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THE IMPLIED WARRANTY OF HABITABILITY AS A MECHANISM FOR REDISTRIBUTING INCOME: GOOD GOAL, BAD POLICY*

The judicially created warranty of habitability appears to have been intended primarily as a means to alleviate poverty by forcing landlords to better maintain low-rent housing units under threat of legal sanctions. The Author argues, however, that the warranty of habitability results in scarcer, more expensive housing for the poor. Moreover, the quality of low-rent housing is a consequence of inadequate demand due to the low incomes of renters rather than an inadequate supply of housing units. The Author proposes legislative alternatives to the warranty of habitability as more effective means of helping the poor.

IN A SERIES of District of Columbia cases, the following determinations were made. First, a lease for residential property is illegal and unenforceable when that property is in violation of the local housing code, even if the tenant was on notice of the violations prior to signing the lease agreement.¹ Second, there exists an implied warranty of habitability such that a tenant's obligation to pay rent is suspended for the period of time during which violations of the housing code exist.² Moreover, at the time of trial for either breach of warranty or possession, if a breach of warranty is found, the finder of fact determines the extent to which the rental obligation is permanently reduced, if at all.³ Third, in order to

* The Author would thank his wife, Rebecca, and his son, Halden, who made the writing of this Note well worthwhile. The Author also thanks his advisor, Laura Brown Chisolm, for her constructive criticism.

1. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. 1968). In *Brown*, the violations consisted of "an obstructed commode, a broken railing and insufficient ceiling height in the basement . . ." *Id.* at 836. Since the tenant had vacated the premises, the court did not decide the issue of whether and when the landlord could regain possession from the tenant under an illegal lease. The court did have occasion to decide this issue in a later case, *Diamond Housing Corp. v. Robinson*, 257 A.2d 492 (D.C. 1969). It held that "the tenant becomes a tenant at sufferance[,] and the tenancy, like any other tenancy at sufferance, may be terminated on thirty days' notice." *Id.* at 495. See *infra* note 4 and accompanying text.

2. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

3. *Id.* at 1082-83.

regain possession of leased property from a tenant who has asserted a breach of the implied warranty of habitability as an affirmative defense for nonpayment of rent, the landlord must first rebut a presumption of illicit retaliatory motivation.⁴

The purpose of this Note is twofold. The first is to distinguish between two apparent goals of the implied warranty of habitability.⁵ The second is to explain why the use of the warranty of habitability to achieve one of these goals, the assurance of basic health and safety standards, may be a justifiable public policy, while its use to achieve the other goal, a redistribution of income to alleviate poverty, effectively counters the public interest it is meant to foster. This Note presents flaws in this judicially-created incomes policy and offers alternatives that are consistent with the goal of raising the quality of housing available to the poor.

I. THE IMPLIED WARRANTY OF HABITABILITY

The warranty of habitability is one component of a twenty to thirty-year trend in residential tenant-landlord law intended to heighten the protections afforded to tenants. The trend appears to be due as much to legislative enactments and codifications as to judicial application of contract and consumer law to residential

4. See *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 865 (D.C. Cir. 1972) ("when the landlord's conduct is 'inherently destructive' of tenants' rights, the jury may . . . presume that the landlord intended [to punish tenants or chill the exercise of their rights]"). In this instance, the violations were:

large pieces of plaster . . . missing throughout the house . . . no step from the front walk to the front porch . . . [a] shaky and unsafe [front porch] . . . a wall in the back bedroom which was not attached to the ceiling and which moved back and forth when pressed . . . nails protrud[ing] along the side of the stairway . . . a pane of glass missing from the living room window and . . . the window frame in the kitchen . . . [was] so far out of position that one could see into the back yard through the space between it and the wall."

Id. at 858.

