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ultimate judicial power within the union, making the dominant faction in the union subject to some superior law. It also eliminates the need for judicial review insofar as detecting bias is concerned since such review bodies act not only as arbiters of unresolved disputes but also as watchdogs over the union's internal disciplinary mechanisms. The attributes of public review would appear to best circumvent the institutional peculiarities of the union.

Dr. Clark Kerr, one of the original members of the UAW's Public Review Board, summarized the broader problem succinctly:

The union, like every other major institution in an increasingly industrialized nation, has become more distant from its members. In the process of centralization the union administration has tended to take on a life and power of its own. The individual member remains the theoretical source of authority within the organization, but in a struggle with his own officers he is, more often than not, unable to muster the resources to make his sovereignty meaningful. The odds are with the administration.⁶¹

While independent judiciaries would not totally eliminate bias from union proceedings, they would help reverse the odds. Independent review would remind union leadership of the importance of due process principles as applied to internal institutions, and in this respect would strengthen existing disciplinary apparatus. It would also make evident to all members the close relationship that exists between the ends of justice and the means by which they are attained.⁶² The correlation between union democracy and union strength is obvious, and only when more union leaders demonstrate the courage and wisdom to abdicate some of their own power to independent review bodies will union members receive the "full and fair hearing" guaranteed by the LMRDA.

GARBER A. DAVIDSON, JR.

Landlord and Tenant—Recent Erosions of Caveat Emptor in the Leasing of Residential Housing

The maxim caveat emptor has threaded a path through many areas of the law. While major modifications have occurred in some areas,¹ this

⁶¹ DEMOCRACY & PUBLIC REVIEW, *supra* note 60, at 3.

⁶² *Id.* at 30-31.

¹ UNIFORM COMMERCIAL CODE §§ 2-314, -315; *see* 8 S. WILLISTON, CONTRACTS

dubious doctrine, with few exceptions, has tenaciously persisted in the area of landlord and tenant law. However, recent decisions² in several jurisdictions have virtually excised caveat emptor from residential leases by implying either a warranty or covenant of habitability on the basis of local housing codes. As defined by one court:

[I]t is a covenant that at the inception of the lease, there are no latent defects in facilities vital to the use of the premises for residential purposes because of faulty original construction or deterioration from age or normal usage. And further it is a covenant that these facilities will remain in usable condition during the entire term of the lease. In performance of this covenant the landlord is required to maintain those facilities in a condition which renders the property livable.³

While fundamental, it bears repetition that at common law a lease was considered a conveyance of an estate in land.⁴ The concept of land as the central element of the leasehold has yielded several important and disadvantageous consequences for the lessee. Lease covenants, contrary to the contracts rule, are assumed to be independent.⁵ The obligation to pay rent might continue despite the lessor's breach of a covenant to repair,⁶ or even despite the destruction of the premises.⁷ As the lessor has parted with possession, he is under no obligation to repair in the absence of express covenant or statute.⁸ Where there are defects existing at the

§§ 983-89 (Jaeger ed. 1964); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

² *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. 1968); *Lemle v. Breeden*, 462 P.2d 470 (Hawaii, 1969); *Lund v. McArthur*, 462 P.2d 482 (Hawaii, 1969); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969).

³ *Marini v. Ireland*, 56 N.J. 130, —, 265 A.2d 526, 534 (1970).

⁴ 1 AMERICAN LAW OF PROPERTY § 3.2 (A.J. Casner ed. 1952) [hereinafter cited as Casner].

⁵ 6 S. WILLISTON, CONTRACTS § 890 (Jaeger ed. 1962).

⁶ *E.g.*, *Stone v. Sullivan*, 300 Mass. 450, 15 N.E.2d 476 (1938).

⁷ *Fowler v. Bott*, 6 Mass. 63 (1809); *Coogan v. Parker*, 2 S.C. 255 (1871).

