLEARINGHOUSE REV. 468 (1972)—observes that rejection of caveat emptor and the development of implied warranties in the sale of goods has been followed by similar developments in the lease or sale of realty.

Bruno, *New Jersey Landlord-Tenant Law: Proposals for Reform*, 1 RUTGERS-CAMDEN L.J. 299 (1969)—contends that since courts have failed to provide relief for the indigent tenant faced with substandard housing, the legislature should provide, *inter alia*, rent withholding and repair-and-deduct procedures, and a warranty of habitability and fitness for intended use.

Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L.J. 909 (1971)—studies the extensive judicial and legislative

reform of landlord-tenant law in the District of Columbia which has provided the tenant with broad affirmative remedies and defenses and represents a sound and appropriate response to the urban housing crisis that may be applied in jurisdictions throughout the country.

Dooley & Goldberg, *A Model Tenants' Remedies Act*, 7 HARV. J. LEGIS. 357 (1970)—proposes a standard of habitability measured by housing code and health and safety regulations, and authorizes rent withholding, abatement, suit for damages, and repair-and-deduct remedies when landlord fails to maintain standard of habitability.

Durnford, *The Landlord's Warranty Against Defects and the Recourses of the Tenant*, 15 MCGILL L.J. 361 (1969)—argues that although Canadian law requires the landlord to warrant against all defects in leased premises which prevent or diminish their intended use, whether such defects are known to the landlord or not, reform is needed to unify the tenant's right to damages for defects with the landlord's obligation to repair.

Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URBAN L. 695 (1969)—recognizes that housing codes, alone or with tenant-initiated remedies, have failed to alleviate substandard housing conditions. Before landlord may collect rent, he should be required to obtain a certificate of occupancy stating that the premises complies with local housing regulations; such license or certificate should be subject to periodic renewals.

Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966)—suggests that a new civil remedy for housing code violations is required to provide the necessary code enforcement.

Grimes, *Caveat Lessee*, 2 VALPARAISO L. REV. 189 (1968)—observes in the lessor's emerging tort liability some relief from the strict doctrine of caveat lessee and the doctrine's rejection of implied covenants of fitness or habitability.

Indritz, *The Tenants' Rights Movement*, 1 NEW MEXICO L. REV. 1, 86-107 (1971)—surveys the recent development of the warranty of habitability first expressed in *Pines v. Perssion*, the illegal lease concept of *Brown v. Southall Realty Company*, and the contractual implied warranties developed in *Lemle v. Breeden* and *Javins v. First Nat'l Realty Corp.*

Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279 (1960)—urges the adoption of statutes imposing on lessor a duty to put the

premises in a fit condition and to keep them repaired in states currently lacking such legislation.

Moskovitz, *Defending an Eviction Action by Showing Housing Code Violations—Model Answer and Points and Authorities*, 3 CLEARINGHOUSE REV. 98 (1969)—offers six theories on which a defense against eviction for nonpayment of rent where code violations exist may be based: illegal contract; illegal performance by landlord of obligations under the lease; failure of consideration; constructive eviction; actual partial eviction; equitable doctrine of "clean hands."

Moskovitz, *Rent Withholding and The Implied Warranty of Habitability—Some New Breakthroughs*, 4 CLEARINGHOUSE REV. 49 (1970)—discusses major cases, issues, and available remedies, including the "substantiality" test and waiver of the implied warranty, rescission, suits for damages and specific performance, and rent withholding.

2 National Housing and Development Law Project, *Handbook on Housing Law, Landlord-Tenant Materials* (1970)—presents a compilation of rent withholding materials, with model brief, including implied warranty of habitability argument.

Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969)—analyzes the bifurcated relationship between landlord and tenant that has developed from the common law, in which the tenant's right to possession and his obligation to pay rent are independent from, and unrelated to, the landlord's obligation to provide services. The relationship fails to recognize that in the modern setting the tenant seeks not merely possession, but possession of habitable premises. Current legislative efforts, including housing and sanitation codes and rent abatement devices, offer ineffective remedies, and courts must fashion new remedies to reflect the following policies: rent serves as consideration for services as well as for possession; lease covenants are reciprocal; lease of space for living purposes includes a warranty of habitability; vigorous rent withholding remedies and the tenant's right to sue for damages need be established; and the equitable doctrine of "good faith" should be applied to the landlord-tenant relationship.

Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670 (1966)—contends that the landlord's implied affirmative obligations should be supplemented

by a statutory lease establishing, *inter alia*, the landlord's duty to maintain the premises in a condition fit for occupancy that complies with the requirements of the relevant housing codes and the tenant's right to withhold rent or terminate the lease when the landlord fails to perform his obligations.

Schoshinski, *Remedies of the Indigent Tenant—Proposal for Change*, 54 GEO. L.J. 519 (1966)—proposes a change in the common law's consistent refusal to recognize an implied warranty of habitability in leases. The current housing shortage and substandard condition of much available low-income housing require that, in exchange for the exorbitant rent the tenant pays him, the landlord be compelled to furnish and maintain shelter that meets at least the minimum standards of habitability. The warranty of habitability may be implied directly from the applicable housing codes, from an illegal contract theory, or drawn by analogy from the implied warranties found in the law of sales of chattels or newly constructed buildings.

Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DENVER L.J. 387 (1967)—suggests that changing conditions in the nature of lease transactions and the inequality of knowledge concerning the premises require the development of a limited implied warranty of habitability.

Comment, *The Failure of a Landlord to Comply with Housing Regulations as a Defense to Non-Payment of Rent*, 21 BAYLOR L. REV. 372 (1969)—suggests that the cumulative effect of the *Brown v. Southall Realty* void lease defense and the *Edwards v. Habib* ban on retaliatory evictions may permit tenants to remain rent-free indefinitely in substandard housing.

Note, *Contract Principles and Leases of Realty*, 50 B.U.L. REV. 24 (1970)—predicts that the application of contract and warranty principles to landlord-tenant law will better reflect the current landlord-tenant relationship and help to remedy slumlord abuses.

Note, *Emerging Landlord Liability: A Judicial Reevaluation of Tenant Remedies*, 37 BROOKLYN L. REV. 387 (1971)—warns that judicial establishment of tenant's repair-and-deduct remedy may help to alleviate substandard housing conditions where landlords make sufficient profit, but may lead to abandonment of buildings by landlords unable to afford the improvements.

Note, *Landlord v. Tenant: An Appraisal of the Habitability and Repair Problem*, 22 CASE W. RES. L. REV. 739 (1971)—argues that the enactment and enforcement of statutes implying in all leases a

warranty of habitability, providing a repair-and-deduct remedy, proscribing retaliatory acts by the landlord, and abolishing the self-help eviction are required to supplement current judicial and legislative efforts to guarantee habitable premises for modern urban tenants.

Comment, *Tenant's Remedies in the District of Columbia: New Hope for Reform*, 18 CATHOLIC U. L. REV. 80 (1968)—discusses the *Brown v. Southall Realty* and *Edwards v. Habib* defenses.

Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489 (1971)—concludes that *Javins v. First Nat'l Realty Co.*, and *Kline v. 1500 Massachusetts Ave.* Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (landlord obliged to take reasonable precautions to protect his tenants from the foreseeable criminal acts of third persons), provide the tenant with relief from building decay and rising crime, extend the established laws of sales and innkeeper-guest to landlord-tenant disputes, and emphasize the dependent obligations and the landlord's inherent service duties that characterize the modern lease.

Comment, *Landlord and Tenant—Implied Warranty of Habitability—Demise of the Traditional Doctrine of Caveat Emptor*, 20 DE PAUL L. REV. 955 (1971)—surveys leading cases in development of implied warranties in sale and lease of real property.

Note, *Current Interest Areas of Landlord-Tenant Law in Iowa*, 22 DRAKE L. REV. 376 (1973)—concludes that judicial recognition of the implied warranty of habitability in *Mease v. Fox* represents a significant development in tenants' protection. Statutory control of rental security deposits is also required.

Note, *Implied Warranty of Habitability in Housing Leases*, 21 DRAKE L. REV. 300 (1972)—views the modern lease as a contract, subject to contract law of implied warranty and the remedies of rescission, reformation, and damages. Public policy, the inequality of bargaining power between landlord and tenant, and the severe housing shortage suggest that efforts to contract away the implied warranty should be proscribed.

Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123 (1971)—analyzes the emerging implied warranty as permitting the aggrieved tenant to discard the ineffective remedy offered by con-

structive eviction and to seek instead damages, rescission, or reimbursement for cost of repairs necessary to make premises habitable.

Note, *Leases and the Illegal Contract Theory—Judicial Reinforcement of the Housing Code*, 56 GEO. L.J. 920 (1968)—concludes that although the illegal contract theory may preclude recovery of unpaid rent by violating landlords and may force them to comply with housing code standards, additional protection against a landlord's retaliatory measures and a direct attack on the problems of slum dwellings are required to promote effective relief.

Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965)—concludes that although code enforcement may have effected the correction of expensive structural deficiencies on a citywide basis and forced the removal of imminently dangerous conditions, it has failed to impose standards of maintenance and sanitation. Rehabilitation of urban slums requires that code enforcement be undertaken in conjunction with urban planning, clearance, public housing, urban renewal, zoning laws, and mortgage guarantee and loan programs.

Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458 (1970)—notes that the emergence of the implied warranty of habitability closely parallels the development from nonliability to strict liability in the areas of chattel manufacture and of builder-vendor. Continued development of reform in landlord-tenant law may result in the application of products liability doctrine and torts remedies to landlord-tenant law.

Comment, *Housing Codes and the Tort of Slumlordism*, 8 HOUSTON L. REV. 522 (1971)—argues that while the contract remedies provided by an implied warranty of habitability are significant in combatting slumlordism, a private action in tort would offer greater damages and present a more pressing threat to the offending landlord.

Note, *D.C. Housing Regulations, Article 290, Section 2902: Construed Pursuant to Brown v. Southall Realty Co. and Javins v. First Nat'l Realty Corp.—A New Day for the Urban Tenant?*, 16 HOWARD L.J. 366 (1971)—suggests that the contractual remedies now available to the tenant faced with violations of the housing code provide effective means to induce repair, but may drive private landlords, and their units, from the market. To realize the purpose behind the Housing Regulations the District must be prepared to assume the burden of providing safe and sanitary housing.

Comment, *Rent Mitigation for Housing Code Violations*, 56 IOWA L. REV. 460 (1970)—notes that the emerging implied warranty of habitability permits the tenant to withhold rent to secure his right to a habitable dwelling and reflects judicial efforts to solve the problems of substandard urban housing.

Note, *Lindsey v. Normet: Landlord-Tenant Relationships—A Judicial or Legislative Definition?*, 11 J. FAMILY L. 775 (1972)—suggests that the Supreme Court decision that makes the definition of the landlord-tenant relationship a legislative rather than a judicial function may impede judicial reformation of landlord-tenant law and may undermine the judicially created implied warranties of habitability established in *Pines v. Perssion* and *Javins*.

Note, *The Doctrine of Caveat Emptor As Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform*, 2 RUTGERS-CAMDEN L. REV. 120 (1970)—concludes that the emerging implied warranty against latent defects in the sale or lease of realty reflects a policy decision by some jurisdictions to shift the risks attending real estate transactions to the party better able to evaluate those risks and protect against them.

Note, *Habitability in Slum Leases*, 20 S.C.L. REV. 282 (1968)—suggests that landlord-tenant law requires extensive statutory reform that would recognize warranties of fitness and habitability and would place the duty to repair on the landlord.

Note, *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244 (1952)—notes that California recognizes the dual nature of leases. Dependent construction of covenants would permit tenant to abandon and be excused from further rent following landlord's breach.

Note, *The Plight of the Indigent Tenant: The Failure of the Law to Provide Relief*, 5 SUFFOLK L. REV. 213 (1970)—concludes that the emerging implied warranty of habitability in leases may provide relief to the otherwise remediless indigent tenant faced with substandard housing.

Comment, *The Landlord's Common-Law Duty to Repair: Some Recent Innovations*, 22 SYRACUSE L. REV. 997 (1971)—notes that recent decisions have relied on an implied warranty of habitability, private law rent withholding, and common law repair-and-deduct principles to provide the tenant facing substandard conditions with effective remedies to secure needed repairs.

Note, *Landlord and Tenant: Lease Agreement Void As An Illegal Contract When Dwelling Is In Violation of Local Housing Code At Time of Letting: Brown v. Southall Realty Company*, 30 U. PITT. L. REV. 134 (1968)—contends that while the illegal contract theory recognizes society's interest in providing habitable living quarters for the poor, it does little to further the indigent's interest in maintaining possession. Judicial recognition of an implied warranty of habitability is required to permit the tenant to remain in possession while withholding rent.

Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor*, 3 U. RICHMOND L. REV. 316 (1969)—argues that the lessor's duty should be limited to the exercise of reasonable care to insure that premises are safe for use when the tenant takes possession.

Comment, *Plotting the Long-Overdue Death of* Caveat Emptor *in Leased Housing*, 6 U. SAN FRANCISCO L. REV. 147 (1971)—concludes that the increasing emphasis on the contractual nature of leases, some relaxation of the abandonment requirement for constructive eviction, and the emerging implied warranties of habitability recognized the social realities of urban tenancies and undermine the outdated *caveat emptor* principles of landlord-tenant law.

Comment, *Tenant Remedies—The Implied Warranty of Fitness & Habitability*, 16 VILL. L. REV. 710 (1971)—contrasts the implied warranty based on analogy to sales law with the warranty based on housing codes: the former offers the flexibility of remedies modeled on the Uniform Commercial Code, but may be subject to disclaimer of liability; the latter may effectively preclude disclaimer of liability, but lacks flexibility in application.

Comment, *Rent Abatement Legislation: An Answer to Landlords*, 12 VILL. L. REV. 631 (1967)—contends that legislation adopting the relevant municipal housing codes, establishing a minimum standard of habitability, and authorizing supervised rent withholding when conditions fall below standards is needed to insure the availability of decent low-income housing.

Comment, *The New Michigan Landlord-Tenant Law: Partial Answer*

to a Perplexing Problem, 15 WAYNE L. REV. 836 (1969)— notes that legislation imposes warranty of habitability and engrafts all applicable housing codes onto residential leases for terms of less than one year.

38 FORDHAM L. REV. 818 (1970)—comments on *Lemle v. Breeden.*

45 MARQ. L. REV. 630 (1962)—comments on *Pines v. Perssion.*

31 U. PITT. L. REV. 138 (1969)—comments on *Reste Realty Corp. v. Cooper.*

25 VAND. L. REV. 654 (1972)—comments on *Lindsey v. Normet.*

Comments on *Brown v. Southall Realty Co.*:

4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 204 (1968).