5. *Javins* is generally perceived as "the leading case establishing the implied warranty of habitability." Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 522 (1984); see also Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503, 525 (1982) ("Commentators have pointed out flaws in [the *Javins* Court's] reasoning and have questioned the soundness of some of [its] factual assumptions, but no one can doubt the profound influence the *Javins* case has had on later implied warranty decisions." (footnotes omitted)). *Javins* was not the first case to consider an implied warranty of habitability, however. See, e.g., *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (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); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

leases.⁶ At least one commentator has gone so far as to suggest that the provision of residential rental housing in the United States has taken on many aspects of a regulated public utility.⁷ But in contrast to the analogous-sounding implied warranty of merchantability of the Uniform Commercial Code,⁸ the warranty of habitability goes beyond an attempt to ensure that renters get essentially what they bargained for. The term itself is a misnomer, since the source of the landlord's duty to provide habitable premises emanates from public policy (generally in the form of the local housing code⁹) rather than from any agreement between the landlord and tenant.¹⁰

The implied warranty of habitability, as it has developed, is not solely a mechanism to enforce the implied terms of a bargained-for contract between the tenant and landlord, as is the warranty of merchantability implied in a contract between the buyer and seller of a good.¹¹ At a minimum, the warranty of hab-

6. See Glendon, *supra* note 5, at 521-528.

7. See generally Berger, *The New Residential Tenancy Law — Are Landlords Public Utilities?*, 60 NEB. L. REV. 707 (1981) (discussing rent control and eviction control as limitations on a landlord's freedom to contract). This theory has not escaped the judiciary. Nearly ten years earlier, Judge Robb, dissenting in *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 871 (D.C. Cir. 1972), stated that "[t]he theory of the majority seems to be that if not an outlaw a landlord is at least a public utility, subject to regulation by the court in conformity with its concept of public convenience and necessity."

8. U.C.C. § 2-314 (1987).

9. *E.g.*, CLEVELAND, OHIO, CODIFIED ORDINANCES ch. 361.02 (1986) ("the purpose of this Code is to establish minimum standards necessary to make all dwelling structures safe, sanitary, free from fire and health hazards and fit for human habitation and beneficial to the public welfare"). But see, for example, *Glasoe v. Trinkle*, 107 Ill. 2d 1, 471 N.E.2d 915 (1985), in which the Illinois Supreme Court held that neither a building code nor a housing code is required to enforce an implied warranty of habitability. Defects substantial enough to render a dwelling uninhabitable to a person with reasonable sensitivities was held to constitute a breach of the implied warranty. For a discussion of this case and the court's holding, see Note, *Expansion of Tenants' Rights and Remedies in Illinois: Glasoe v. Trinkle and the Implied Warranty of Habitability*, 32 WASH. U.J. URB. & CONTEMP. L. 273 (1987).

10. Rabin, *supra* note 5, at 523. Under this view, the so-called warranty is neither waivable nor disclaimable, since it derives from public policy and not from an agreement between the parties. *Id.*

11. See Glendon, *supra* note 5, at 547 ("the implied warranty of habitability in residential leases has small resemblance to implied warranties in the sale of goods"). If the analogy to sales contracts were to hold, several conclusions would presumably follow:

The warranty of habitability would apply to any premises used or occupied by human beings, whether for residential, commercial, or charitable purposes. In addition, acceptance of premises clearly uninhabitable or assent by the tenant to a lease provision describing the premises as conveyed "as is" would usually constitute a waiver of the warranty. The landlord's duty under the warranty would

itability additionally seeks to ensure that tenants reside in a dwelling which meets basic housing health and safety standards.¹² Presumably, modern consumers of rental housing have little knowledge of the technicalities of building construction and maintenance requirements.¹³ In an increasingly complex market society where specialization is highly valued, there seems little reason to expect an individual consumer to become apprised of every bit of information that might possibly have an impact on the individual's well-being.¹⁴ It may therefore be reasonable and efficient for government¹⁵ to set and enforce such technical standards¹⁶ legisla-

be discharged by delivering and maintaining rental premises of "fair average quality" fit for the ordinary purposes for which such premises are used. Ascertainment of damages for breach would be designed to compensate for and generally would approximate the loss to the tenant of his bargain. Yet, a study of the implied warranty cases and statutes suggests that none of these conclusions is substantially correct.

Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 13-14 (1976). The warranty of habitability generally applies only to residential leases — not to commercial ones. *Id.* at 14.

12. Many courts following *Javins* are willing to find a breach of the warranty of habitability only for defects that substantially threaten health and safety. An existing housing code is generally used as a standard of reference in determining whether there exists a breach of the warranty, but courts do vary as to how closely the warranty follows the code. See Abbott, *supra* note 11, at 17-20. Even when applied only to substantial defects, some surprising results may occur.