⁸ Casner § 3.78. The statutory duty to repair typically takes three forms. The "repair and deduct" category applies broadly to any "building intended for the occupation of human beings" and requires the lessor, in the absence of contrary agreement, to put and maintain the premises in tenable condition. The tenant has the alternative remedies of vacating or repairing the defect and deducting the amount from the rent; the expenditures may not exceed one month's rent in some of these statutes. *See, e.g.*, CAL. CIV. CODE §§ 1941-42 (West 1954); MONT. REV. CODES ANN. §§ 42-201, -202; N.D. CENT. CODE § 47-16-12 (1960); OKLA. STAT. ANN. tit. 41, §§ 31-32 (1954); S.D. COMPILED LAWS ANN. §§ 43-38-8, -9 (1967). Another form applies only to "multiple dwellings" or "tenement houses" and imposes specific duties. *E.g.*, CONN. GEN. STAT. REV. § 19-343 (1958); MASS.

commencement of the term, the lessee takes "as is" and his "eyes are his bargain."⁹ Succinctly stated:

There is no implied covenant or warranty that at the time the term commences the premises are in a tenable condition or that they are adapted to the purpose for which leased. The tenant, then, cannot use such unfitness . . . as a defense to rent. . . . The reason . . . is that the tenant is the purchaser of an estate in land, subject to the doctrine of *caveat emptor*. He may inspect the premises and determine for himself their suitability or he may secure an express warranty.¹⁰

The rule is not inexorable, however. One early exception was the letting of a "furnished house" for a short term. In such instances caveat emptor is thought inapplicable as the parties contemplate immediate occupation without prior inspection and "may be supposed to contract in reference to a well understood purpose of the hirer to use it as a habitation."¹¹ Despite infrequent extensions,¹² this exception has been narrowly construed and held applicable only to furnishings and defects existing at the beginning of the term.¹³ Of more recent vintage is the rule implying a covenant of fitness for the purpose leased where the lease restricts the tenant to a particular use and is accepted by him before the premises are completely constructed or altered.¹⁴ As in the "furnished house" situation, the lack of opportunity for inspection is the stated rationale for implying the covenant.

Further mitigation of the tenant's plight is afforded through the doctrines of constructive eviction and the implied covenant of quiet enjoyment.¹⁵ By these theories, any act or omission of the landlord that

ANN. LAWS ch. 144, §§ 66-89 (1965); N.Y. MULT. DWELL. LAW §§ 78-80 (McKinney 1946). Others impose broad liability on all lessors and specifically allow an action in tort for damages. GA. CODE ANN. §§ 61-111, -112 (1966); LA. CIV. CODE ANN. arts. 2692-95 (1952). See generally, Feuerstein & Shestack, *Landlord and Tenant—The Statutory Duty to Repair*, 45 ILL. L. REV. 205 (1950).

⁹ Moore v. Weber, 71 Pa. 429, 432 (1872).

¹⁰ Casner § 3.45.

¹¹ Ingalls v. Hobbs, 156 Mass. 348, 350, 31 N.E. 286 (1892); *accord*, Young v. Povich, 121 Me. 141, 116 A. 26 (1922); Hackner v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942); *cf.* Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126 (1889). See Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor*, 3 U. RICH. L. REV. 322 (1969).

¹² See, e.g., Delamater v. Foreman, 184 Minn. 428, 239 N.W. 148 (1931) (multiple apartment buildings, furnished or unfurnished).

¹³ Davenport v. Squibb, 320 Mass. 629, 70 N.E.2d 793 (1947); Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (1888).

¹⁴ Woolford v. Electric Appliances, 24 Cal. App. 2d 385, 75 P.2d 112 (1938); J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App. 1930).