21 VAND. L. REV. 117 (1968).

Comments on *Javins v. First Nat'l Realty Corp.*:

20 BUFFALO L. REV. 567 (1971).

39 GEO. WASH. L. REV. 152 (1970).

84 HARV. L. REV. 729 (1971).

6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 193 (1970).

32 OHIO STATE L.J. 207 (1971).

39 U. CIN. L. REV. 600 (1970).

23 U. FLA. L. REV. 785 (1971).

24 VAND. L. REV. 425 (1971).

For further discussion of remedies for breach of the implied warranty of habitability see periodicals and annotations listed under Habitability: Statutory Remedies, *infra* at 740.

Annotations

Implied warranty by seller, in absence of fraud or misrepresentation, as to fitness, condition, or quality of new dwelling, 78 A.L.R.2d 446 (1961).

Modern status of rules as to existence of implied warranty of habitability or fitness for use of leased premises, 40 A.L.R.3d 646 (1971).

Habitability and Fitness, CCH POV. L. REP. ¶ 2105 (1972).

Lease Illegality or Invalidation, CCH POV. L. REP. ¶ 2210 (1972).

Model Code and Uniform Act

See provisions in Habitability: Statutory Remedies, *infra* at 743.

b. *Statutory Remedies*

Development

In a number of jurisdictions, statutes create a warranty of habitability (see *supra* at 727) in all residential leases or otherwise place upon the landlord the obligation to put and maintain the premises in a habitable condition. Most of these statutes alter the tenant's obligation with respect to paying rent in the event that the landlord breaches his obligation. The statutes are generally of three types:

Rent abatement.—The tenant is relieved of all obligation to pay rent for the duration of the breach.

Rent withholding.—The tenant may deposit the rent in judicial escrow until the landlord remedies the breach.

Repair-and-deduct.—The tenant may make repairs resulting from the landlord's breach and deduct the cost from the rent.

Leading Cases

DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500 (1971)—held Pennsylvania's rent withholding statute constitutional.

Farrell v. Drew, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1971)—upheld the constitutionality of New York's Spiegel Law authorizing rent abatement for welfare recipients.

Cf. Leading cases for Habitability: Implied Warranty, *supra* at 728.

Jurisdictions

The following statutes authorize rent abatement as a tenant's remedy:

CONN. GEN. STAT. ANN. §§ 47-24a to c (Supp. 1969).
MASS. LAWS ANN. ch. 239, § 8A (Cum. Supp. 1972).

The following statutes authorize rent withholding as a tenant's remedy:

MO. STAT. ANN. §§ 441.570-.580 (Cum. Supp. 1973).
N.J.S.A. §§ 2A:42-85 to -97 (Cum. Supp. 1972).
N.Y. REAL PROP. ACT. & PROC. LAW §§ 769-82 (McKinney Cum. Supp. 1972).
PA. STAT. ANN. tit. 35, § 1700-1 (Cum. Supp. 1972).

The following statutes authorize repair-and-deduct as a tenant's remedy:

CAL. CIV. CODE §§ 1941-42 (Cum. Supp. 1973).

DEL. CODE ANN. tit. 25, §§ 5301-11 (Cum. Supp. 1970) (also authorizes termination of rental agreement).
HAWAII REV. STATS. §§ 521-42, -62 to -66 (Supp. 1972) (also authorizes termination of rental agreement).
LA. CIV. CODE arts. 2692-95 (1952).
MONT. REV. CODES §§ 42-201, -202 (1947) (also authorizes termination of rental agreement by vacating).
N.D. CENT. CODE §§ 47-16-12, -13 (1960) (also authorizes termination of rental agreement by vacating).
OKLA. STAT. ANN. tit. 41, §§ 31, 32 (1954) (also authorizes termination of rental agreement by vacating).
VA. CODE § 32-64, -66 (1969) (applies to landlord's failure to supply sanitary privy or water closet; tenant required to supply the facilities and deduct the cost from the rent).

The following statutes authorize other tenant's remedies:
GA. CODE ANN. §§ 61-111 to -113 (1966) (requires landlord to keep premises in repair and makes him liable for substantial improvements made by tenant with his consent and for all damages resulting from his failure to repair).
ILL. ANN. STAT. tit. 23, § 11-23 (1968) (authorizes welfare agency to withhold rent allowance from the recipient, or directly from the landlord, where welfare recipient is living in premises which violate housing or building code; eviction of tenant for rent withholding under this statute prohibited).
IOWA CODE ANN. § 413 (1949) (forbids landlord to collect rents without first obtaining health certificate stating that the leased premises complies with the minimum state housing requirements; municipality authorized to maintain civil action against violators).
ME. REV. STAT. ANN. tit. 14, § 6021 (Supp. 1972) (authorizes tenant to rescind rental contract and recover just proportion of rent).
N.Y. SOC. WEL. LAW § 143-b(2) (McKinney 1966) (authorizes abatement of welfare recipient's rental allowance).

Periodicals

Clough, *Pennsylvania's Rent Withholding Law*, 73 DICK. L. REV. 583 (1969).
Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 572 (1969).

Comment, *The Failure of a Landlord to Comply with Housing Regulations as a Defense to the Non-Payment of Rent*, 21 BAYLOR L. REV. 372 (1969)—criticizes the illegal contract theory used in *Brown v. Southall Realty Co.* (*supra* at 728) as a basis for rent withholding.

Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 CAL. L. REV. 304 (1965)—provides general background material with emphasis on rent strikes and rent withholding by welfare officials.

Comment, *Rent Mitigation for Housing Code Violations*, 56 IOWA L. REV. 460 (1970)—discusses the unanswered questions in *Javins v. First Nat'l Realty Corp.* (*supra* at 728). The comment proposes that an administrative agency determine whether a breach of the implicd warranty of habitability has occurred and the appropriate rent reduction resulting from the breach.

Comment, *Rent Withholding: The Tenant's Remedy Against Unfit Housing*, 10 J. FAMILY L. 481 (1971)—develops common law theories for rent withholding and concludes that the material failure of consideration theory is the most sound.

Comment, *Rent Withholding: A New Approach to Landlord-Tenant Problems*, 2 LOYOLA U.L. REV. 105 (1969)—criticizes existing rent withholding legislation and proposes a model statute.

Note, *Rent Withholding for Minnesota: A Proposal*, 55 MINN. L. REV. 82 (1970)—discusses the inadequacies of common law remedies and proposes that Minnesota enact a rent withholding statute similar to the ABF Model Code provisions (*see infra* at 743).

Comment, *Rent Withholding for Welfare Recipients: An Empriical Study of the Illinois Statute*, 37 U. CHI. L. REV. 798 (1970)—studies in detail the operation of the Illinois statute.

Note, *DePaul v. Kauffman: The Pennsylvania Rent Withholding Act*, 32 U. PITT. L. REV. 626 (1971)—discusses the points clarified and question left unanswered by the case holding Pennsylvania's rent withholding statute constitutional.

Note, *Rent Withholding—A Proposal for Legislation in Ohio*, 18 Western RES. L. REV. 1705 (1967)—reviews tenant's common law remedies and concludes that legislation is needed. The note offers a draft of a proposed statute.

10 DUQUESNE L. REV. 113 (1971)—comments on *DePaul v. Kauffman*.
Cf. periodicals listed under Habitability: Implied Warranty, *supra* at 731.

Annotations

Rights and remedies of tenant upon landlord's breach of covenant to repair, 28 A.L.R. 1448 (1924), supplemented by 28 A.L.R.2d 446 (1953).
Validity and construction of statute or ordinance authorizing withholding or payment into escrow of rent for period during which premises are not properly maintained by landlord, 40 A.L.R.3d 821 (1971).
Tenant's right, where landlord fails to make repairs, to have them made and set off against rent, 40 A.L.R.3d 1369 (1971).

Model Code

Under sections 2-203 to -208, the landlord must supply and maintain fit dwelling units in compliance with all applicable state and local building or sanitation codes or regulations and in compliance with general standards of habitability and safety. The Model Code allows rent withholding as a tenant's remedy in the following situations:

(a) If the landlord fails to repair, the tenant, after informing the landlord, may have minor repairs made and deduct the cost from his rental payment. Section 2-206.

(b) If the landlord fails to supply hot water, the tenant may, as an alternative remedy, keep a portion of the rent. If the landlord fails to supply reasonable water and/or heat, the tenant, as an alternative remedy, may procure substitute housing during which time his rent will be abated. Section 2-207.

(c) If the premises are made partially unusable by fire or other casualty, the tenant may vacate that part and reduce his rent to the fair market value of the part he continues to occupy. Section 2-208.

Uniform Act

Section 2.104(a)(2) places upon the landlord an affirmative duty to make repairs and do whatever is necessary to put and maintain the premises in a fit and habitable condition. The remainder of section 2.104(a) places specific duties upon the landlord to insure maintenance

of the premises. These include conforming to building and housing codes; maintaining supplied or required facilities and applicances in good and safe working order; removing waste; and providing adequate running water, hot water, and reasonable heat unless such are physically within the exclusive control of the tenant and are supplied by a direct public utility connection or unless the dwelling is not required by law to be so equipped.

Breach of any of these obligations entitles the tenant under section 4.101 to terminate the rental agreement no less than thirty days after the landlord's receipt of written notice of the breach if the breach is not remedied within fourteen days. Actual damages may be recovered, including reasonable attorney's fees if the breach is willful. Recurrence of the breach within six months entitles the tenant to terminate the rental agreement fourteen days after written notice to the landlord of the breach. Termination of the rental agreement entitles the tenant to the return of all security recoverable under section 2.101 and all prepaid rent.

B. *Tort*

1. *Slumlordism*

Development

At common law, the doctrine of *caveat emptor* limited the landlord's tort liability and held him liable only for injuries caused by latent defects in the premises of which he had, or reasonably should have had, knowledge. During occupancy, the landlord was generally responsible for the condition of common areas. Otherwise, he was liable only for injury resulting from his active negligence.

The promulgation of housing codes and the development of the warranty of habitability (*supra* at 727) have given the tenant new contractual remedies against the landlord. Additionally, tort theories have been suggested that, if adopted, may provide slum tenants with relief from substandard housing conditions. One recently proposed theory urges that courts recognize a new tort, "slumlordism," in actions against landlords who maintain unfit housing:

> One who undertakes to perform a service for his own economic benefit, but who performs it in a way both inconsistent with those 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 had no meaningful alternative but to deal with him, commits a tort for which substantial damages ought to lie.

Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 890 (1967). Additional tort remedies that have been proposed include nuisance, intentional infliction of mental distress, and negligence per se.

Although the proposed tort remedies have not yet developed a substantial body of case law, at least one court has imposed liability for the tort of slumlordism. Moreover, several recent cases have included claims for relief based on the emerging tort theories.

Leading Case

Quesenbury v. Patrick, 6 CLEARINGHOUSE REV. No. 7683, at 352 (No. 68942, Colo. Dist. Ct., El Paso County, June 8, 1972)—upheld a lower court decision that slumlordism presents a claim upon which relief can be granted. The lower court listed the elements of the tort:

(a) existence of a valid housing code;
(b) provision in the code for criminal liability;
(c) notice of defects to the landlord;
(d) failure of the landlord to make repairs within a reasonable time; and
(e) damage to the victim as a result of the failure to repair.

Factors influencing the amount of damages include:

(a) plaintiff's lack of education or financial ability to move;
(b) widespread practice of the landlord's rental policy; and
(c) financial loss suffered by the victim.

Jurisdictions

In these jurisdictions plaintiffs have included in their complaints claims for relief based on tort:

Ball v. Tobeler, 6 CLEARINGHOUSE REV. No. 4988, at 353 (No. 2 Civ. 38424, Cal. Ct. App., filed Mar. 27, 1972) (tenants allege that landlord's violation of housing codes constitutes an actionable nuisance); *Arguelles v. Cortez*, 6 CLEARINGHOUSE REV. No. 5503, at 165 (No. 10639, Cal. Ct. App., Jan. 7, 1972) (reversing trial court's order that sustained demurrer to tenant's complaint alleging intentional infliction of mental distress attributable to the landlord's violation of housing codes); *Rose v. Hewes Co.*, 3 CLEARINGHOUSE REV. No. 2410, at 142 (No. 393347, Cal. Super. Ct. Alameda County, Sept. 16, 1969) (Tenant filed complaint

charging landlord with intentional infliction of emotional distress, breach of warranty of quiet enjoyment, trespass, and invasion of privacy. The lower court grantcd a temporary restraining order to prevent defendant landlord from evicting plaintiff tenant. A settlement was reached, 6 CLEARINGHOUSE REV. 175 (1972), in which landlord agreed either to make repairs within a specified time or to end residential occupancy of the building, to allow plaintiff to remain in the apartment at a rental of one dollar per month until the repairs were completed, and to return plaintiff's rental payments for the past four years in settlement of plaintiff's claim of damages for mental anguish); *Mendoza v. Gonzales*, [1968-1971 Transfer Binder] CCH POV. L. REP. ¶ 9416 (No. 217161, Cal. Super. Ct., Jan. 31, 1969) (tenant filed complaint seeking actual and punitive damages for intentional infliction of mental distress based on landlord's failure to keep building in safe and sanitary condition).

Littlefield v. Rice, [1968-1971 Transfer Binder] CCH POV. L. REP. ¶ 10,524, 3 CLEARINGHOUSE REV. No. 2568, at 238 (Me. Super. Ct., complaint undated) (complaint filed charging landlord with the torts of slumlordism and nuisance).

Golden v. Gray, 68 Misc. 2d 679, 327 N.Y.S.2d 458 (Sup. Ct. Monroe County, 1971) (plaintiff's complaint urging recovery against slumlord on alternative tort theories dismissed for failure to state a cause of action).

Periodicals

Blum & Dunham, *Slumlordism as a Tort—A Dissenting View*, 66 MICH. L. REV. 451 (1968).

Falick, *A Tort Remedy for the Slum Tenant*, 58 ILL. B.J. 204 (1969).

Sax, *Slumlordism as a Tort—A Brief Response*, 66 MICH. L. REV. 465 (1968).

Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967).

Model Brief

A model brief compiling tort theories against slum landlords has been prepared by:

National Housing and Development Law Project
Earl Warren Legal Institute
University of California
Berkeley, California 94720

2. *Criminal Acts of Third Parties*

Development

Tenants seeking to hold their landlords liable for injuries resulting from the criminal acts of third persons have generally been denied recovery on two grounds. First, in the absence of a special relationship between the parties—and the landlord-tenant relationship traditionlly has not qualified—the common law ordinarily imposes no duty on a private individual to protect another person from the harmful acts of a third party. Additionally, the courts have regarded the criminal as an "independent moral agency" over whom the landlord exercised no control. Accordingly, the tenant has failed to show that the landlord's conduct was a proximate cause of the injury. Some recent cases have departed from the traditional common law positions on both of these points, however, and have permitted the tenant to recover.