Red Robinson, an 87-year-old Harlem landlord . . . has been sent to jail three times — once for 30 days — for failing to supply heat to squatters in the burned-out building he owns next door. "The judge strictly told me that regardless of who it is, I'm supposed to give them heat and hot water. . . ."

Lochhead, *Protracted Rent Control War Takes Toll on Housing Stock*, INSIGHT, Apr. 13, 1987, at 38.

13. "[T]oday's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee." *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

14. Economists refer to this as *rational ignorance*. When the expected benefit from acquiring additional information is less than the expected additional cost, the economically rational consumer chooses to be ignorant of the additional information. See R. BYRNS & G. STONE, *ECONOMICS* 433 (4th ed. 1989).

15. An argument could be made here that a prospective tenant could hire a private contractor to assess the health and safety conditions of a potential residence and that such an arrangement would likely be more efficient than a government bureaucracy. Such an argument would have to consider the economies of scale involved in centralizing the inspection process in connection with the enforcement of housing standards. Unless the private housing inspectors can directly bring about an enforcement of the minimum health and safety standards, multiple private inspections will presumably be made as different prospective tenants consider the premises, or an additional inspection will have to be made by a government inspector anyway. This also raises the issue of whether individuals could afford to, or would even choose to, hire private inspectors on their own. If health and safety is a

tively, through housing codes establishing minimum health and safety criteria, and judicially, through an implied warranty of habitability limited to ensuring that the substantial health and safety requirements of the housing code are enforced and that rental housing poses no significant threat to a tenant's health and safety through latent defects.¹⁷ If housing safety is a matter of public policy, then legislatively mandating minimum health and safety standards and judicially enforcing them are justifiable as an appropriate, and seemingly noncontradictory, means toward that end. Unless legislation is discriminatory under the interstate commerce clause,¹⁸ violative of fundamental constitutional rights under the due process clause,¹⁹ or, in the case of state legislation, violative of the supremacy clause,²⁰ as long as the ends of the legislation are in the public interest and the means chosen bear a rational connection to those ends, the Supreme Court will show substantial deference in upholding state or federal regulatory legislation.²¹

public good (see *infra* note 25) that society chooses to make available to everyone, then private inspections are inappropriate unless the fee is publicly paid. However, one must also consider the reality of the responsiveness of a bureaucratic housing authority to individuals, especially poor individuals, and the extent to which individuals avail themselves of such government help. Furthermore, one must gauge how often the housing authority actually inspects residential rental property and how frequently it follows through with enforcement against violators.

16. And then again, it may not be reasonable and efficient for government to set and enforce such standards. Government, too, may suffer from imperfect information and rational ignorance. See R. BYRNS & G. STONE, *supra* note 14, at 94. Government action may also suffer from rent-seeking behavior, special interest effects, political shortsightedness, and bureaucratic self-interest. See Gwartney & Wagner, *The Public Choice Revolution*, 23 INTERCOLLEGIATE REV. 17, 19-23 (Spring 1988).

17. See Rabin, *supra* note 5, at 520, who argues that the warranty of habitability should only be used to enforce contract expectations.

[A]lthough the warranty of habitability applied to latent defects promotes the efficient provision of housing, the same warranty applied to patent defects retards it. The key question is, Does the law reflect what the parties would have bargained for with full knowledge and experience? To the extent that it does, the law promotes the efficient provision of housing.

18. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States and with Indian Tribes.").

19. U.S. CONST. amend. V ("No person shall be . . . deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

20. U.S. CONST. art. VI, cl. 2 ("This Constitution and Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land").

21. See generally G. STONE, L. SEIDMAN, C. SUNSTEIN, AND M. TUSHNET, CONSTITUTIONAL LAW 1-65, 115-212, 249-339, 691-751, 840-925 (1986) (Supreme Court reluctant

A second goal underlying the warranty of habitability, however, goes beyond ensuring that rental housing poses no substantial threat to the occupant's health and safety. The objective of some courts in implying a warranty of habitability appears to be a redistribution of income from landlords to tenants by attempting to force landlords to offer higher quality housing at a lower rent than determined solely by market forces.²²

One obvious way to help the poor, at least in the short run, is to redistribute some of the income generated by society directly from its wealthier to its poorer members, either as cash or in-kind payments.²³ Redistributing income to the poor is perceived by many as an appropriate function of government.²⁴ Although the redistribution of income would seem to be a task better suited to the legislative and administrative branches of government,²⁵ the

to invalidate state or federal regulatory legislation unless the legislation interferes with either the Commerce Clause or fundamental individual rights).