¹⁵ Casner § 3.47; 2 R. POWELL, REAL PROPERTY ¶ 225(3) (Rohan ed. 1967).

renders the premises substantially unsuitable for their intended purpose or that seriously interferes with the tenant's beneficial enjoyment is a breach of the covenant and may constitute a constructive eviction. Both doctrines evolved from a recognition that the common law estate theory did not conform to modern urban life.¹⁶ However, these doctrines have not fully overcome the harshness of caveat emptor. The act or omission must be substantial and of permanent effect.¹⁷ Moreover, the lessor must be under some legal duty to act on the tenant's behalf. Lacking such duty, there can be no constructive eviction.¹⁸ Further, the tenant must abandon the premises within a reasonable time on pain of waiver. "A tenant cannot claim uninhabitability, and at the same time continue to inhabit."¹⁹

The logic is admirable, but the tenant's position is dilemmic. If the breach is afterwards determined insubstantial, he is still liable on the rental agreement; if he dallies too long, he is deemed to have waived the defects.²⁰ The abandonment requirement can itself be harsh; in periods of adequate housing shortage the indigent tenant, in particular, may find suitable housing difficult to obtain, if he can find any at all.²¹ Some limited relief from the abandonment rule has been afforded through the doctrines of partial *actual* and partial *constructive* eviction,²² and also where the

¹⁶ See Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DEPAUL L. REV. 69, 70 (1951).

¹⁷ *Id.* at 79-87.

¹⁸ *E.g.*, Hopkins v. Murphey, 233 Mass. 476, 124 N.E. 252 (1919).

¹⁹ Two Rector Street Corp. v. Bein, 226 App. Div. 73, 76, 234 N.Y.S. 409, 412 (1929). See also Candell v. Western Fed. Sav. & Loan Ass'n, 156 Colo. 552, 400 P.2d 909 (1965); Richards v. Dodge, 150 So.2d 477 (Fla. 1963); Venters v. Reynolds, 354 S.W.2d 521 (Ky. 1962); 52 C.J.S. *Landlord and Tenant* § 457 (1968).

²⁰ 52 C.J.S. *Landlord and Tenant* §§ 455, 459 (1968). See Annot., 91 A.L.R.2d 638 (1963).

²¹ Poor tenants complain of housing code violations . . . but they cannot move away. They are immobilized by lack of funds or by their race. Code administrators hesitate to act because . . . it may mean more evicted tenants with no place to go.

P. WALD, LAW AND POVERTY: 1965 REPORT TO THE NATIONAL CONFERENCE ON LAW AND POVERTY 14 (1965), cited in Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1275 n.95 (1966). See also Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966).

²² It is well recognized that a partial actual eviction suspends the lessee's entire rent obligation although he retains possession of the remainder of the premises. The lessor may not apportion his wrong. See, e.g., Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917). Fewer courts have embraced the theory of partial constructive eviction. In one case the lessee, with a "fortitude born of desperation," remained in his fire gutted apartment while the lessor, as obligated, failed to promptly repair. Noting the acute housing shortage, the court held it "intolerable that the tenant . . . must cling to the naked possession of the un-

tenant seeks equitable relief for breach of covenant.²³

In recent years several courts have endeavored to depart from caveat emptor; three distinct approaches have added momentum to the judicial efforts to circumvent that doctrine. *Pines v. Perssion*²⁴ provided a major impetus for this recent development. In *Pines* several students, prior to leasing a furnished dwelling, inspected the premises and found them admittedly "filthy." In reliance upon the lessor's oral promise to repair, the lease was signed but no repairs were effected. After the students took possession certain defects, latent at the time of leasing, caused the house to be found in violation of the local building code. The tenants vacated and sued to recover their rent deposit and other expenditures. Despite caveat emptor, the court held they were not chargeable with knowledge of these latent defects and held that an implied warranty of habitability existed. While the court's decision was based on the early "furnished house" exception, the reasoning was much broader:

Legislation and administrative rules, such as the safe place statute, building codes, and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially . . . desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would . . . be inconsistent with current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.²⁵

The breach of the warranty constituted a failure of consideration, and the tenants, in recovering, were held liable only "for the reasonable rental value of the premises during the period of actual occupancy."²⁶

inhabitable . . . without redress from the inexorable accrual of full rent." *Johnson v. Pemberton*, 197 Misc. 739, —, 97 N.Y.S.2d 153, 155-56 (City of N.Y. Mun. Ct. 1950); See also *Majen Realty Corp. v. Glotzer*, 61 N.Y.S.2d 195 (City of N.Y. Mun. Ct. 1946). The theory, however, does not completely extinguish liability for rent. *Gombo v. Martise*, 41 Misc. 2d 475, 246 N.Y.S.2d 750, *rev'd*, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (Sup. Ct. 1964). Most authority requires an eviction for breach of the implied covenant of quiet enjoyment, at least where claimed in defense to an action for rent. *Moe v. Sprinkle*, 32 Tenn. App. 33, 221 S.W.2d 712 (1949); 49 Am. Jur. *Landlord and Tenant* § 333 (1970).