Leading Cases

Mayer v. Housing Authority, 84 N.J. Super. 411, 202 A.2d 439 (1964), *aff'd mem.*, 44 N.J. 567, 210 A.2d 617 (1965)—held, in a case involving non-criminal conduct by a third party, that a landlord owes his tenants a duty of reasonable care as to portions of the premises within the landlord's control. If breach of this duty is a proximate cause of harm inflicted by a third person, then the landlord is liable for the injury whether or not the injury was precipitated by an independent, intervening cause.

Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970)—held that the landlord of a multiple-dwelling unit has a duty to protect his tenants from the criminal acts of third parties committed in common areas under his control. Here, the landlord had actual and constructive notice that crimes were being committed against the tenants and was held to a standard of reasonable care. On the theory that a covenant for protection is implied in the lease, this standard of care is measured by the level of protection actually provided by the landlord at the inception of the lease; when tort theory is applied, the standard is measured by the care commonly provided in apartments of similar type in a similar community.

Jurisdictions

The following cases have held that where there are special conditions from which the landlord should foresee an unreasonable risk or likelihood of harm from criminal acts of others, the landlord must take reasonable measures to protect his tenants from such dangers:

Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970).

Kendall v. Gore Properties, Inc., 236 F.2d 673 (D.C. Cir. 1956).

Ramsay v. Morrissette, 252 A.2d 509 (D.C. Ct. App. 1969).

Johnson v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972).

Mayer v. Housing Authority, 44 N.J. 567, 210 A.2d 617 (1965), *aff'g mem.*, 84 N.J. Super. 411, 202 A.2d 439 (1964) (noncriminal act).

Bass v. New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969).

Da Rocha v. N.Y. Housing Authority, 282 App. Div. 728, 122 N.Y.S.2d 397 (Sup. Ct. 1953) (noncriminal act).

The following cases have refused to hold a landlord responsible for the criminal acts of third parties:

Applebaum v. Kidwell, 12 F.2d 846 (D.C. Cir. 1926).

De Foe v. W. & J. Sloane, 99 A.2d 639 (Mun. Ct. App. D.C. 1953).

Stelloh v. Cottage 83, 52 Ill. App. 2d 168, 201 N.E.2d 672 (1964).

Teall v. Harlow, 275 Mass. 448, 176 N.E. 533 (1931).

Johnston v. Harris, 30 Mich. App. 627, 186 N.W.2d 752 (1971).

Peter Piper Tailoring Co. v. Dobbin, 195 Mo. App. 435, 192 S.W. 1044 (1917).

Goldberg v. Housing Authority, 38 N.J. 578, 186 A.2d 291 (1962).

McCappin v. Park Capital Corp., 42 N.J. Super. 169, 126 A.2d 51 (1956).

Tirado v. Lubarsky, 49 Misc. 2d 543, 268 N.Y.S.2d 54 (Civ. Ct. N.Y.C. 1966), *aff'd mem.*, 52 Misc. 527, 276 N.Y.S.2d 128 (Sup. Ct. 1966).

DeKoven v. 780 West End Realty Co., 48 Misc. 2d 951, 266 N.Y.S.2d 463 (Civ. Ct. N.Y.C. 1965).

Broaddus v. Commercial Nat'l Bank, 113 Okla. 10, 237 P. 583 (1925).

Burns v. Gordon, 100 Pitt. Leg. J. 195 (Allegheny County Ct. 1952).

Periodicals

Comment, *The Landlord's Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275 (1971)—discusses *Kline v. 1500 Massachusetts Ave. Apartment Corp.* and its implications.

Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Areas*, 56 CORNELL L. REV. 489 (1971)—offers a general discussion of tenants' rights, including the landlord's implied duty to protect the tenant. The note concludes that *Kline v. 1500 Massachusetts Ave. Apartment Corp.* places the landlord-tenant relationship within the legal purview of the common law of innkeeper and guest, but criticizes the *Kline* court for its failure to supply an intelligible standard of care for landlords to follow.

Note, *Crime in Apartments: Landlord Liability*, 5 GA. L. REV. 349 (1971)—suggests that the landlord in a large, multi-unit apartment complex owes an affirmative duty to protect the tenant from forseeable criminal conduct, but urges that this duty should extend only to crimes of violence against the tenant's person.

55 MINN. L. REV. 1097 (1971)—suggests that the remedies provided by *Kline v. 1500 Massachusetts Ave. Apartment Corp.* are inadequate.

20 RUTGERS L. REV. 140 (1965)—comments on *Mayer v. Housing Authority* and discusses the nature of the special relationships which impose an affirmative obligation of protection on private individuals.

49 TEXAS L. REV. 586 (1971)—discusses the *Kline* decision and notes that since the contemporary landlord retains substantial control over the common areas of leased property, it is desirable to allocate the responsibility for protection in the common areas to the landlord, who can most effectively exercise it.

24 VAND. L. REV. 195 (1970)—suggests that the ultimate scope of the duty imposed by *Kline* on the landlord should be to protect the tenant from forseeable criminal acts which occur either in the common hallways or in the tenant's own apartment.

Annotations

Landlord's liability arising from theft of tenant's property, 58 A.L.R.2d 1289 (1958).

Private person's duty and liability to protect another against criminal attacks by a third person, 10 A.L.R.3d 619 (1966).

Landlord's duty to protect against crime, 43 A.L.R.3d 331 (1972).

Treatises

RESTATEMENT (SECOND) OF TORTS § 315 (1965)—provides that there

is no duty on an individual to prevent a third person from causing physical harm to another in the absence of a special relationship between the individual and the third person or unless a special relationship exists between the individual and the injured party which gives that party a right to protection. Sections 314A and 320 discuss these special relationships.

Model Code and Uniform Act

Although neither deals with a landlord's duty to protect his tenant from the criminal acts of third parties, section 4.101 of the Uniform Act authorizes a tenant's suit for actual damages resulting from the landlord's failure to maintain the premises, and section 2-205 of the Model Code authorizes such an action if the landlord's failure to maintain is willful or negligent. These sections, however, do not dispose of the issue since the question of proximate cause is not addressed.

C. *Extraordinary Remedies—Receivership*

Development

In some jurisdictions, when a landlord is unable or unwilling to maintain the condition of his property within legal standards, a private individual or a municipality may petition the court to place the building in the hands of a receiver. The receiver, who may be the municipality, a private party, or a social agency, is authorized to collect rents, apply for grants and loans, and use these funds to rehabilitate the premises. The amount expended constitutes a prior lien which must be satisfied before any mortgage debt.

Leading Cases

In re Department of Bldgs., 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964)—upheld the constitutionality of the New York receivership statute: where there is a shortage of housing, and multiple dwellings become dangerous and unfit, the state may enact legislation reasonably aimed at correcting the condition and promoting the public welfare, even though the means adopted may impair the obligation of the mortgagee's contract or the private rights established by existing contracts; additionally, the notice and defense provisions of the law satisfy the requirements of due process.

St. Louis v. Golden Gate Corp., 421 S.W.2d 4 (Mo. 1967)—held that the appointment of a receiver for the purpose of repairing the building in question was beyond the general power of a court of equity. The court further stated that authority for this kind of relief had to be conferred by statutes providing proper constitutional safeguards.

Jurisdictions

The following statutes authorize judicial appointment of a receiver to remedy substandard housing:

ILL. REV. STAT. ch. 24, § 11-31-2 (Supp. 1973) (authorizes injunctive relief against violators of housing codes and grants to the Chicago courts the equity power to appoint receivers).

CONN. GEN. STAT. ANN. § 19-347(b) (1968).

IND. ANN. STAT. § 48-6144 (Supp. 1971).

MASS. ANN. LAWS ch. 111, §§ 127A-J (Supp. 1972).

N.J. STAT. ANN. §§ 2A:42-79 to -84 (Supp. 1972).

N.Y. MULT. DWELL. LAW § 309 (McKinney Supp. 1972).

Periodicals

Angevine & Taube, *Enforcement of Public Health Laws*, 52 Mass. L.Q. 205 (1967)—discusses Massachusetts legislation designed to combat unsanitary conditions in apartment buildings and compares this legislation to New York law. The Massachusetts statutes give a tenant, local board of health, or the local code enforcement agency the authority to institute receivership proceedings.

Gribetz, *New York City's Receivership Law*, 21 J. HOUSING 297 (1964).

Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966)—traces code enforcement from the turn of the century until 1966, explores the failure of the housing codes to prevent further decay of urban areas, and explores alternative methods to achieve more effective enforcement.

Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275 (1966)—criticizes the ineffectiveness of local housing codes in curing slum conditions and suggests the use of receivership as a possible means of combatting the problem of a landlord's refusal to improve intolerable conditions. If the income from the property is inadequate to finance the repairs, the

receiver should be authorized by the court to borrow the necessary funds. Furthermore, the receiver should be permitted to secure the debt with a lien on the property superior to all private debts.

McElhaney, *Retaliatory Evictions: Landlords, Tenants and Law Reform*, 29 MD. L. REV. 193 (1969)—describes the operation of receivership and discusses its role in the Model Code (*see infra* at 752).

Rosen, *Receivership: A Useful Tool for Helping to Meet the Housing Needs of Low Income People*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 311 (1968)—describes the use of receivership in various jurisdictions and suggests that the use of receivership proceedings may be effective in easing the shortage of urban housing and improving living conditions for inhabitants of low-rent apartments.

Walsh, *Slum Housing: The Legal Remedies of Connecticut Towns and Tenants*, 40 CONN. B.J. 539 (1966)—concludes that administrative problems with enforcement render the Connecticut rent receivership statute inadequate to deal with slum housing conditions.

Zisook, *Rehabilitation—When Is it Economically Feasible in Renewal?*, 15 J. HOUSING 157, 159 (1958).

Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 828-30 (1965)—discusses extensively the remedies available to tenants under municipal housing codes. Receivership and its operation in New York and Chicago are considered.

Note, *Preference Liens for the Costs of Repairing Slum Property*, 1967 WASH. U.L.Q. 141—examines the case law bearing on the issue whether preference liens for slum repair costs are a legitimate impairment of the obligations of contracts. The note concludes that displacement of liens under a receivership or municipal repair program would be no more disruptive than displacement forced by property taxes, mechanics lien laws, and similar statutory priorities.

Model Code

The tenant may petition for the appointment of a receiver five days after notice to the landlord of conditions dangerous to life, health, or safety of the petitioner. In case of rodents or other vermin, he may petition immediately upon notice to the landlord. Section 3-301.

Section 3-302 defines necessary parties defendant. Mortgagees and other lienors are given an opportunity to defend their interests.

Sufficient defenses to the proceeding include (section 3-303):

(1) The condition described in the petition does not exist at the time of trial.

(2) Willful or negligent acts of a petitioner, his family, or persons on the premises with his consent are responsible for the condition.

(3) A petitioner has refused to allow reasonable access to correct the condition.

The court may stay judgment if a person having an interest in the proceeding is willing and able to correct the condition in accordance with the court's order and posts bond. The procedure to be followed if such a person fails to comply with the provisions of the court's order are described. Section 3-304.

Any suitable person may be appointed receiver. Section 3-305.

The receiver shall have the powers and duties accorded a receiver forclosing a mortgage on realty and all other powers and duties deemed necessary by the court, including the collection and use of rents, issues, and profits of the property prior to and despite any assignments of rent. These funds are to be used to correct the alleged condition of the premises, make the premises comply with all applicable legal standards, pay all expenses reasonably necessary to the proper operation and management of the property, compensate the tenant for actual damages, and pay the costs of the receivership proceeding and attorney's fees. Section 3-306(1).

The receiver is also authorized to issue and sell negotiable notes superior and prior to all existing assignments, liens, and encumbrances except taxes and assessments, and to obtain first mortgage insurance from a federal agency. Section 3-306(2).

Section 3-307 outlines the procedure and criteria for discharging the receiver. If the court determines that repairs cannot be paid out of the future profits of the property, it shall not permit such repairs and may order that appropriate action be taken, including demolition of the building.

V. Landlord's and Tenant's Rights—Just Compensation and Eminent Domain

Development

One of the most difficult of the eminent domain issues concerning

tenancies is the method of valuation of the condemned property. Traditionally, the property has been valued as if it were an undivided fee, and the resulting compensation has been apportioned between the landlord and tenant. Recently, an alternative theory has gained support which would require that the actual value of the existing leaseholds be considered when determining the total compensation.

Leading Case

People ex rel. Dept. of Public Works v. Lynbar, Inc., 253 Cal. App. 2d 870, 62 Cal. Rptr. 320 (1967)—held that the constitutional requirement of just compensation requires that the owner be made whole for his actual loss. Therefore, the value of existing leaseholds must be taken into account in determining total value when the actual rent does not equal the economic rent.

Periodicals

Baker, *Condemnation: Concepts and Consequences of Public Intervention in the Landlord-Tenant Relationship*, 9 U. KANSAS L. REV. 399 (1961)—identifies interests that are, or, in the author's opinion, should be, protected and discusses the impact of condemnation on the legal relationship between landlord and tenant.

Committee on Leases, *Condemnation of Leasehold Interests*, 3 REAL *Prop., Prob. & Trust J.* 226 (1968)—surveys the present state of the law in this area.

Horgan, *Some Legal and Appraisal Considerations in Leasehold Valuation Under Eminent Domain*, 5 HASTINGS L.J. 34 (1953)—analyzes leading cases dealing with the elements of compensation, fixtures, and loss of business or profits.

Horgan & Edgar, *Leasehold Valuation Problem in Eminent Domain*, 4 U. SAN FRANCISCO L. REV. 1 (1969)—discusses the basic principles of leasehold valuation and gives a critical reading of *People ex rel. Dept. of Public Works v. Lynbar, Inc.*

Johnston, *"Just Compensation" for Lessor and Lessee*, 22 VAND. L. REV. 293 (1968)—criticizes market valuation in general and unit valuation in particular. The author favors a theory of indemnity.

Kanner, *And Now, for a Word from the Sponsor: People v. Lynbar, Inc. Revisited*, 5 U. SAN FRANCISCO L. REV. 39 (1970)—defends *Lynbar* in a response to the article by Horgan & Edgar.

Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477 (1962)—analyzes thoroughly the procedural and substantive issues in condemning leaseholds.