22. "When code enforcement is seriously pursued, market forces generally prevent landlords from passing on their increased costs through rent increases. . . . But it is undoubtedly true that the same landlords would be able to make a greater profit if the housing code were enforced laxly or not at all." *Robinson v. Diamond House Corp.*, 463 F.2d 853, 860 (D.C. Cir. 1972) (citation omitted).

23. These "transfer strategies" include such income transfer programs as social security, aid to families with dependent children, food stamps and unemployment insurance. See E. DOLAN & D. LINDSEY, *MICROECONOMICS* 383-386 (5th ed. 1988). "Examples of in-kind transfers are food, medical care, and housing. In-kind transfers may be effected by distributing 'vouchers' that can be used to purchase only specified commodities . . ." T. POGUE & L. SGONTZ, *GOVERNMENT AND ECONOMIC CHOICE: AN INTRODUCTION TO PUBLIC FINANCE* 131 (1978). Other suggested methods of helping the poor include creating greater economic *opportunities* for the poor (through anti-discrimination laws, education, and otherwise) and encouraging *general* economic growth, see, e.g., P. SAMUELSON & W. NORDHAUS, *MICROECONOMICS* 458-464 (1989), and targeting impoverished areas for economic development, see, e.g., Shapiro, *A Conservative War on Poverty*, *U.S. NEWS & WORLD REP.*, Feb. 27, 1989, at 20-23.

24. See J. BUCHANAN & M. FLOWERS, *THE PUBLIC FINANCES: AN INTRODUCTORY TEXTBOOK* 86 (4th ed. 1975).

25. Courts themselves may affect the distribution of income in the course of deciding a case, especially when providing a remedy. However, this consequential redistribution, typically involving a small number of parties and resulting from fairly well-defined legal principles applied to the case at hand, needs to be distinguished from a judicial *goal* of income redistribution. The redistribution of income and wealth with the goal of reducing poverty has the characteristics of a quasi-public good. *Id.* A pure public good "(1) cannot be provided for one person without also being provided for others and (2) once provided for one person can be provided for others at zero added cost." E. DOLAN & D. LINDSEY, *supra* note 23, at 111. The benefits to society from reducing poverty by redistributing income seem to satisfy the criteria for a quasi-public good. See J. BUCHANAN & M. FLOWERS, *supra* note 24, at 31-32, 86. Impure,

or 'quasi' public goods, are supplied by the state and financed out of taxation because it is considered that their quality and/or quantity of supply would be

judicial approach of imposing a warranty of habitability to attain this goal might be justified (if not constitutionally,²⁶ at least by those favoring judicial activism in social policy formulation) as the court unilaterally taking what action it could to reduce perceived inequities in the distribution of income and wealth, were it not for two factors. First, many landlords are only "slightly more affluent" than their tenants.²⁷ There even appears to be a current trend towards small-scale ownership of residential rental property.²⁸ "[M]ore than 80 percent of New York's rental market is owned by small landlords, and 64 percent of those are just breaking even or losing money."²⁹ The warranty of habitability is clearly not a "means tested" redistribution program, since a tenant's income and wealth are not factors determining whether the tenant qualifies for its benefits.³⁰ On the contrary, it seems the primary beneficiaries of indirect housing assistance, such as housing codes and

inadequate under private provision. Since, however, the extent to which a good is a public good is . . . a matter of degree, there is room for genuine political debate about the appropriate means of provision.