²³ *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 163 N.E.2d 4 (1959).

²⁴ 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

²⁵ *Id.* at 595-96, 111 N.W.2d at 412-13.

²⁶ *Id.* at 597, 111 N.W.2d at 413. The rationale in *Pines* was followed in *Buckner*

The court's rationale in *Pines* was later utilized by the New Jersey Supreme Court in *Reste Realty Corp. v. Cooper*.²⁷ In *Reste* the defendant lessee had rented office space in a commercial building; during the first year of occupancy, rainfall from an adjacent driveway caused periodic flooding rendering the offices unsuitable for the lessee's purposes. With knowledge of this defect, the lessee negotiated a second lease in reliance on the lessor's oral promise to correct the flooding. No corrections were made and the tenant abandoned after notice. Neither lease obligated the lessor to repair, nor contained any warranty of fitness. In a suit for accrued rent the lessor, as usual, asserted caveat emptor, and noted, particularly, the lease provisions reciting examination of the premises and agreement to accept them in "present condition." The argument proved unavailing:

It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor. Building code requirements and violations are known or made known to the lessor, not the lessee. He is in a better position to know of latent defects, structural or otherwise . . . which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to discover them. . . .

. . . .

[I]n our judgment present day demands of fair treatment for tenants with respect to latent defects remediable by the landlord . . . require imposition on him of . . . a limited warranty of habitability.²⁸

v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967), in which the court found an implied warranty of habitability and allowed the tenant to recover a prior rent deposit. The court also held invalid a purported waiver of the lessor's duty to repair under CAL. CIV. CODE § 1941. However, the *Pines* rationale was recently emasculated in *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970). The court refused the tenant's request to hold that the lessor's compliance with a local housing code was an implied covenant in the lease, reasoning

[to hold] that the housing code is implied in lease agreements . . . would circumvent the existing enforcement procedures . . . a tenant would withhold rent and the case would then be taken into court by the landlord for ejectment, nonpayment of rent, or both . . . judicial definition of terms in the housing code would supplant administrative regulation.

Id. at —, 174 N.W.2d at 533. One reply is that administrative enforcement is frequently unsuccessful. Inspectors typically face masses of minor violations, problems of overlapping agency jurisdiction, inspection, and sometimes difficult decisions in determining the party to be held responsible. While criminal sanctions—the primary enforcement mechanism—are potentially adequate (see N.Y. MULT. DWELL. LAW § 304 (McKinney Supp. 1970)), they have frequently proven ill-suited in effecting the goals of maintenance and repair. See Gribetz and Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Comment, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965).

²⁷ 53 N.J. 444, 251 A.2d 268 (1969).

²⁸ *Id.* at 452-54, 251 A.2d at 272-73.

While the defects were obvious at the inception of the second and controlling lease, this fact did not preclude reliance upon the newly implied warranty due to the lessor's oral promise to repair, though "knowing acceptance of a defective leasehold would normally preclude reliance upon any implied warranties . . ." ²⁹ Strangely, the court based its decision on a more traditional ground holding that the tenant was constructively evicted by breach of an express covenant of quiet enjoyment. It has been urged that the result was unique since the covenant of quiet enjoyment traditionally embraces only interference with the tenant's beneficial use from conditions attributable to the lessor and manifested after occupancy, but does not warrant initial fitness where, as here, there is no change of condition. ³⁰