Snitzer, *Valuation and Condemnation Problems Involving Trade Fixtures*, 16 VILL. L. REV. 467 (1971)—offers a general discussion of the problems of definition and valuation of fixtures in the field of eminent domain, with an extended exploration of the special problems concerning the landlord-tenant relationship.

Note, *Condemnation and the Lease*, 43 IOWA L. REV. 279 (1958)—treats with little analysis three problems: the effect of condemnation on the obligation to pay rent; the lessee's right to compensation; and the apportionment of the compensation. The author also deals briefly with the utility of condemnation clauses in a lease.

Annotations

Are different estates in real property taken under eminent domain to be valued separately, or is entire property to be valued as a unit and the amount apportioned among separate interests, 69 A.L.R. 1263 (1930), *supplemented* by 166 A.L.R. 1211 (1947).

PART II: THE PUBLIC SECTOR

I. INTRODUCTION

This segment of the Project concerns the legal rights and obligations of the landlord and tenant in federally-assisted low-rent public housing established by the United States Housing Act of 1937.[1] Several substantive legal problems have emerged from the Act, including the location of public housing projects, the determination of eligibility standards for admission to public housing dwellings, the system by which eligible applicants are assigned to available dwellings, the treatment of tenants' grievances, and the standards for the eviction of tenants. Each of these substantive problems further poses troublesome questions regarding the procedural safeguards due applicants and tenants. This segment attempts to describe the issues of current significance and to outline the resolutions offered by the courts, legislatures, and administrative bodies.

Although this Project does not attempt to treat the mechanics of the public housing system under the United States Housing Act of 1937, a basic outline of the statutory scheme is useful in understanding the problems presented. The 1937 Housing Act provides for a public housing program financed by the federal government, but operated by local governments. Under the Act, the state is required to enact enabling legislation that authorizes municipalities to create local housing authorities (LHA's). The LHA is governed by a Board of Commissioners that is appointed by local officials and has the primary responsibility for developing new projects and operating existing ones.

To finance its housing programs, the LHA sells tax exempt bonds amortized over a forty year period. The Department of Housing and Urban Development (HUD) enters into an Annual Contributions Contract (ACC) that obligates the federal government to make annual payments of principal and interest on the bonds. Originally the LHA was required to pay exclusively from the rents collected from tenants all maintenance and administrative expenses of its projects. A 1969 amendment to the Housing Act of 1937, however, limits the amount of rent the LHA can collect from a tenant to 25 percent of his income and permits the federal government to subsidize part of the LHA's annual operating expenses.[2]

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1. 42 U.S.C. § 1401 *et seq.* (1970).

2. For a somewhat more thorough, yet still concise, description of the mechanics of the development and financing of public housing projects, see Special Project, *Public Housing*, 22 VAND. L. REV. 875, 901-06 (1969).

Although the primary emphasis of this segment of the Project is directed at the traditional LHA-owned and operated public housing, the landlord-tenant relationship in government-assisted, privately owned housing will be treated in less detailed fashion where appropriate. The most important government-assisted, privately owned program is the section 236 program, incorporated into the National Housing Act of 1934 as section 236 by the Housing and Urban Development Act of 1968.[3] The 236 program provides low- and moderate-income families with rental housing developed and owned by private developers through a program of mortgage insurance and interest subsidy payments. The federal government's interest subsidy payments lower the interest rate on the private owner's mortgage to one percent, and this saving must be passed on to the tenant in the form of lower rental rates. Additional assistance is available under section 101 of the Housing and Urban Development Act of 1965,[4] which provides for the payment of rent subsidies to a limited number of tenants per project in an amount equal to the excess of the fair market rental over 25 percent of the tenant's income. The section 236 program has largely replaced the earlier, similar 221(d)(3) program, and throughout this Project they will be treated as if they were the same program.[5]

Although HUD publishes regulations in the Code of Federal Regulations, the regulations which are more important to the subjects treated in this Project are published as circulars. The Supreme Court has ruled that directives contained in these circulars are binding on the local housing authorities.[6] The HUD circulars are compiled as the *Low Rent Management Manual* contained in the *HUD Unified Issuances System of Low Rent Housing Handbooks.*

II. Site Selection

A. Introduction—The Problem

While the subject of site selection in its entirety is beyond the scope of this Project, the effect that a public housing project's location will have on the city's pattern of residential racial segregation and on racial segregation in the city's public housing projects merits consideration in a treatment of landlord-tenant relations. Recently, public housing tenants and applicants have mounted successful judicial attacks on site

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3. 12 U.S.C. § 1715z-1 (1970).
4. 12 U.S.C. § 1701s (1970).
5. For a more complete discussion of the mechanics of the 236 program see C. Edson & B. Lane, A Practical Guide to Low- and Moderate-Income Housing chs. 2 & 3 (1972).
6. Thorpe v. Housing Authority, 393 U.S. 268 (1969).

selection decisions which would have effectively perpetuated segregation both in public housing and in the residential pattern of the city.[7] These attacks came in instances where all of the sites selected were in primarily black areas of a city. Because most applicants are black, and because most whites are reluctant to move into black neighborhoods, the selection of sites within black areas tends to create all-black housing projects in all-black neighborhoods. The pertinent federal statute and the HUD regulations thereunder are designed to stifle site selection which perpetuates residential segregation. Although the statute and regulations have not been uniformly successful in achieving their purpose, the clear trend of the few decisions on point is to require the local housing authorities and HUD to take affirmative action to insure greater integration in low-rent public housing projects.[8]

B. Federal Statutes and Regulations

Title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000d (1970), provides:

> No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Pursuant to that statute HUD has promulgated regulations designed to assure compliance with its provisions. Section 1.4(b)(2)(i), 24 Code of Federal Regulations (1970) provides: "A [local housing authority], in determining the location or types of housing . . . may not . . . utilize criteria or methods of administration which have the effect of subjeeting persons to discrimination because of their race, color, or national origin . . . ." More detailed regulations appear in HUD Circular RHA 7410.1, chapter 1, section 1:

> The aim of a local authority in carrying out its responsibility for site selection should be to select from among sites which are acceptable under the other criteria of this Section those which will afford the greatest opportunity for inclusion of eligible applicants of all groups regardless of race, color, creed or national origin, thereby affording members of minority groups an opportunity to locate outside of areas of concentration of their own minority group. Any proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable and will be returned to the Local Authority for further consideration and submission of either

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7. *See* notes 9-30, *infra*, and accompanying text.

8. *See id.* For an extensive treatment see C. EDSON & B. LANE, A PRACTICAL GUIDE TO LOW- AND MODERATE-INCOME HOUSING ch. 9 (1972) (Site selection for §§ 235 and 236 housing). *See generally* HUD Circular RHA 7410.1; Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970).

(1) alternative or additional sites in other areas so as to provide more balanced distribution of the proposed housing or (2) a clear showing, factually substantiated, that no acceptable sites are available outside the area of racial concentration . . . .

The next paragraph of that circular provides that the phrase "acceptable sites are available" means sites which meet the other HUD criteria and which can be purchased "within economically feasible cost limitations." Furthermore, denial by the city officials of any required rezoning or other site approval is deemed an acceptable reason for no site being available outside an area of racial concentration. The local housing authority faced with such a denial is required, however, to submit a statement of its specific efforts to gain site approvals or rezoning from the reluctant city official.

C. Case Law

Despite these HUD regulations designed to provide desegregated public housing facilities, tenants and prospective tenants have found it necessary to resort to judicial action in attempts to force local housing authorities to provide more integrated public housing. The leading case in this area is *Gautreaux v. Chicago Housing Authority*,[9] in which a class comprised of black tenants and applicants for public housing claimed that the Chicago Housing Authority's (CHA) site selection decision violated their fourteenth amendment rights. The first opinion in the *Gautreaux* litigation[10] granted dismissal of plaintiffs' claims that, regardless of intention, defendant's failure to select sites that would alleviate Chicago's segregated housing patterns violated sections 1981 and 1983, 42 U.S.C. (1970), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000d. The court denied, however, defendant's motion to dismiss plaintiffs' claim that CHA *intentionally* selected sites and assigned tenants for the purpose of maintaining existing patterns of racial segregation in Chicago in violation of these same statutes. The court subsequently granted plaintiffs summary judgment on the ground that CHA's intentional conduct in choosing sites did violate sections 1981 and 1983, 42 U.S.C. (1970).[11] Looking at statistics showing the racial composition of neighborhoods in which public housing was located, the court found that 99.5 percent of the public housing projects were located in, or contiguous to, black neighborhoods. Moreover, the court was persuaded by plaintiffs' evidence that in the five major family

9. 265 F. Supp. 582 (N.D. Ill. 1967).

10. *Id.*

11. Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969).

housing programs undertaken since 1954, members of the city council had rejected for racial reasons otherwise suitable sites in white neighborhoods, and that CHA officials had joined city council members in a plan which effectively eliminated sites in white neighborhoods from consideration.[12] In addition, testimony from CHA officials tended to indicate that racial discrimination was a factor in the selection of sites. The court concluded that all of this evidence raised a strong inference that contrary to the commands of the fourteenth amendment, impermissible racial criteria were used in the selection of public housing sites in Chicago; since CHA did not present any evidence that impermissible racial criteria were not used, plaintiffs were entitled to judgment as a matter of law. The court postponed final judgment for 30 days and ordered the parties to enter into negotiations and attempt to "formulate a comprehensive plan to prohibit the future use, and to remedy the past effects, of CHA's unconstitutional site selection and tenant assignment procedures."[13] When the parties failed to agree on such a comprehensive plan, the district court entered its judgment order.[14] The order is complex, but in essence it divides Chicago into two types of areas: "Limited Public Housing Areas," which have over 30 percent non white residents or are within one mile from any point on the perimeter of such tract; and "General Public Housing Areas," which comprise the balance of the city. The first 700 units started after the order were to be built in the "General Public Housing Areas," and thereafter, 75 percent of all public housing units built were to be located in these largely white areas. Two further provisions of the order were designed to prevent a large concentration of public housing units in one small area. First, CHA was ordered to limit the size of the projects to house no more than 120 persons and to provide no units above the third floor for families with children. Secondly, low rent public housing could not exceed fifteen percent of the dwelling units in any given census tract.

The last reported decision to date in the *Gautreaux* litigation was designed to implement the 1969 judgment order.[15] In this decision, the court noted that since July, 1971, the Chicago City Council had not approved the acquisition of any sites submitted by the CHA pursuant

12. An Illinois statute provides that no property may be acquired by a public housing authority without the prior approval of the city's governing body. ILL. REV. STAT. ch. 67.5, § 9 (Supp. 1973).

13. 296 F. Supp. at 914. For a discussion of the tenant assignment problem see pages 772-74 *infra*.

14. 304 F. Supp. 736 (N.D. Ill. 1969).

15. 342 F. Supp. 827 (N.D. Ill. 1972).

to the judgment order. To effectuate its judgment orders, the court ordered the CHA to forego approval by the city council and proceed with the acquisition of sites and development of projects consistent with its earlier order. Furthermore, the court declared that chapter 67.5, section 9 of Illinois Revised Statutes (Supp. 1973), which requires local government approval of any acquisition of property by a local housing authority, "shall not be applicable to CHA's actions . . . ."[16]

Prior to the *Gautreaux* decision, one federal district court had held in *Thompson v. Housing Authority*[17] that the Miami Housing Authority's relocation of persons displaced by urban renewal into a black neighborhood was not an act of racial discrimination in violation of the equal protection clause of the fourteenth amendment. The court reasoned that there was a presumption of legality to official acts rebuttable only by a clear showing to the contrary. Furthermore, the court declared that housing authorities have broad discretion in determining sites and that their decision would stand absent a showing of bad faith or action in violation of the law. According to the court, not only did plaintiffs fail to sustain their burden of showing bad faith or racial discrimination in violation of the fourteenth amendment, but defendants' evidence affirmatively established that no discrimination was practiced in its selection of the site for the housing project sought to be enjoined.[18]

Subsequent to the *Gautreaux* and *Thompson* cases, four other courts have considered the issue of site selection for public housing. In the first case, *Hicks v. Weaver*,[19] a federal district court in Louisiana enjoined a housing project which was to be built in a black neighborhood of Bogalusa, Louisiana, and which was to house black tenants under an official policy of segregation in force at the time of the site selection. The court essentially adopted HUD Circular RHA 7410.1, chapter 1,

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16. *Id.* at 830. The *Gautreaux* case is the subject of much comment. The most extensive treatment covers not only the *Gautreaux* case but the whole area of discrimination in regard to site selection and includes data and information gathered by a field study of the site selection methods of 3 local housing authorities. Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970). A thoughtful criticism of the result reached in *Gautreaux* may be found in Note, *Public Housing and Urban Policy: Gautreaux v. Chicago Housing Authority*, 79 YALE L.J. 712 (1970). *See also* Note, *Discriminatory Site Selection in Public Housing and Federal Judicial Response*, 64 N.W.U.L. REV. 720 (1970); 44 N.Y.U.L. REV. 1172 (1969); 118 U. PA. L. REV. 437 (1970).

17. 251 F. Supp. 121 (S.D. Fla. 1966).

18. At least one commentator has called this case a sham on the theory that plaintiff in fact represented landlords who were opposed for economic reasons to any public housing in their neighborhood. Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63, 117 n.352 (1970). Whether or not the case was a sham, the decision reached is narrow and has not been followed.

19. 302 F. Supp. 619 (E.D. La. 1969).

section 1[20] and ruled that while the location of public housing in an all-black neighborhood was not per se violative of Title VI of the Civil Rights Act of 1964,[21] it would raise a strong inference that, if unexplained, would support the finding of a violation. Moreover, a permissible explanation would require a showing that, for example, no other suitable sites were available. After reviewing the Bogalusa Housing Authority's past site selections—all of which were made while its official policy of segregation was in effect—and the actual segregation which resulted from those decisions, the court found that the dominant factor in selecting sites for public housing in Bogalusa was the racial concentration of neighborhoods and that this intentional perpetuation of segregation in public housing violated both the fourteenth amendment's equal protection clause and Title VI. To remedy these violations the court issued a preliminary injunction against any further development of the planned project until a full hearing on the merits could be held. In a supplemental order, HUD was enjoined from dispersing any more funds to the Bogalusa Housing Authority prior to the hearing.