G. BANNOCK, R. BAXTER, & R. REES, *THE PENGUIN DICTIONARY OF ECONOMICS* 336 (1972) [hereinafter G. BANNOCK]. Matters to be resolved by political debate, such as the appropriate provision of public goods, typically have been matters for legislatures rather than courts to decide. For instance, the U.S. Supreme Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 207 (1819), held that:

[W]here the [legislation] is not prohibited [by the constitution], and is really calculated to effect any of the objects intrusted [sic] to the government, to undertake . . . to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

26. In *Lindsey v. Normet*, 405 U.S. 56, 74 (1972), the U.S. Supreme Court held: We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions.

27. Glendon, *supra*, note 5, at 563. "In Boston, for example, the landlord is apt to be a policeman, taxi-driver or school teacher who has mortgaged himself to the hilt to buy a two- or three-decker building in which he and his family occupy one floor." *Id.* at 563, n.403.

28. *Id.* at 563.

29. Lochhead, *supra*, note 12, at 39.

30. See D. GREENWALD & ASSOCIATES, *THE MCGRAW-HILL DICTIONARY OF MODERN ECONOMICS: A HANDBOOK OF TERMS AND ORGANIZATIONS* 365-366 (2d ed. 1973) (a means test requires that applicants for public assistance prove their need to become eligible to receive benefits).

rent control, are the middle and upper classes rather than the poor.³¹ Second and more important, as discussed later, this form

31. This is amply demonstrated by noting some prosperous cities that utilize rent control.

Ostensibly aimed at helping poor tenants, rent control seems to proliferate in cities with large proportions of middle- and upper-income tenants. Beverly Hills, Santa Monica, Berkeley, Palm Springs and Los Gatos, all prosperous California cities, control rents. So do many of New Jersey's affluent suburbs. "Clearly, the major beneficiary is a population that is firmly entrenched in the middle class," says a study by Richard Devine of the Center for Community Change in Oakland, Calif. . . . The accounting firm Arthur D. Little Inc. found that in New York City, upper-income tenants each year are spared \$500 million via rent regulation; lower-income tenants are spared \$110 million.

Lochhead, *supra*, note 12, at 38.

The only beneficiaries of rent control are those who have leases at the time the law is adopted. To the extent key money [a finder's fee collected by the current tenant from the new tenant] represents the present value of saving [due to the rent controls], all subsequent tenants pay not the controlled rent, but rather the market rent. (Of course the market rent is higher than it would be in the absence of rent control, because rent control depresses the supply [by reducing the rent the landlord actually receives].) Seen in this light, rent control is a law which transfers part of the ownership rights of a rental property from the landlord to the original tenant. Among other things, this ought to make it clear that any income redistribution emanating from rent control bears little resemblance to the income redistribution that would emerge from a conscious policy to help the poor. Even if all renters are poor, rent control helps the first generation of renters at the expense not only of landlords but also of subsequent generations of renters.

E. MILLS & B. HAMILTON, *URBAN ECONOMICS* 245-246 (4th ed. 1989).

It may seem that the prospective tenant would pay key money only equal to the present value of rent savings during his or her own expected period of occupancy. But this is not the case. One of the benefits the new tenant acquires upon getting a rent-controlled apartment is the right to charge key money when he or she moves out.

Id. at 245, n.23.

This problem is further illustrated in a suburb of Cleveland, Ohio:

Urban planners warn of middle-class flight by those who perceive the movement by Clevelanders into Lakewood as a harbinger of deterioration and plummeting property values. But, they say, strict adherence to standards — building codes, traffic codes, and local ordinances — is the only way to keep new residents in line and old residents from moving away. . . . Walter Geist [building commissioner for the City of Lakewood, Ohio] dismisses critics with a derisive wave of his hand. "People get angry when they have to do something that costs them money," he says. "But they'd be a lot angrier if property values declined. I have no problem with enforcement. . . ." The consensus among urban planners who have visited Lakewood is to applaud Geist for his extremism. They say such an attitude is necessary when more and more homes in a city are being purchased by lower-income residents with little or no down payment. . . . Residents who are heavily mortgaged have no money for critical repairs to old homes, and as decay sets in, appalled neighbors move out.

Theiss, *Lakewood: Tough Enough?*, *CLEVELAND MAG.*, Nov. 1988, at 71, 72 & 110; see also Fleetwood & Eichenwald, *There's Nothing Liberal About Rent Control*, *WASH.*

of judicial market intervention in the long run will fail to have the desired effect of reducing poverty by making better housing available to the poor.³² Although the goal may be proper, the policy is counterproductive in light of the goal.