The dicta in *Reste* concerning the covenant of habitability was later the *ratio decidendi* in *Marini v. Ireland*.³¹ The defendant lessee held a one year apartment lease that contained an express covenant of quiet enjoyment but no covenant to repair. During occupancy, defects in the plumbing caused flooding; repeated attempts to inform the lessor failed. The lessee then employed self-help, had the plumbing repaired, and deducted the amount from the monthly rent. Drawing on *Pines* and *Reste*, the New Jersey court reversed the lower court decision for the lessor in his ejectment suit and held the self-help remedy available. Significantly, the court did not rely on the covenant of quiet enjoyment³² but, noting that the lease prohibited use "for any other purpose than dwelling," concluded that an implied covenant of habitability arose "because it is indispensable to carry into effect the purpose of the lease . . ." ³³

This approach of construing the terms of the lease raises the question of whether a purported waiver of any implied covenants in the lease should be given recognition. One authority cited in *Marini* considered it "well settled that courts will not make a better . . . contract than the parties themselves have seen fit to enter into."³⁴ The question is not academic; as such covenants are increasingly implied, form leases will undoubtedly contain specific waivers of the covenants. The validity of such a waiver

²⁹ *Id.* at 455, 251 A.2d at 274.

³⁰ See Note, *Landlord and Tenant: A Further Erosion of "Caveat Emptor": Reste Realty Corporation v. Cooper*, 31 U. PITT. L. REV. 138 (1969).

³¹ 56 N.J. 130, 265 A.2d 526 (1970).

³² See Note, 31 U. PITT. L. REV. 138, *supra* note 30.

³³ 56 N.J. at —, 265 A.2d at 533.

³⁴ *William Berland Realty Co. v. Hahne & Co.*, 26 N.J. Super. 477, 486, 98 A.2d 124, 129 (1953).

appears doubtful. Housing codes, even if not specific in placing the duty of compliance on the lessor, are enacted, in part, for the tenant's benefit in recognition of his frequent inequality of bargaining power.³⁵ It is similarly recognized that one cannot assume risk where a statute exists which thus serves to protect a party from himself.³⁶ *Reste* acknowledged this absence of arms length dealing in landlord-tenant relations and, though reserving decision on the issue, cited authority casting grave doubt that any waiver would be upheld.³⁷

While the court in *Marini* considered the characterization of the new covenant a "mere matter of semantics," the conclusion that a breach "would constitute a constructive eviction"³⁸ seems unfortunate. Unless the court intended to embrace the as yet limited theory of partial constructive eviction,³⁹ the lessee's retention of possession was inconsistent with the abandonment requirement. The court, not unmindful of the problem, observed:

It is of little comfort to a tenant in these days of housing shortage to accord him, upon a constructive eviction, the right to vacate the premises and end his obligation to pay rent. Rather he should be accorded the alternative remedy of terminating the cause of the constructive eviction.⁴⁰

One must agree, and as the court's previous efforts in *Reste* suggest, such analytical inconsistencies seem inherent in attempts to accommodate new results within arguably outmoded property concepts.⁴¹

More unfortunate, however, were the limited remedies the court allowed for breach of the new covenant. In *Reste*, the court took note of the "drastic course" involved in abandonment and indicated approval of a rule allowing the tenant to withhold a portion of the agreed rent and to pay only the reduced "reasonable rental value" of the defective premises

³⁵ *McNally v. Ward*, 192 Cal. App. 2d 871, 14 Cal. Rptr. 260 (1961); *Altz v. Leiberson*, 233 N.Y. 16, 134 N.E. 703 (1922).

³⁶ *Finnigan v. Royal Realty Co.*, 35 Cal. 2d 409, 218 P.2d 17; W. PROSSER, *LAW OF TORTS* § 67 (3d ed. 1964).

³⁷ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (disclaimer of implied warranties held no bar to tort recovery for defective auto; *Michaels v. Brookchester, Inc.*, 26 N.J. 379, 140 A.2d 199 (1958) (Tenement House Act held to create tort liability); UNIFORM COMMERCIAL CODE § 2-302 (unconscionable contract or clause).

³⁸ 56 N.J. at —, 265 A.2d at 534.