El Cortez Heights Residents & Property Owners Association v. Tucson Housing Authority[22] was decided just after *Hicks*. In *El Cortez*, plaintiffs, who were property owners and residents in the only black middle class neighborhood in Tucson, Arizona, sought to enjoin the construction of a housing project which would be occupied by Negroes, Mexican-Americans, and Indians. The trial court denied the injunction and the Arizona Court of Appeals reversed. The case is significant in one major respect: no intent on the part of the housing authority to discriminate against a racial minority was found. The housing authority testified that although it was generally aware of the racial composition of the neighborhood, no official consideration was given to that factor. The court then read Title VI of the 1964 Civil Rights Act,[23] section 1.4, 24 Code of Federal Regulations (1969), and the fourteenth amendment as affirmatively requiring the housing authority to consider the racial composition of the neighborhood in which the site under consideration was to be located. The court agreed with *Hicks* that while the location of a project in a black neighborhood does not automatically render the site unacceptable, it does, nevertheless, create "strong doubts" as to the acceptability. The effect of *El Cortez*, therefore, is to subject to attack

20. Text quoted at pp. 758-59 *supra*.
21. 42 U.S.C. § 2000d (1970).
22. 10 Ariz. App. 132, 457 P.2d 294 (1969).
23. 42 U.S.C. § 2000d (1970), quoted at p. 758 *supra*.

even neutral action which results in discrimination, regardless of intent to discriminate.

A similar result was reached in *Banks v. Perk*,[24] in which the federal district court ordered the Cleveland, Ohio, city government to reissue previously revoked building permits for two low-rent housing projects in white neighborhoods. Furthermore, the court declared that the Cuyahoga Metropolitan Housing Authority "has an affirmative duty to integrate its housing projects and to be instrumental in dispersing urban housing patterns"[25] and enjoined the CMHA from building any more low-rent public housing units in black neighborhoods. The decision was based on Title VI of the Civil Rights Act of 1964,[26] on sections 1981 and 1983 of 42 U.S.C. (1970), on the Fair Housing Act of 1968,[27] and on the equal protection clause of the fourteenth amendment. As in *El Cortez*, the *Banks* court held that the plaintiffs need not show an intent to discriminate on the part of the local housing authority, but may prevail by showing that the LHA's action merely results in racial discrimination.

In *Blackshear Residents Organization v. Housing Authority*[28] the court noted that HUD regulations[29] preclude the building of public housing in an area of racial concentration unless it is shown that no other suitable sites are available. The court found that neither HUD nor the local housing authority had made a meaningful determination of whether the site of a proposed project was in an area of racial concentration. HUD and the LHA were enjoined from building the proposed project until such a determination consistent with guidelines set forth in the opinion was made.

The decisions clearly indicate that an LHA cannot select sites for its projects with an intent to maintain segregated public housing or segregated residential patterns. It is too early to conclude, however, that absent a showing of intent to discriminate an LHA's site selection can be attacked successfully in every instance in which it results in segregated housing. Nor is it certain that the requirement of the *Banks* case, that the LHA has an affirmative duty to be instrumental in the desegregation of urban housing by integrating its housing projects, will be adopted in future decisions.[30]

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24. 341 F. Supp. 1175 (N.D. Ohio 1972).
25. *Id.* at 1182.
26. 42 U.S.C. § 2000d (1970).
27. 42 U.S.C. § 3601 *et seq.* (1970).
28. 347 F. Supp. 1138 (W.D. Tex. 1971).
29. HUD Circular RHA 7410.1, ch. 1, § 1, quoted at pp. 758-59 *supra*.
30. Although the question of site selection for § 236 housing involves issues of zoning and land use, many of the considerations are the same as in the public housing area. Leading cases

III. Eligibility for Admission

A. *Introduction—The Problem*

Since the number of applicants for public housing exceeds the supply of available units, some means of determining eligibility for admission is necessary. This problem is complicated by the overwhelming excess of demand over supply, by the difficulty in determining the class of low income families, and by the desire of local housing authorities to achieve as much stability as possible in their projects. The choice of eligibility criteria has largely been left to the discretion of local housing authorities. At the outset, the rule that an applicant's income be below the established maximum has required that the LHA's develop some standard method of computing the applicant's income. Beyond this, many local authorities have developed additional criteria such as net asset maximums, the requirement of a good prior rent-paying record, residency requirements, and so-called "desirability" standards. The desirability standards attempt to measure a family's social behavior and determine whether they will be the kinds of tenants who will contribute to the social well-being of the project, have proper respect for property of the project or other tenants, and not be a nuisance to their neighbors. Although problems develop with all of the eligibility criteria, the chief source of litigation has been residency requirements and desirability standards.

In addition to litigation involving the substantive requirements for admission, controversy has surrounded the procedures used by local housing authorities in dealing with applicants. Although questions have arisen involving the order of waiting lists and notification of applicants of their status on the list, the major issue has concerned whether a rejected applicant is entitled to a hearing and, if so, what formalities are required.

B. *Federal Substantive Eligibility Requirements*

Section 1402(1) of 42 U.S.C. (1970) states: "The dwellings in low rent housing shall be available solely for families of low income." Subsection two defines "families of low income" as "families . . . who are in the lowest income group and who cannot afford to pay enough

concerning the subject of § 236 site selection include: Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Kennedy Park Homes Ass'n. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971). A well known case which involves issues of both urban renewal and site selection of a 221(d)(3) project is Shannon v. Department of Housing & Urban Dev., 436 F.2d 809 (3d Cir. 1970), *noted in* 39 GEO. WASH. L. REV. 1229 (1971).

to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use."[30.1] Subject to HUD approval, the determination of specific income limits and rents is left to the local housing authorities.[31] The authority to fix rents, however, is limited by a statutory provision which requires a gap of twenty percent between the maximum public housing rental limits "and the lowest rents at which private enterprise unaided by public subsidy is providing . . . a substantial supply of decent, safe, and sanitary housing. . . ."[32]

In regard to preferences among applicants, the federal law provides only that

> the public housing agency shall adopt and promulgate regulations establishing admission policies which shall give full consideration to its responsibility for the rehousing of displaced families, to the applicant's status as a serviceman or veteran or relationship to a serviceman or veteran or to a disabled serviceman or veteran, and to the applicant's age or disability, housing conditions, urgency of housing need, and source of income: *Provided*, that in establishing such admission policies the public housing agency shall accord to families of low income such priority over single persons as it determines to be necessary to avoid undue hardship.[33]

A very general declaration of policy to the 1937 Housing Act states: "It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to approval of the [federal] Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies."[34]

In addition to these federal statutes and regulations, local housing authorities have developed their own substantive admission criteria.[35]

C. The Case Law and Regulations

1. *Residency Requirements*

According to the 1969 *Vanderbilt Law Review* Special Project's survey of the residency requirements of a number of local public housing

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30.1. 42 U.S.C. § 1402(2) (1970).

31. HUD Circular RHA 7465.1 (June 1969).

32. 42 U.S.C. § 1415(7)(b)(ii) (1970).

33. 42 U.S.C. § 1410(g)(2) (1970).

34. 42 U.S.C. § 1401 (1970).

35. A helpful discussion of eligibility requirements appears in Special Project, *Public Housing*, 22 VAND. L. REV. 875, 907-23 (1969). An analysis and criticism of desirability standards, focusing on the New York City regulations, appears in Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 426-36. A discussion of eligibility requirements as related to both admission and eviction is found in Note, *Nonfinancial Eligibility and*

agencies, most local agencies require only that the applicant reside in the city at the time he applies for admission.[36] A few local agencies do establish length-of-time residency requirements, however, and some of these have been the focus of litigation.

The leading case involving length-of-time residency requirements for low-rent public housing applicants is *Cole v. Housing Authority*,[37] in which the First Circuit Court of Appeals held that a two-year residency requirement violates the fourteenth amendment's equal protection clause. The court, relying heavily on the Supreme Court's 1969 decision in *Shapiro v. Thompson*[38] striking down length-of-time residency requirements for welfare applicants, found that the requirements affected the right to travel—a constitutionally protected right which can be impaired or "penalized" only if the state can show some compelling interest. The defendant argued that the residency requirement was justified by four concerns: the city's interest in giving priority to the housing needs of its own citizens; the facilitation of accurate planning for future housing needs; the likelihood that the requirement calms voters' fears of an influx of poor nonresidents to fill new housing and therefore facilitates approval of future projects; and the recognition of older residents' "prior claim on [the city's] charity." The court held that these concerns were not "compelling interests" that could justify penalizing the right to travel and stated that "[e]ven by a standard of rational relationship to a permissible goal, we doubt that the justifications put forth by the Authority could withstand judicial scrutiny."[39]

Lane v. McGarry[40] explicitly rejected the *Cole* decision and found that the Syracuse (N.Y.) Housing Authority's one-year residency requirement did not unreasonably burden, restrict, or penalize the exercise of the right to travel. Holding that the state's interests do not have to be compelling, and that the state must show only that there is a reasonable basis for the standards, the court found such a reasonable basis in the need to allocate scarce low-rent dwellings which, unlike the welfare payments in *Shapiro v. Thompson*, cannot simply be spread more thinly over a greater number of people. The court concluded that residency

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Eviction Standards in Public Housing—The Problem Family in the Great Society, 53 CORNELL L. REV. 1122 (1968). The most recent piece on the admission problem is Comment, *Gaining Admission to Low-Rent Public Housing*, 13 B.C. IND. & COM. L. REV. 35 (1972).

36. Special Project, *supra* note 35, at 915.

37. 435 F.2d 807 (1st Cir. 1970).

38. 394 U.S. 618 (1969).

39. 435 F.2d at 813.

40. 320 F. Supp. 562 (N.D.N.Y. 1970).

requirements gave a valid preference to "those whose jobs or present life patterns bind them to the community."[41]

The *Lane* decision has been effectively overruled, however, by *King v. New Rochelle Municipal Housing Authority*.[42] In *King*, the Second Circuit affirmed the district court's holding that a five-year residency requirement for state-aided low-rent housing violated the equal protection clause of the fourteenth amendment. Concluding that the state must show a compelling interest to penalize travel, the court noted that a mere showing of some reasonable basis for the requirement will not suffice. Defendant alleged justifications similar to those put forth in both *Cole* and *Lane*, but the court refused to recognize these as compelling. The court also rejected a distinction urged by defendant between intrastate and interstate travel, holding that both are protected by the Constitution. At least one commentator agrees that a rigid length-of-residency requirement is probably unconstitutional, but argues that where there is a shortage of available low-rent housing units, a family's length of residency is one legitimate factor in determining preferences among applicants for the scarce units.[43]

2. *Desirability Standards*

a. *Validity of Desirability Standards*

While some commentators have criticized the use of desirability requirements for determining eligibility for public housing,[44] some courts have expressly approved their use. Perhaps the most direct support of desirability criteria has come in *Davis v. Toledo Metropolitan Housing Authority*,[45] in which the court rejected the plaintiff's claim that the Toledo (Ohio) Housing Authority's standards were overly

41. *Id.* at 564.

42. 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971), *aff'g* 314 F. Supp. 427 (S.D.N.Y. 1970).

43. Walsh, *The Constitutionality of a Length-of-Residency Test for Admission to Public Housing*, 49 J. URBAN LAW 121 (1971).

44. Several commentators have criticized the use of desirability standards for determining eligibility to public housing. *See* Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 426-36; Special Project, *Public Housing*, 22 VAND. L. REV. 875, 919-22 (1969); Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122, 1128-34 (1968). No reported decision, however, has ever held that a housing authority cannot use desirability standards in deciding which applicants are eligible. Such requirements have been declared invalid, though, when they attempt to exclude members of a broadly defined class solely because they are members of the class.

45. 311 F. Supp. 795 (N.D. Ohio 1970).

broad and vague and, therefore, invalid. The challenged desirability standards that the court sustained provided that in order to be eligible for housing, a family must not be: (1) a detriment to the health, safety, or morals of its neighbors or community, (2) an adverse influence upon sound family and community life, (3) a source of danger to the peaceful occupation of the other tenants, (4) a source of danger or cause of damage to the premises or property of the Authority, or (5) a nuisance.[46]

b. *Illegitimacy*

Thomas v. Housing Authority[47] held that a local housing authority could not automatically exclude applicants because of one or more illegitimate children. The court did sanction desirability requirements in general: ". . . the [local housing] Authority must of necessity have the authority to prescribe reasonable criteria for the screening of applicants for admission and for the exclusion of those applicants with respect to whom illegal or disorderly conduct amounting to a nuisance may reasonably be anticipated."[48] Similarly, the court reasoned that "[t]he Housing Authority is not required to tolerate criminal activities within the facilities, or disorderly conduct, or conduct amounting to a nuisance or which seriously violates ordinary standards of decency."[49] However, the court held that "the fatal vices of the [unwed mother] policy are its inflexibility, and its general disharmony with the spirit and aim of the low-rent housing program."[50] The decision stands for the proposition that the fact of illegitimacy may carry some presumptive weight in the consideration of applicants, but may not be used to *automatically* exclude unwed mothers from public housing.

In 1970 another federal district court construed the *Thomas* decision narrowly in denying a motion for shelter *pendente lite* by plaintiffs who had been denied admission because of illegitimacy. In deciding *McDougal v. Tamsberg*[51] the court stated that "a large number of illegitimate children, each by different men, is a factor which may be considered by the Housing Authority in screening applicants for its facilities in order to eliminate those whose conduct might constitute criminal activity, or disorderly conduct, or which amount to a nuisance or seriously violate ordinary standards of decency."[52] By alleging the illegiti-

46. *Id.* at 797.
47. 282 F. Supp. 575 (E.D. Ark. 1967).
48. *Id.* at 580.
49. *Id.* at 581.
50. *Id.* at 580.
51. 308 F. Supp. 1212 (D.S.C. 1970).
52. *Id.* at 1216.

macy of plaintiff's five children, the housing authority established a prima facie case that showed conduct seriously violative of ordinary standards of decency, and plaintiff's preliminary motion was denied.

HUD Circular (Dec. 18, 1968) seems to codify these results: "b. A Local Authority may not establish policies which automatically deny admission or continued occupancy to a particular class, such as . . . families having one or more children born out of wedlock . . . ." Although the regulations and the cases uniformly prohibit the use of an illegitimacy criterion as an *automatic* determinant of tenant ineligibility, illegitimacy apparently may still be one permissible desirability standard which is given some weight in screening applicants.

c. *Criminal Records*

HUD Circular (Dec. 18, 1968) states that "families having a police record" may not be excluded *as a class* from public housing. Nevertheless, a 1966 New York Supreme Court decision upholding the exclusion of an individual because of his criminal record may well retain its validity. In *Manigo v. New York City Housing Authority*,[53] plaintiff's husband had been arrested seven times in the previous eight years. On four of those occasions he was determined to be a juvenile delinquent, and on two occasions he was jailed. In addition, he had been arrested for the possession of drugs, but these charges had been dropped. The court sustained the housing authority's decision to deny admission, reasoning that the husband's entire behavior pattern ovcr a period of years justified considering him undesirable as a prospective tenant. Again, the purpose of desirability standards received implicit judicial approval: "There can be no doubt that the [housing authority], to protect the large concentration of children and elderly persons who reside within its properties, must take steps to prevent the development of unsafe conditions therein. Without a proper screening of prospective tenants the dangers to those persons residing therein would be multiplied many times over."[54]

d. *Unpaid Rent*

In *Neddo v. Housing Authority*[55] plaintiff was denied admission on the grounds that she owed the housing authority rent from a prior tenancy. Noting that the policy was arbitrary and unreasonable because

53. 51 Misc. 2d 829, 273 N.Y.S.2d 1003 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 803, 279 N.Y.S.2d 1014, *cert. denied*, 389 U.S. 1008 (1967).