II. TRENDS IN HOUSING QUALITY

While the problems of low quality housing for the poor in the United States are not insignificant, it is worth placing the problems in perspective. "Americans are housed better than at any time in our history, and surely better than the citizens of almost any other country."³³ From 1940 to 1980, the percentage of dwellings lacking at least one component of basic plumbing fell from 55.4 percent to 2.7 percent.³⁴ Over the same period, the percentage of dwelling units with more than 1.5 persons per room fell from nine percent to one percent and, in 1980, 60 percent had fewer than one-half person per room.³⁵

[T]he obvious and easily quantifiable indices of housing quality — crowding and plumbing deficiency — have been virtually eliminated by 1980. This means, among other things, that measurement of subsequent changes in housing quality will be more difficult. The nation is now eliminating structural and other defects that are less easily measured. But even taking into account these problems, the best available evidence shows that the quality of housing has continued to improve during the early '80s. In particular, it appears that the quality of low-income housing has continued to improve.³⁶

Overall, low-income renters have shared significantly in the improvement in housing quality, at least for the decade 1974-83,³⁷ but rental housing nevertheless "contains a majority of the overcrowded and substandard urban units."³⁸

If rental housing generally has improved in quality through time, what explains the rising concern with habitability over the last twenty years? The answer lies in the fact that even as the

MONTHLY, June 1986, at 19 (primary beneficiaries of rent control are the middle and upper classes, rather than the poor).

32. See *infra* notes 65-92 and accompanying text.

33. E. MILLS & B. HAMILTON, *supra* note 31, at 217.

34. *Id.* Basic components of plumbing include hot water and a toilet. *Id.*

35. *Id.*

36. *Id.* at 217-18.

37. *Id.* at 218.

38. J. HEILBRUN, *URBAN ECONOMICS AND PUBLIC POLICY* 303 (3d ed. 1987).

quality of housing was improving, the focus of housing dissatisfaction shifted away from the quality of the structures themselves, toward the quality of the neighborhood environment.³⁹ “[T]he quality of life offered by a dwelling unit depends to an important degree on the character of the neighborhood in which it is located.”⁴⁰ Deterioration in the quality of individual housing units is tied to the deterioration of neighborhoods into slums.⁴¹ Racial segregation and discrimination, as well as poverty, are tied to the quality and characteristics of neighborhoods.⁴² The continued prosperity of the 1950s and ‘60s brought rising expectations about the quality of life society could and should provide its citizens.⁴³ The civil rights movement, the anti-war/anti-establishment counterculture, and changes in political and legal institutions each contributed to the call for improved housing.⁴⁴

III. THE ECONOMICS OF RENTAL HOUSING

Many of the problems relating to the quality and availability of housing are explained by its rather unique characteristics.⁴⁵ Housing is an extremely durable capital asset. Notwithstanding the Internal Revenue Code, “housing appears to depreciate less than 1 percent per year.”⁴⁶ In any given year, 97 to 98 percent of housing services are supplied by previously existing housing stock.⁴⁷ Housing is essentially immovable and the basic features of

39. *Id.* at 302, 320.

40. E. MILLS & B. HAMILTON, *supra* note 31, at 229.

41. *See id.*

42. For a discussion of the effects of racial segregation and discrimination on neighborhoods, see *id.* at 233-39 (noting that segregation and discrimination effectively create two separate housing markets, which in turn affect the composition of the neighborhood). For a discussion of the effect of poverty on neighborhoods, see J. HEILBRUN, *supra* note 38, at 319-25 (arguing that ghetto redevelopment programs are inherently limited by the residential nature of the neighborhoods and the expansion of inner city blight).

43. *See* Rabin, *supra* note 5, at 540-554.

44. *Id.* at 549. It is interesting to note that Judge J. Skelly Wright, who wrote the *Javins* and *Robinson* opinions, acknowledged in a letter to Edward Rabin that he “was indeed influenced by the fact that, during the nationwide racial turmoil of the sixties and the unrest caused by the injustice of racially selective service in Vietnam, most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white.” *Id.* Judge Wright felt he did what he “could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation’s capital.” *Id.*

45. *See* E. MILLS & B. HAMILTON, *supra* note 31, at 221; J. HEILBRUN, *supra* note 38, at 303.