³⁹ See note 22 *supra*.

⁴⁰ 56 N.J. at —, 265 A.2d at 535.

⁴¹ See Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. Rev. 1279 (1960).

if he elected not to abandon.⁴² Yet the court in *Marini* made it explicit that "the tenant has *only* the alternative remedies of making the repairs or removing from the premises."⁴³ Moreover, he may effect only such repairs as "are reasonable in light of the value of the leasehold."⁴⁴ Such a rule is of least benefit to the indigent tenant who, as noted, may have no place to go if he abandons, but whose meager leasehold is most likely in need of extensive repair. He is probably unable to afford additional expenditures beyond the "reasonable" level if out of pocket.⁴⁵

Finally, it is clear that the covenant as announced by the New Jersey court extends only to latent defects; the tenant who knowingly leases premises in a defective state will have no remedy for breach of the covenant. This qualification seems inconsistent with the court's acknowledgment in *Reste* that "an awareness by legislatures of the inequality of bargaining power between landlord and tenant in many cases, and the need for tenant protection, has produced remedial tenement house and multiple dwelling statutes."⁴⁶ To the extent that residential leases are formed in an adhesive context⁴⁷ and the various housing codes evidence a legislative determination that property owners must satisfy minimum duties of maintenance, it seems incongruent that the indigent tenant in a "take-it-or-leave-it" situation should be left exclusively to often inadequate administrative remedies.⁴⁸

In contrast to the constructive eviction approach utilized in *Marini*, a more unique theory was employed by the District of Columbia Court of Appeals in *Brown v. Southall Realty Co.*⁴⁹ The landlord leased premises which, at the time of letting, were known by him to be defective and in violation of the housing code. When the tenant withheld rent, the lessor sued for possession. The tenant abandoned and disclaimed any future liability for rent on the grounds of illegality. The court agreed and found that the letting violated a regulation that "[N]o persons shall rent or offer to rent any habitation . . . unless . . . in repair." The letting was contrary

⁴² 53 N.J. at 462 n.1, 251 A.2d at 277 n.1.

⁴³ 56 N.J. at —, 265 A.2d at 535 (emphasis added). Cf. *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970).

⁴⁴ *Id.*

⁴⁵ See note 21 *supra*. See also Comment, *The Indigent Tenant and the Doctrine of Constructive Eviction*, WASH. U.L.Q. 461, 478 (1968).

⁴⁶ 53 N.J. at 452, 251 A.2d at 272.

⁴⁷ 2 R. POWELL, REAL PROPERTY ¶ 221 (1) (Rohan ed. 1967).

⁴⁸ See note 26 *supra*.

⁴⁹ 237 A.2d 834 (D.C. App. 1968).

to public policy, and the lease void and unenforceable.⁵⁰ The illegal contract theory in *Brown* involved only pre-existing and known defects; its application to situations in which the defects and violations arise after the letting is uncertain.⁵¹ It might be argued that the landlord's continued provision of defective housing, despite initial compliance with the regulations, constitutes an illegal performance, renders an initially valid contract unenforceable and provides a good defense to an action for accrued rent if the violations were "serious or more than an incidental part of the performance."⁵² However, substantial authority would reject this reasoning: "There is no policy . . . against . . . recovery unless [the] contract was illegal, and a contract is not necessarily illegal because it is carried out in an illegal way."⁵³

The distinction appears unsound; what flouts public policy is the prohibited performance, not the contract as such. Housing codes typically require the lessor to maintain the premises in a healthy and safe condition. The failure to do so is no less illegal than the act of originally leasing the premises in a defective condition. It would be anomalous not to prohibit the lessor's recovery in both cases.⁵⁴

The illegal contract theory produces the remedy of total rent withholding. Since the lease is void, the lessor may not assert it in an action for rent or ejectment. However, like the solution in *Marini*, the illegal contract theory may prove cold comfort to the indigent tenant. Entry under a void lease uniformly creates a tenancy at will, terminable on either reasonable or statutory notice.⁵⁵ The same result should obtain in the case of supervening illegality. Thus, the theory may become a double edged sword; a tenant might withhold his rent and successfully defend an action for rent or possession, but subject himself to later ouster.⁶⁰

A third approach in departing from the caveat emptor doctrine was

⁵⁰ *Id.* at 836-37; see also *Jess Fisher & Co. v. Hicks*, 86 A.2d 177 (D.C. App. 1952); *Leuthold v. Stickney*, 116 Minn. 299, 133 N.W. 856 (1911).