54. 51 Misc. 2d at 831, 273 N.Y.S.2d at 1004.

55. 335 F. Supp. 1397 (E.D. Wis. 1971).

it denied admission "regardless of the ability of those persons to have paid or to pay, and regardless of any change of circumstances establishing an ability to pay in the future,"[56] the federal district court concluded that at least in this case such a policy was too rigid. Accordingly, the court required the local authority to grant plaintiff a hearing during which she would have the opportunity to show that she was not liable for the unpaid rent.

e. *Welfare Recipients*

In *Colon v. Tompkins Square Neighbors, Inc.*,[57] the district court held that denial of admission to government-assisted housing under the section 221(d)(3) program solely on the basis of an applicant's status as a welfare recipient violates the equal protection clause of the fourteenth amendment. Further, the court stated that defendant's selection policy calling for a "balanced tenant body" vaguely suggested a quota system, which would be constitutionally impermissible. The issue of automatic rejection of welfare recipients does not appear to have arisen in connection with low-rent public housing built under the United States Housing Act of 1937.

IV. PROCEDURAL RIGHTS OF THE APPLICANT

Section 1410g(4) of 42 U.S.C. (1970) provides:

> the public housing agency shall promptly notify (i) any applicant determined to be ineligible for admission to the project of the basis for such determination and provide the applicant upon request, within a reasonable time after the determination is made, with an opportunity for an informal hearing on such determination. . . .

The legislative history of this section states:

> The provision for a hearing is not intended to require a formal hearing, which would impose a burdensome procedure on local housing agencies, but rather that the applicant be given an opportunity to be heard by an officer or employee of the agency other than the person who made the determination of ineligibility.[58]

A number of judicial decisions have broadened this limited review procedure in some instances. In *Neddo v. Housing Authority*,[59] the court ordered a hearing for an applicant in order to give her an opportunity to show that she was not liable for past due rent that the authority claimed she owed. Though the court was not altogether clear as to the

56. 335 F. Supp. at 1400. For a complete discussion of the requirement of hearings for rejected applicants see pp. 770-72 *infra*.

57. 294 F. Supp. 134 (S.D.N.Y. 1968).

58. 1969 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 1524, 1539.

59. 335 F. Supp. 1397 (E.D. Wis. 1971).

exact form of the hearing, it did provide for an informal procedure to the extent that no stenographic record was required and that witnesses need not testify under oath. The court did require, however, that the applicant be given reasonable notice, that she be allowed counsel at her own expense, and that the decision be in writing, stating the grounds for the decision and the evidence relied on. Similarly, in *Davis v. Toledo Metropolitan Housing Authority*[60] a federal district court enjoined defendants "from continuing to refuse the plaintiffs a hearing upon the question of eligibility for housing."[61] The court in *Davis* gave even fewer criteria for the required hearing than did the *Neddo* court holding simply that an "evidentiary hearing" was required.

The New York Court of Appeals has held, however, that no evidentiary hearing is required when an applicant is determined ineligible. In *Sumpter v. White Plains Housing Authority*[62] the trial court held that a hearing was required, but was reversed by the New York Supreme Court, Appellate Division, which held that a right to be advised at a private conference of the reasons for ineligibility is all that is required when an applicant is declared ineligible. The court of appeals unanimously affirmed the appellate division. Distinguishing cases holding that benefits conferred on individuals by the government cannot be terminated without a hearing, the court stated: "It has long been settled that a party aggrieved by loss of a pre-existing right or privilege may enjoy procedural rights not available to one denied the right or privilege in the first instance."[63] The court of appeals further reasoned that because of the number of applicants for public housing in New York, a hearing for each applicant declared ineligible would impose too great a burden on the housing authority.[64]

In summary, the federal statute seems to require at least a conference between a rejected applicant and a housing authority official who did not make the decision of ineligibility. Although some courts have expanded that right and now require a more formal hearing, others have declined to do so. Moreover, those courts which have ordered some sort of expanded hearing for rejected applicants have required fewer formali-

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60. 311 F. Supp. 795 (N.D. Ohio 1970).

61. *Id.* at 797.

62. 63 Misc. 2d 654, 313 N.Y.S.2d 133 (Sup. Ct. 1970), *rev'd*, 36 App. Div. 2d 728, 320 N.Y.S.2d 472 (1971), *aff'd*, 29 N.Y.2d 420, 278 N.E.2d 892, 328 N.Y.S.2d 649 (Ct. App.), *cert. denied*, 460 U.S. 928 (1972).

63. 29 N.Y.2d at 425, 328 N.Y.S.2d at 652, 278 N.E.2d at 894.

64. *See also* Spady v. Mount Vernon Housing Authority, 70 Misc. 2d 270, 333 N.Y.S.2d 557 (Sup. Ct. 1972) (the court said in dicta that no hearing is required for applicants declared ineligible).

ties than are probably required in the case of other tenant grievances, including evictions.[65]

V. Selection & Assignment of Eligible Tenants

A. *Requirements for Federally Supported Public Housing*

After a determination of eligibility for public housing and after placement of applicants into their respective preference categories (e.g., persons displaced by urban renewal, veterans, those with no preference), the LHA must design a method to assign eligible applicants to available units. The significance of assignment procedures is indicated by the existence of racial segregation in public housing and the efforts that have been made to diminish the extent of that segregation. It is now clear that the government can no longer provide racially separate but equal housing facilities as a matter of expressed official policy.[66]

The more recent developments concerning racial discrimination in public housing began in 1962 with President Kennedy's Executive Order 11063,[67] which declared that housing discrimination is contrary to public policy. Four years later, the Congress, in Title VI of the Civil Rights Act of 1964, proscribed discrimination in federally supported public housing.[68] Pursuant to section 601 of Title VI, HUD has promulgated regulations designed to assure the placement of tenants into public housing units in a nondiscriminatory fashion.[69] These regulations include both general proscriptions against racial discrimination and a specific requirement in regard to tenant assignment:

> A [local housing authority], in operating low-rent housing . . . shall assign eligible applicants to dwelling units in accordance with a plan . . . providing for assignment on a community-wide basis in sequence based upon the date and time the application is received, the size or type of unit suitable, and factors affecting preference or priority established by [the LHA's] regulations, which are not inconsistent with the objectives of Title VI of the Civil Rights Act of 1964. . . .[70]

HUD Circular RHM 7401.1 (December 30, 1964) establishes more detailed requirements for tenant assignment designed to ensure compliance with Title VI and the regulation quoted above. The circular

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65. See pp. 777 and 779 *infra*.

66. *See* Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515 (1959). *See also* Special Project, *Public Housing*, 22 VAND. L. REV. 875, 938-40 (1969); Note, *The Public Housing Administration and Discrimination in Federally Assisted Low Rent Housing*, 64 MICH. L. REV. 871, 875-78 (1966).

67. 37 Fed. Reg. 11527 (1962).

68. Section 601 of Title VI is quoted at p. 758 *supra*.

69. These regulations are contained in 24 C.F.R. pt. 1.

70. 24 C.F.R. § 1.4(b)(2)(ii) (1972).

provides two plans from which the local housing authority may choose. Alternatively, the LHA may continue to use its previous plan if, *inter alia*, that plan produces a greater degree of occupancy and desegregation than either of the two prescribed plans. The first of the two prescribed assignment plans provides that applicants are to be offered vacancies in the order in which their names appear on a community-wide waiting list of eligible applicants for a particular type dwelling. If an applicant rejects an offer, he is to be moved to the last place on the waiting list. The second prescribed plan has been termed the "free choice" plan. Under this plan, if there are vacancies at three projects, the first applicant on the list is offered a unit in the project with the most vacancies. If he rejects that unit, he may be offered units in the other two projects; if he rejects both, he is moved to the bottom of the list. If there are only two locations with suitable vacancies, the first eligible applicant is offered a vacancy in the project with the most vacancies and, upon rejection, a unit in the other project. If he rejects both of these, he is moved to last place on the list of eligible applicants. Should there be only one project with suitable vacancies, the first eligible applicant is offered a unit therein and, if he rejects it, he may be offered a unit in the next project in which a suitable vacancy occurs. Upon rejection of both offers, he is moved to the bottom of the list. Some variation is allowed in the plan, but an applicant gets only three rejections at most. If the applicant can show some good reason not related to race, color, or national origin for rejecting an offer, then that rejection is not counted against him. An example of a good reason for rejection is inaccessibility of the offered location to the applicant's place of employment.

Gautreaux v. Chicago Housing Authority[71] demonstrates that even these rather elaborate regulations have not completely eliminated racial discrimination in assigning tenants to low-rent housing. In that case, the district court found that quotas set by the Chicago Housing Authority limited the number of blacks who could be admitted to four housing projects located in white neighborhoods. As shown in an appendix to the subsequent judgment order in *Gautreaux*, CHA had submitted a plan to HUD which on its face revealed no signs of quotas and which complied with the HUD regulations.[72] To remedy the segregated housing conditions created by these quotas, the court ordered a complicated scheme of tenant assignment to be used by the CHA.[73]

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71. 296 F. Supp. 907 (N.D. Ill. 1969).
72. 304 F. Supp. 736, 742-43 (N.D. Ill. 1969).
73. This scheme is set forth at 304 F. Supp. 736, 739-40.

In contrast to the *Gautreaux* decision the district court in *Blackshear Residents Organization v. Housing Authority*[74] refused to order the Austin, Texas, Housing Authority (AHA) to submit a comprehensive desegregation scheme for its projects. Finding that the housing authority had recently adopted the HUD "freedom of choice" plan, the court decided that it was not clear that racial segregation existing in Austin's public housing would continue under the plan. The court did, however, enjoin the AHA from even the slightest departure from the "freedom of choice" plan.[75]

B. Requirements for State Supported Housing

In *Holmes v. New York City Housing Authority*[76] 31 eligible applicants for public housing, representing the class of all eligible applicants, alleged a number of procedural deficiencies in the housing authority's selection process and claimed such deficiencies increased the opportunity for favoritism and arbitrariness on the part of the housing authority. Since an "objective scoring system" was already in effect for federally supported projects, plaintiffs' allegations related only to admission procedures for projects financed by the state. The Second Circuit held that the fourteenth amendment's due process clause requires the housing authority to employ some ascertainable standard to establish preferences among otherwise eligible applicants. Moreover, the court ordered that further selection be made in some reasonable fashion and suggested assignment by lot or by chronological order of application.

C. Requirements for Federally Assisted, Privately Owned Housing

In *Colon v. Tompkins Square Neighbors, Inc.*[77] a federal district court followed the *Holmes* decision and held that the owner of a section 221(d)(3) project was required to complete an investigation of applicants' eligibility and notify applicants of the results of that investigation within a time limit agreed upon by the parties. Moreover, the owner was required to maintain a chronological waiting list so that applicants could gauge their waiting time.

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74. 347 F. Supp. 1138 (W.D. Tex. 1972).

75. One additional procedure is the requirement found in 42 U.S.C. § 1410(g)(4)(ii) (1973 Supp.) that the local housing authority advises eligible applicants "of the approximate date of occupancy insofar as such date can be reasonably determined."

76. 398 F.2d 262 (2d Cir. 1968).

77. 294 F. Supp. 134 (S.D.N.Y. 1968).

VI. EVICTION

A. Introduction

Two general issues have arisen with respect to evictions from low-rent public housing. The first concerns procedural rights to be afforded a tenant before he is evicted from a public housing project. The second major issue involves the reasons for which a tenant may be evicted. The procedural question has been the subject of much litigation and some rather clear answers have emerged; the question of what reasons will support an eviction, however, has not been answered uniformly.

B. Pre-Eviction Procedural Requirements

1. The Early Case Law

Brand v. Chicago Housing Authority[78] provides the leading case in a series of decisions holding that simple termination of a lease in accordance with its notice provisions is sufficient to evict tenants from public housing projects. In *Brand* no reason was required for a termination, and the legal relationship between public housing authorities and their tenants was equated with that between landlords and tenants in the private sector.[79]

An exception to the early rule that evictions could be effected by simple termination of the lease developed in several "Gwinn Amendment" cases. The Gwinn Amendment was enacted as a rider to an appropriations bill in 1953[80] and provided generally that no person who was a member of any organization designated as subversive by the United States Attorney General could occupy federally supported housing. The leading Gwinn Amendment case is *Rudder v. United States*,[81] which held that the application of the Amendment violated plaintiff's due process rights. In a statement widely quoted in subsequent cases, the United States Court of Appeals for the District of Columbia Circuit emphasized that it was holding the public landlord to higher standards than private landlords in its dealing with tenants: "The government as

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78. 120 F.2d 786 (7th Cir. 1941).

79. Other early cases reached similar results. *See, e.g.*, Walton v. City of Phoenix, 69 Ariz. 26, 208 P.2d 309 (1949); Chicago Housing Authority v. Ivory, 341 Ill. App. 282, 93 N.E.2d 386 (1950); Municipal Housing Authority v. Walck, 277 App. Div. 791, 97 N.Y.S.2d 488 (Sup. Ct. 1950); Columbus Metropolitan Housing Authority v. Simpson, 85 Ohio App. 331, 85 N.E.2d 560 (Ct. App. 1949); Columbus Metropolitan Housing Authority v. Stires, 84 Ohio App. 73, 84 N.E.2d 296 (Ct. App. 1949); Housing Authority v. Turner, 201 Pa. Super. 62, 191 A.2d 869 (Pa. Super. Ct. 1963).