⁵¹ See *Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836 (D.C. App. 1968), *rev'd sub nom. Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

⁵² 6 S. WILLISTON, *CONTRACTS* § 1761 (Rev. ed. 1938).

⁵³ *Fox v. Rodgers*, 171 Mass. 546, 547, 50 N.E. 1041, 1042 (1898); see *Measday v. Sweazea*, 78 N.M. 781, 438 P.2d 525 (1968); cf. *Tocci v. Lembo*, 325 Mass. 707, 92 N.E.2d 254 (1950). See generally 17 C.J.S. *Contracts* § 190 (1963).

⁵⁴ See WILLISTON, *supra* note 52. See also *RESTATEMENT OF CONTRACTS* § 608 (1932).

⁵⁵ *Casner* §§ 3.27-28, 3.91. See *Diamond Housing Corp. v. Robinson*, 257 A.2d 492 (D.C. App. 1969).

⁶⁰ See *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968).

taken by the Hawaii Supreme Court in *Lemle v. Breeden*.⁵⁷ The lessee's furnished "Tahitian style" dwelling proved rat infested and was abandoned within three days. While factually the case fell within the "furnished house" exception, and the tenant urged constructive eviction, the court eschewed both approaches. Unlike in *Marini*, the court asserted that "to search for gaps and exceptions in a legal doctrine such as constructive eviction which exists only because of the somnolence of the common law and the courts is to perpetuate further judicial fictions when preferable alternatives exist."⁵⁸ The preferable alternative was simply a rejection of the "wooden rules of property law" and treatment of the lease as a bilateral contract and sale of the premises for a term.⁵⁹ The court, by thus analogizing a lease doctrinally to a sale and with additional assist from tort authority, had little difficulty in concluding that lessor's superior bargaining power and opportunity to inspect and maintain his product imply a warranty that the premises are suitable for their intended use as a habitation. The usual contract remedies of damages, reformation, and rescission are available to the lessee upon material breach, and the remedial problems of constructive eviction are eliminated.⁶⁰

The implied warranty approach was recently followed in the District of Columbia in *Javins v. First National Realty Corporation*.⁶¹ The tenants urged that violations of the housing regulations occurring after the leasing were a defense to the lessor's ejectment action. Regarding the treatment of leases as contracts "wise and well considered," the court reviewed the erosion of caveat emptor in consumer protection cases but declined to imply a general warranty of habitability in all urban leases. Instead, drawing on *Brown*, the court held that the housing regulations were implied terms of the leases they covered and created a non-waivable duty to comply with their standards. The opinion is suitably vague, however, on one result of this interaction between lease and housing regulation. In the lower court, the tenants argued both that the illegal contract theory of *Brown*

⁵⁷ 462 P.2d 470 (Hawaii 1969); See *Lund v. MacArthur*, 462 P.2d 482 (Hawaii 1969).

⁵⁸ 462 P.2d at 475.

⁵⁹ See Lesar, *supra* note 41, at 1281.

⁶⁰ 462 P.2d at 473-75; see note 1 *supra*, and see also *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); Jaeger, *Product Liability: The Constructive Warranty*, 39 NOTRE DAME LAWYER 501 (1964).