80. Independent Offices Appropriation Act of 1953, ch. 578, 66 Stat. 393, 402-03.

81. 226 F.2d 51 (D.C. Cir. 1955).

landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process."[82]

The courts, however, did not apply the rationale of the Gwinn Amendment cases to evictions based on other reasons or evictions where no reason at all was given. For example, in *Housing Authority v. Turner*[83] the court concluded that despite the Gwinn Amendment cases and their holding that tenants could not be evicted from public housing for unconstitutional reasons, evictions where no reason was given were not prohibited. Early judicial reluctance to expand tenants' procedural rights prior to eviction is further evident in several New York state court decisions. In these decisions, if the local housing authority had abided by its own rules and regulations concerning eviction of tenants, then their actions were sustained, at least if the action was not arbitrary or capricious.[84]

2. *The Evolution of the Right to a Pre-Eviction Hearing*

In order to stop eviction of tenants by a simple unexplained cancellation of the lease, HUD Circular (February 7, 1967) was promulgated. This circular required that every evicted tenant be given a reason for his eviction and that the tenant, in a "private conference or other appropriate manner," be "given an opportunity to make such reply or explanation as he may wish."

The circular was made binding on public housing authorities by the Supreme Court in *Thorpe v. Housing Authority*.[85] This case arose when defendant housing authority notified the president-elect of a tenants' organization that her lease would not be renewed. Defendant gave no reason for the lease termination but merely served the notice in accordance with the notice provision of the lease. Plaintiff's eviction was sus-

82. *Id.* at 53. Other Gwinn Amendment cases, all striking down the application of the provision, include: Housing Authority v. Cordova, 130 Cal. App. 2d 883, 279 P.2d 215 (1955), *cert. denied*, 350 U.S. 969 (1956); Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954); Kutcher v. Housing Authority, 20 N.J. 181, 119 A.2d 1 (1955); Peters v. New York City Housing Authority, 9 Misc. 2d 942, 128 N.Y.S.2d 224 (Sup. Ct. 1953); Lawson v. Housing Authority, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955). Since the Gwinn Amendment was allowed to lapse in 1955, there has been no further litigation on the issue.

83. 201 Pa. Super. 62, 191 A.2d 869 (1963).

84. Austin v. New York City Housing Authority, 49 Misc. 2d 206, 267 N.Y.S.2d 309 (Sup. Ct. 1966); Smalls v. White Plains Housing Authority, 34 Misc. 2d 949, 230 N.Y.S.2d 106 (Sup. Ct. 1962); New York City Housing Authority v. Watson, 27 Misc. 2d 618, 207 N.Y.S.2d 920 (Sup. Ct. 1960); New York City Housing Authority v. Russ, 1 Misc. 2d 170, 134 N.Y.S.2d 812 (Sup. Ct. 1954).

85. 393 U.S. 268 (1969).

tained by the Supreme Court of North Carolina.[86] After the United States Supreme Court had granted certiorari,[87] HUD issued the February 7, 1967 circular, and the Supreme Court remanded the case to the North Carolina Supreme Court for a decision in light of the circular.[88] The North Carolina court refused to apply the new regulations and again sustained the eviction.[89] The United States Supreme Court reversed the state court's decision and, in addition to declaring the circular binding on the local housing authority, held that it applied retroactively to plaintiff.[89.1] The Supreme Court declined, however, to rule on plaintiff's request that the Court order a hearing complete with guidelines comporting with due process requirements. Chief Justice Warren reasoned that the request was premature because the plaintiff might voluntarily vacate upon hearing the reason for her eviction, or, if she objected to the reason, the housing authority might voluntarily decide to grant the kind of hearing she desired.

One year later, however, the Second Circuit was confronted with the issue of procedural due process and ruled that the local housing authority must provide tenants an opportunity for a pre-eviction hearing. In *Escalera v. New York City Housing Authority*[90] the court held that full compliance with the requirements of the HUD circular was not sufficient to satisfy the requirements of the fourteenth amendment's due process clause. The court prescribed several elements of a hearing which must be present to satisfy tenants' due process rights. First, notice prior to the hearing must "insure that the tenant is adequately informed of the evidence against him so he can effectively rebut the evidence."[91] Secondly, the decision must be based solely on evidence presented at the hearing, and, although a full written opinion is not necessary, the housing authority is required to state in writing the reasons for its final decision and provide an indication of the evidence on which it relied in reaching that decision. Thirdly, the tenant must be afforded an opportunity to confront and cross-examine any witness who contributes evidence influential in the decision. Finally, the decision must be rendered by an impartial hearing examiner. The court sanctioned the use of a hearing board comprised of officers of the housing authority so long as members of the board took no, or only minimal, part in making the

86. Housing Authority v. Thorpe, 267 N.C. 431, 148 S.E.2d 290 (1966).
87. 385 U.S. 967 (1966).
88. 386 U.S. 670 (1966).
89. Housing Authority v. Thorpe, 271 N.C. 468, 157 S.E.2d 147 (1967).
89.1. 393 U.S. 268 (1969).
90. 425 F.2d 853 (2d Cir. 1970).
91. *Id.* at 862.

initial decision to evict the tenant whose appeal was being heard. In summary of its holding, the court declared that "[a]lthough a full-fledged adversary hearing need not be afforded in all cases, the tenant must be adequately informed of the nature of the evidence against him and accorded an adequate opportunity to rebut the evidence."[92]

Shortly after *Escalera* was decided, the Fourth Circuit considered the same issue when a district court had granted the housing authority's motion to dismiss the tenant's complaint. In *Caulder v. Durham Housing Authority*.[93] The court of appeals applied the test used by the United States Supreme Court in *Goldberg v. Kelley*[94] and balanced the nature and extent of the tenant's loss against the LHA's need for summary adjudication. Finding the loss suffered by a tenant evicted from public housing "grievous," the court remanded the case to the district court with instructions to order a hearing substantially similar to that ordered in *Escalera*. In a footnote, the court recognized that on remand the housing authority might be able to present some compelling reasons for summary procedure. If this occurred, the district court was ordered to decide the weight due such reasons and balance them against the tenant's loss.[95] *Escalera* and *Caulder* were followed by a federal district court in *Maeberry v. Housing and Redevelopment Authority*.[96] The *Maeberry* court held that both notice and a hearing were required and declared that a tenant must be given the opportunity to have counsel present at the hearing. The court rejected, however, plaintiff's request that either the housing authority or the local welfare agency be required to pay the attorney's fee.[97]

In some instances state statutes may deal with the problem of pre-eviction hearings. For example, a Michigan statute provides for a Board of Tenant Affairs composed of eight to twenty members, one-half of whom must be tenants. The Board has authority to review any eviction decision made by the local housing authority and its decision is binding on the authority. The statute provides that "[t]he tenant . . . shall be entitled to a fair hearing before the board and shall have the right to be

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92. *Id.* at 863.

93. 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).

94. 397 U.S. 254 (1970) (due process rights of welfare recipient prior to termination of benefits).

95. 433 F.2d 998 at 1004 n.3.

96. 341 F. Supp. 643 (D. Minn. 1971).

97. Three other significant pre-1971 decisions have held that due process requires that tenants be provided with a pre-eviction hearing. Shepard v. Chicago Housing Authority, CCH Pov. L. Rep. ¶ 12,760 (N.D. Ill. 1971); Ruffin v. Housing Authority, 301 F. Supp. 251 (E.D. La. 1969); Williams v. White Plains Housing Authority, 309 N.Y.S.2d 454 (Sup. Ct.), *aff'd*, 35 App. Div. 965, 317 N.Y.S.2d 935 (1970) (involving a housing project supported exclusively by state funds).

represented by counsel."[98] No mention is made as to whether a "fair hearing" includes a right of confrontation and cross-examination of persons supplying information adverse to the tenant, and no reported decision on this point has been found.[99]

3. *Judicial Hearings as a Substitute for Administrative Hearings*

In *Escalera v. New York City Housing Authority*,[100] the Second Circuit noted that a tenant could institute a proceeding in a state court to overturn the threatened eviction, staying the eviction order in the interim. The *Escalera* court held, however, that this judicial review was not an adequate substitute for an administrative hearing. The court reasoned that the tenant's burden of proving arbitrary and capricious action or abuse of discretion by the housing authority was too great in a judicial proceeding. The Fourth Circuit has ruled, however, that a South Carolina law that provides for judicial proceedings including a full review of the factual basis on which the eviction decision was based, and that allows a tenant to demand a jury trial, obviates the necessity for an administrative hearing.[101] The court noted that the South Carolina provision requires the housing authority to prove its allegations at a full trial before it can obtain an eviction order; therefore, tenants are already afforded due process prior to evictions. At least three courts have rejected the *Tamsberg* decision that a judicial trial obviates the need for an administrative hearing. In *Glover v. Housing Authority*,[102] the court of appeals rejected defendant's argument that an evidentiary hearing conducted by the district court made unnecessary a requirement that the housing authority provide an administrative hearing: "[W]e think this argument misses the point that it is a hearing within the administrative framework to which [the plaintiff] is entitled."[103] The Supreme Court of Wisconsin followed *Glover*, despite a two-judge dissent which would have adopted the *Tamsberg* decision.[104] Finally, in

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98. MICH. STAT. ANN. §§ 5.3056(3)-(8) (1969).

99. The literature on procedural due process in connection with eviction from public housing includes: Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 447-55; Special Project, *Public Housing*, 22 VAND. L. REV. 875, 944-53 (1969); Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122 (1968); Comment, *Eviction Procedures in Public Housing*, 73 DICK. L. REV. 307 (1968); Note, *The Government as Proprietor*, 55 VA. L. REV. 1079 (1969).

100. 425 F.2d 853 (2d Cir. 1970).

101. Johnson v. Tamsberg, 430 F.2d 1125 (4th Cir. 1970).

102. 444 F.2d 158 (5th Cir. 1971).

103. *Id.* at 161-62.

104. Housing Authority v. Mosby, 53 Wis. 2d 275, 192 N.W.2d 913 (1972).

Brown v. Housing Authority,[105] a federal district court in Wisconsin reasoned that requiring a tenant to wait out the 30-day notice period before he is brought into court was a hardship and that most tenants would not be bold enough to hire counsel and endure the trial. Therefore, the court concluded, as a practical matter most tenants would feel compelled to begin looking for another place to live at the beginning of the 30-day period.

4. *Recent Developments*

The most significant single development in the law governing tenants' procedural rights is the issuance of HUD Circular RHM 7465.9 (February 22, 1971). The circular provides that:

> A tenant shall be afforded an opportunity for a hearing before an impartial official or a hearing panel if he disputes within a reasonable time any LHA action or failure to act in accordance with the lease requirments, or any LHA action or failure to act involving interpretation or application of the LHA's regulations, policies or procedures which adversely affect the tenant's rights, duties, welfare or status.

This regulation requires that if a hearing panel is established, it must have an uneven number of panelists, and, if LHA officials are appointed to the panel, tenants must be represented in the same number and there must be an impartial tie breaker. Furthermore, the circular provides that within a reasonable time the tenant must receive notice of the complete grounds or reasns for the LHA's action and of the rules and regulations governing the hearing. Moreover, the tenant is to be afforded an opportunity to present his case and be represented by counsel if he chooses, and the right to present a case includes the right to present witnesses and to "confront and cross-examine witnesses in appropriate circumstances." The decision of the hearing panel or official must be in writing and must state the reasons and evidence relied on for the decision. The decision is binding on the housing authority unless it determines "that the hearing panel has acted arbitrarily or exceeded its authority," in which case the matter may be judicially reviewed. Finally, if the LHA determines that a tenant's grievance has been decided in a previous panel decision on the same or similar set of facts and for that reason refuses to grant a hearing, both the LHA and the tenant are free to pursue other appropriate relief. The circular also provides that the LHA may adopt the hearing procedure to deal with applicants' grievances. In an appendix to the circular is a Model Grievance Procedure that local housing authorities may adopt at their discretion. Included in this procedure is a provision regarding notice to the tenant to vacate

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105. 340 F. Supp. 114 (E.D. Wis. 1972).

upon a hearing panel decision that upholds an eviction. Significantly, this provision provides that if the tenant chooses not to vacate but instead to contest legal action commenced to compel vacation, the housing authority must "prove that the reasons upon which it originally relied constituted good cause for eviction under the applicable law, rules and regulations."

Thus far, the circular has been almost universally accepted by those courts which have considered it. The first federal deeision to involve the circular was *Glover v. Housing Authority.*[106] The Fifth Circuit declined to decide *Glover* on the basis of plaintiff's constitutional claim that due process required a pre-eviction hearing, but rather held that the HUD Circular required the housing authority to grant an administrative hearing prior to dispossessing a tenant.[107]

5. *Government-Assisted Privately Owned Housing*

In *McGuane v. Chenango Court, Inc.,*[108] the Second Circuit held that receipts by a privately owned corporation of federal benefits in the form of mortgage insurance did not constitute state action and that defendant would be held to no higher standard of due process in connection with evictions than any other private landlord. When benefits from the government are more extensive, however, more stringent requirements of due process have been imposed. In *McQueen v. Druker,*[109] defendant was a private corporation receiving government assistance under the 221(d)(3) program that involves, in addition to mortgage

106. 444 F.2d 158 (5th Cir. 1971).

107. A federal district court also cited the circular with apparent approval, but seemed to base its decision that a hearing is prerequisite to eviction on constitutional due process grounds. Brown v. Housing Authority, 340 F. Supp. 114 (E.D. Wis. 1972). Two state courts have applied the circular. The first was Chicago Housing Authority v. Harris, 49 Ill. 2d 274, 275 N.E.2d 353 (1971). In the second, the Wisconsin Supreme Court applied the circular retroactively to all tenants who were evicted subsequent to the date of its publication, February 22, 1971, but who had not vacated the premises. In the case of those who vacated, however, the circular would not apply. Housing Authority v. Mosby, 53 Wis. 2d 275, 192 N.W.2d 913 (1972).

A direct attack on the validity of the circular was defeated in Housing Authority v. United States Housing Authority, 468 F.2d 1 (8th Cir. 1972). Twenty-four housing authorities joined in a federal court suit seeking to enjoin the application of the circulars on the grounds that they were not promulgated in accordance with a provision of the Administrative Procedure Act requiring publication of agency regulations in the Federal Register and that they exceeded HUD's authority to regulate the affairs of the local housing authorities. The district court held for plaintiffs and enjoined the implementation of the circular. Housing Authority v. United States Housing Authority, 54 F.R.D. 402 (D. Neb. 1972). The Eighth Circuit, however, reversed the district court and remanded with instructions to enter judgment upholding the validity of the circulars. Housing Authority v. United States Housing Authority, 468 F.2d 1 (8th Cir. 1972).

108. 431 F.2d 1189 (2d Cir. 1970).

109. 438 F.2d 781 (1st Cir. 1971), *aff'g* 317 F. Supp. 1122 (D. Mass. 1970).

insurance, financial assistance from the government to lower the interest rate on the sponsoring corporation's note and supplement the rent of low-income tenants. The court, in holding that a tenant could not be evicted in retaliation for the exercise of her first amendment rights, reasoned that "at least when a specific governmental function is carried out by heavily subsidized private firms or individuals whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches."[110]

The extent to which a private, government-assisted housing project must afford due process to tenants where state action is found has been discussed by at least one state court. *Fuller v. Understadt*[111] involved a project which was owned and managed by a private corporation which received financial assistance from the state and whose operations were subject to state regulations. The state aid was held sufficient to subject the corporation to fourteenth amendment due process requirements. The New York Court of Appeals concluded that the extent to which the corporation must afford its tenants due process is not the same as a public housing authority: "The test is the limited one of arbitrariness and does not involve a full evidentiary hearing or the full scope review of administrative quasi-judicial action which must be supported by substantial evidence . . . ."[112] The tenant must, however, be given an opportunity to explain or deny the charges made against him.[113]

C. *Substantive Reasons for Evictions*

Except to provide for the eviction of over-income tenants,[114] the United States Housing Act of 1937 is silent as to permissible reasons for the eviction of public housing tenants. The Act qualifies its require-

110. 438 F.2d at 784-85. The district court had found that the eviction was in retaliation for the exercise of a constitutionally protected right, and the court of appeals affirmed the holding that plaintiff could not be evicted on those grounds. The court declined to decide whether notice of good cause and a fair hearing was required in every instance of eviction because the resolution of that question was unnecessary for its decision.

111. 28 N.Y.2d 315, 270 N.E.2d 321, 321 N.Y.S.2d 601 (1971), *noted in* 21 BUFFALO L. REV. 524 (1972).

112. 28 N.Y.2d at 318, 270 N.E.2d at 323, 321 N.Y.S.2d at 603.

113. The *Fuller* case was followed in Bonner v. Park Lake Housing Development Fund Corp., 70 Misc. 2d 325, 333 N.Y.S.2d 277 (Sup. Ct. 1972), involving a defendant being assisted by the federal government through the § 236 program, the successor to 221(d)(3). For a decision requiring an urban renewal agency to grant a hearing prior to eviction see Johnson v. White Plains Urban Renewal Agency, 65 Misc. 2d 293, 317 N.Y.S.2d 899 (Sup. Ct. 1971).

114. 42 U.S.C. § 1410(g)(3) (1970).

ment of eviction of over-income tenants by providing for postponement of eviction if the local housing authority determines that the over-income tenant cannot find suitable private housing within his income range.[115]

Most state enabling statutes are also silent as to permissible reasons for eviction of tenants from public housing. Of those which do list permissible reasons for eviction,[116] the Michigan statute, for example, provides:

> (1) No tenancy . . . shall be terminated by the project management or the local housing commission except for just cause.
> (2) Just cause to terminate a tenancy . . . includes, but is not limited to: a failure to comply with the obligations of the lease or the lawful rules and regulations of the housing commission; the use of a unit for any unlawful purpose; the maintenance of any unsafe, unsanitary or unhealthful condition in any dwelling unit or in any of the common areas; and ineligibility for continued occupancy by reason of over-income.[117]

Some direction is given to local housing authorities in HUD Circular RHM 7465.8 (February 22, 1971), which requires or recommends a number of provisions for inclusion in tenants' leases. One requirement is that the lease set forth "[t]he circumstances under which management may terminate the lease, all limited to good cause . . . ." Attached to the circular is a Model Lease. While the fourteen requirements set out in the circular must be reflected in all leases, HUD recommends, but does not require, the adoption of the Model Lease in its entirety. One of the discretionary clauses of the Model Lease, which may or may not be adopted by the LHA's, lists reasons for which a tenant may be evicted:

> Such notice [of termination] may only be given for good cause, such as nonpayment of rent, serious or repeated damage to the premises, creation of physical hazards, or over-income status.

Since there is only one federal statutory provision and no binding regulations, and since most state statutes do not deal extensively with evictions, development of reasons for eviction has been left to local housing authorities. Examples of common grounds for eviction developed by housing authorities include those listed in the Model Lease clause quoted above.[118]

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115. 42 U.S.C. § 1410(g)(3) (1970).

116. *E.g.*, R.I. GEN. LAWS ANN. § 45-25-18.1(1)(C) (1970); MICH. STAT. ANN. § 5.3054(1) (1969).

117. MICH. STAT. ANN. § 5.3054(I) (1969).

118. For a helpful critical analysis of eviction criteria, with emphasis on those developed by the New York City Housing Authority, see Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 436-45. Further literature helpful to an understanding

Few judicial guidelines for permissible reasons for eviction have developed. The early Gwinn Amendment cases, exemplified by *Rudder v. United States*[119] and *Lawson v. Housing Authority*,[120] established the principle that a tenant cannot be evicted for unconstitutional reasons. In *Holt v. Richmond Redevelopment and Housing Authority*[121] a federal district court found the reason for eviction to be the tenant's organizational activities among other tenants—activities which the court decided were protected by the first amendment. The eviction was voided because "a tenant's continued occupancy in a public housing project cannot be conditioned upon the tenant's foregoing his Constitutional rights."[122] In *Thorpe v. Housing Authority*,[123] plaintiff claimed her eviction was in retaliation for her efforts to organize tenants. Although the Supreme Court vacated per curiam the North Carolina Supreme Court decision upholding the eviction[123.1] and remanded to the state court for a determination of tenant's rights to a pre-eviction hearing in light of a newly promulgated HUD Circular,[123.2] a concurring opinion by Justice Douglas suggested that a tenant may not be evicted for the exercise of a constitutionally protected right: "The recipient of a government benefit, be it a tax exemption . . . , unemployment compensation . . . , public employment . . . , a license to practice law . . . , or a home in a public housing project cannot be made to forfeit the benefit because he exercises a constitutional right."[124] Douglas did suggest, however, several reasons that he considered valid grounds for the eviction of a public housing tenant: "A tenant may be evicted if it is shown that he is destroying the fixtures, defacing the walls, disturbing other tenants by boisterous conduct and for a number of other reasons which impair the successful operation of the housing project. Eviction for such reasons will completely protect the viability of the housing project without making the tenant a serf who has a home at the pleasure of the manager of the project or the housing authority."[125] Several state court

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of eviction criteria includes: Special Project, *Public Housing*, 22 VAND. L. REV. 875, 945-56 (1969); Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122, 1128-34.

119. 226 F.2d 51 (D.C. Cir. 1955).

120. 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955).

121. 266 F. Supp. 397 (E.D. Va. 1966); *accord*, McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971).

122. 266 F. Supp. at 401.

123. 386 U.S. 670 (1969).

123.1. Housing Authority v. Thorpe, 267 N.C. 431, 148 S.E.2d 290 (1966).

123.2. HUD Circular (Feb. 7, 1967), *quoted at* 386 U.S. 670, 672-73 n.3 (1967).

124. 386 U.S. at 678-79 (Douglas, J., concurring).

125. *Id.* at 679-80.

decisions have sanctioned evictions for various reasons. While these decisions arguably approved the reasons assigned by the LHA, the real basis of the decisions seems to be a general approval of the housing authorities' actions so long as they complied with their own rules and regulations.[126]

Evictions on the basis of misrepresentation have been upheld by state courts. In *Housing Authority v. Allard*[127] the Rhode Island Supreme Court seemed to approve implicitly an eviction on the grounds of misrepresentation as long as a jury found that the misrepresentation resulted in the housing authority's signing the lease. The Georgia Supreme Court has also sustained an eviction based on misrcpresentation. In *Williams v. Housing Authority*[128] the court upheld the housing authority's finding that the plaintiff was guilty of misrepresentation in failing to report the birth of an illegitimate child and falsifying the identity of the father of some of her children. The court thought the misrepresentation was serious, declaring that the maintenance of a high moral standard in the housing project was a justifiable concern of the housing authority. It is possible, however, that the effect of this case may be limited in future decisions by its rather extreme facts—the tenant had a number of illegitimate children, apparently fathered by several different men. In addition, there was some evidence, although controverted, that a man was living with the plaintiff at the time of the eviction notice.

Perhaps the best-reasoned decision on the subject of eviction criteria is *Sanders v. Cruise*.[129] The New York Housing Authority notified the plaintiffs that they would be evicted because their son was a drug addict, making them undesirable tenants. The court annulled the eviction on the ground that the basis for the eviction was unreasonable. The housing authority had based its decision of plaintiffs' nondesirability on a regulation providing that a family would bc considered nondesirable if it constitutcs: "(1) a dctriment to the health, safety or morals of its neighbors or the community, (2) an adverse influence upon sound family and community life, (3) a source of danger or a cause of damage to

126. *See, e.g.*, Austin v. New York City Housing Authority, 49 Misc. 2d 206, 267 N.Y.S.2d 309 (Sup. Ct. 1966) (nondesirability); Smalls v. White Plains Housing Authority, 34 Misc. 2d 949, 230 N.Y.S.2d 106 (Sup. Ct. 1962) (misconduct of tenant's children); New York City Housing Authority v. Watson, 27 Misc. 2d 618, 207 N.Y.S.2d 920 (Sup. Ct. 1960) (husband of tenant was incarcerated after being convicted of a crime); New York City Housing Authority v. Russ, 1 Misc. 2d 170, 134 N.Y.S.2d 812 (Sup. Ct. 1954) (nondesirability).

127. 106 R.I. 7, 255 A.2d 158 (1969) (reversing the trial court's decision on a procedural error).

128. 223 Ga. 407, 155 S.E.2d 923 (1967).

129. 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958).

premises or property of the Authority, (4) a source of danger to the peaceful occupation of the other tenants, or (5) a nuisance."[130] The court found the standard set forth in the quoted regulations was itself reasonable and necessary, but held that the authority's application of the standard to the facts of this case could not support a reasonable finding of nondesirability:

> Here, the only fact adduced is that John [the plaintiff's son] has been a drug addict, convicted three times for narcotics offenses. No facts are presented to warrant the conclusion that John committed any overt act detrimental to the health, safety or morals of the other tenants in [the housing project], or that his addiction to narcotics was known to the neighbors or the community, or that such addiction was a source of danger or a cause of damage to [anyone or to any property] . . . .
> To evict tenants from a public housing project on the sole ground that their adult son was a drug addict exceeds any reasonable requirement for the peaceful occupancy of the project and for the preservation of property.[131]

The most explicit judicial statement in connection with eviction criteria is found in an order entered by a federal district court setting forth permissible grounds for the termination of a tenant's lease. The permissible reasons include:

> (1) [m]isrepresentation or concealment of a tenant's eligibility for continued residency; (2) undesirability, which is defined as conduct imperiling the health, safety or morals of the tenant's neighbors or is a source of danger to the property or peaceful occupation of the other residents. Among other things, specific criminal conduct is set forth, established patterns of undesirable behavior are listed, and a pattern of poor housekeeping is included; (3) breach of the rules and regulations; (4) chronic delinquency in the payment of rent; (5) failure to furnish satisfactory verification of income; (6) annual income that exceeds the maximum income allowable; and (7) occupation of an apartment by a residual single member of a family where the unit was originally assigned to an entire family.[132]

VIII. Tenant Grievances

Unlike the areas of site selection, admission, and eviction, tenant complaints concerning housing authority management have not been the source of much litigation. Nevertheless, a number of LHA practices have engendered complaints from tenants, and HUD has promulgated rulings designed to eliminate practices giving rise to some of the more commonly voiced complaints and to provide for a fair procedure for the resolution of tenant grievances.

HUD Circular RHM 7465.9 (February 22, 1971), discussed previously, gives public housing tenants the right to an administrative hear-

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130. 10 Misc. 2d at 535, 173 N.Y.S.2d at 874.

131. 10 Misc. 2d at 537, 173 N.Y.S.2d at 875.

132. Shepard v. Chicago Housing Authority, CCH Pov. L. Rep. ¶ 12,760, at 12,727 (N.D. Ill. 1971).

ing when they feel that the LHA has not acted in accordance with its rules and regulations or lease requirements.[133]

Two other circulars, designed to prohibit some common lease provisions which had been the source of much dissatisfaction among tenants[134] and to require the inclusion of other clauses intended to obviate many frequent grievances,[135] have also been published. The August 10, 1970, circular sets out six clauses often found in adhesion contracts, orders them eliminated from existing leases, and prohibits their use in future leases. Clauses authorizing the LHA's attorney to confess judgment against the tenant in legal proceedings and clauses in which the tenant "agrees" to hold the LHA harmless for injuries caused by its negligence are proscribed. The February 22, 1971, circular requires fourteen clauses to be included in the lease. Most of these clauses are designed to prohibit LHA practices which had given rise to complaints from tenants. One clause provides for the use of a separate legal process to collect monetary claims for damages. Such monetary claims are usually punitive assessments for a breach of housing authority rules or a charge for damage to housing authority property caused by the tenant. The practice of many housing authorities has been to add such assessments to the rent, nonpayment of which is grounds for eviction.[136] The requirement of separate legal proeess to collect such damages should prevent the practice of adding the amount to the rent and alleviate one source of contention between LHA's and tenants. A second significant required clause demands the LHA to acknowledge its duty "to maintain the building and any unassigned community areas in a decent, safe, and sanitary condition in accordance with loeal housing codes and HUD regulations, and its obligations for failure to do so." This requirement may provide tenants with a viable tool for forcing LHA's to upgrade projects which have deteriorated to the point of becoming substandard. Heretofore, no effective remedy for substandard housing has been developed.[137] Moreover, if the courts elect to construe the circular broadly, this requirement could form the basis for injunctive relief compelling the housing authority to provide sufficient police protection at

133. The mechanics of the hearing procedure are presented at pp. 780-81 *supra*.

134. HUD Circular RHM 7465.6 (Aug. 10, 1970).

135. HUD Circular RHM 7465.8 (Feb. 22, 1971).

136. *See* Escalera v. Housing Authority, 425 F.2d 853, 860 (2d Cir. 1970); Note, *Fines in Public Housing*, 68 COLUM. L. REV. 1538 (1968).

137. *See* Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 401-17; Note, *Remedies for Tenants in Substandard Public Housing*, 68 COLUM. L. REV. 561 (1968).

its projects to assure the safety of the tenants, especially in those projects where the LHA has already undertaken to provide some, but not enough, police protection.[138]

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138. Attempts to get additional police protection have had mixed results. *Compare* New York City Housing Authority v. Medlin, 57 Misc. 2d 145, 291 N.Y.S.2d 672 (Civ. Ct. New York County 1968) *and* New York City Housing Authority v. Jackson, 58 Misc. 2d 847, 296 N.Y.S.2d 237 (Civ. Ct. Bronx County 1968), *with* Bass v. New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969).