⁶¹ 428 F.2d 1071 (D.C. Cir. 1970).

extended to violations arising after the letting and that the regulations imposed an implied contractual duty on the lessor to maintain the property. Neither argument was accepted.⁶² In reversing, the circuit court of appeals skirted the issue of supervening illegality: "Under the *Brown* holding, serious failure to comply. . . [with a regulation requiring maintenance and repair] . . . before the least term begins renders the contract void. We think it untenable to find that this section has no effect on the contract after it has been signed."⁶³ What remains uncertain is whether the "effect" of the regulations, in the case of defects arising after the leasing, is relevant to the validity of the lease itself. Logically, it would seem so. As the court in *Javins* acknowledged, under *Brown* the existence of substantial defects at the time of leasing "renders the contract void." The issue of illegality should not hinge on the fortuity of when the defects arose.⁶⁴ Moreover, an acknowledgment of illegality in both contexts—where the defects exist preceding the contract as well as where they subsequently arise—need not be inconsistent with the implication of a contractual duty enforceable by the tenant. Enforcement of an illegal contract is typically allowed where the enforcement is sought by a party who falls within the protected class for whose benefit the contract is judged illegal.⁶⁵

Thus, from the tenant's viewpoint, the warranty and illegal contract theories may merely provide an overlapping choice of remedies. More problematical, however, is whether the lessor could assert the illegality of the lease in either context in defense to an action for breach of his warranty, thereby creating a tenancy at will and jeopardizing the lessee's right to future possession.⁶⁶ The possibility apparently exists; if broader social goals than tenant protection are served by code enforcement, then the illegal leasing suggests an *in pari delicto* situation. The "protected class" exception to the rule of non-enforcement of illegal contracts might not apply, and the lessor could, paradoxically, benefit from his own illegal behavior.⁶⁷ Indeed, the court which decided *Brown* later intimated this possibility:

⁶² *Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836 (D.C. App. 1968).

⁶³ 428 F.2d at 1081.

⁶⁴ See text at notes 52-54 *supra*.

⁶⁵ See, e.g., *Kneeland v. Emerton*, 280 Mass. 371, 183 N.E.155 (1932); *Loewenstein v. Midwestern Inv. Co.*, 181 Neb. 547, 149 N.W.2d 512 (1967); RESTATEMENT OF CONTRACTS § 601 (1932).

⁶⁶ See authorities cited *supra* note 55.

⁶⁷ 17 C.J.S. *Contracts* § 272 (1963).

The Housing Regulations do not compel an owner of housing property to rent his property . . . if the landlord is unwilling or unable to put the property in a habitable condition, he may and should promptly terminate the tenancy and withdraw the property from the rental market, because the Regulations forbid both the rental and the occupancy of such premises.⁶⁸

Of course, the thrust of *Javins* is contrary, but the problem is posed to illustrate that the illegal contract and warranty theories, where they co-exist, may prove conflicting.

Like *Lemle*, *Javins* accorded the usual contract remedies, including specific performance, but also sanctioned the tenant's use of rent withholding. This remedy, first suggested in *Reste*, was later limited in *Marini* by the "repair" requirement. *Brown*, in effect, allowed total rent withholding but at the expense of voiding the lease. Upon breach of the warranty, the lessee may withhold rent and need not effect repairs, abandon, or institute suit. In an ejectment action, the lessor's breach, if partial, results in liability only for the fair rental value of the premises in their defective state; the lessee may retain possession if he tenders that amount. If the breach is total, no rent is owed, and the ejectment action fails.⁶⁹ Moreover, the tenant need not run the risk usually inherent in constructive eviction. He may have the premises inspected and ascertain whether substantial code violations exist. Even if it is later judged that no breach substantial enough to merit rent reduction occurred, and ejectment is ordered, the tenant has at least enjoyed possession during the interim period.

The cases examined typify three distinct approaches employed in recent judicial assaults on caveat emptor in landlord-tenant law. The potential consequences of each is yet unclear, though some conceptual and remedial problems are presently apparent. It is hoped, however, that further re-evaluation of the "obnoxious legal cliché" will flow from the precedents now before the courts.

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⁶⁸ *Diamond Housing Corp. v. Robinson*, 257 A.2d 492, 495 (D.C. App. 1969).

⁶⁹ 428 F.2d at 1082. See also *Bonner v. Beecham*, 2 CCH Pov. L. REP. ¶ 11,098 (Denver, Colo. County Ct. 1970).