46. E. MILLS & B. HAMILTON, *supra* note 31, at 221.

47. *See* J. HEILBRUN, *supra* note 38, at 303.

an existing housing unit are rather inflexible, especially for purposes of upgrading.⁴⁸ Existing housing responds to market forces primarily through changes in quality and rental price.⁴⁹

If the adjustment of supply to changes in demand could take place only through new construction, the process would be even more cumbersome, slow, and expensive than in fact it is. Fortunately, adjustments on the supply side take place not only through new construction but also through a series of complex changes by which the quality of existing units, and therefore their rent level, is "adapted" to the pattern of demand expressed in the market for housing services.⁵⁰

The supply of housing for any particular income class equals housing newly constructed for that housing market plus housing vacated by higher or, possibly, lower income classes and housing converted from other uses, minus housing lost to higher or lower income markets and housing converted to other uses.⁵¹ When profits are pushed below a "normal profit," investors will shift their resources into the next best alternative use for their resources.⁵² For owners of residential rental property, next best alternative uses could include conversion to condominiums, offices, warehouses, or even demolition or abandonment, depending on the demand for these uses at the location of the property.⁵³ How much housing is added to or subtracted from a particular housing market will be determined by the expected profit from doing so.⁵⁴ New housing is created primarily for higher income classes since the present value of the rents for larger, higher-quality housing is generally expected to be greater than construction costs, while the reverse is expected for lower income housing.⁵⁵ As the wealthier move into newly constructed rental housing, vacated rental units

48. See E. MILLS & B. HAMILTON, *supra* note 31, at 221.

49. See *id.* at 228-29.

50. J. HEILBRUN, *supra* note 38, at 303.

51. See *id.* at 310-312, 317-320, 484-487; E. MILLS & B. HAMILTON, *supra* note 31, at 213-215.

52. Normal profits are "the imputed returns to capital and risk taking just necessary to prevent the owners from withdrawing from the industry. These normal profits are . . . the opportunity costs of risk taking and capital." R. LIPSEY, P. STEINER, & D. PURVIS, *MICROECONOMICS* 168 (8th ed. 1988) [hereinafter R. LIPSEY]. "If a firm's . . . profit is less than that normally received by firms with comparable levels of investment and risks, in the long run its owners will move their resources into ventures where at least normal profits are expected." R. BYRNS & G. STONE, *supra* note 14, at 445-46.

53. See J. HEILBRUN, *supra* note 38, at 319-320, 340.

54. See *id.* at 305; R. LIPSEY, *supra* note 52, at 168.

55. See E. MILLS & B. HAMILTON, *supra* note 31, at 228.

filter down through the lower income housing markets.⁵⁶ While the vacated rental units filtering down through the housing markets are typically of lesser quality, or at least are perceived as less desirable, than the newly acquired units, they are generally of better quality than the existing housing stock within the income/quality market into which they fall.⁵⁷

Demand for housing of any particular quality in a given area will be determined in part by household preferences, but to a large extent it will be determined by income, the rents charged,⁵⁸ and the total number of households seeking housing of that quality. Rents for each housing quality class will be determined by demand and supply within that market,⁵⁹ which are in turn influenced by the rents determined within the markets for housing of lesser or greater quality.⁶⁰ Excess demand and excess supply may filter up or down the housing quality markets, depending upon whether there exists excess demand or excess supply in the markets above or below the market for a particular quality of housing.⁶¹ Generally, there is an excess supply of low-income housing.⁶² This puts downward pressure on rents for low-income housing. If the ability of low-income tenants to pay falls short of the rent required by landlords to make a *normal profit* on the units as they currently exist, a landlord must cut costs and/or subdivide the units in order to maintain a *normal profit*.⁶³ Otherwise,

56. See J. HEILBRUN, *supra* note 38, at 310-311; E. MILLS & B. HAMILTON, *supra* note 31, at 228. "Filtering is a natural consequence of deterioration and income growth." *Id.*

57. See J. HEILBRUN, *supra* note 38, at 310.

58. See *id.* at 306.

59. See E. MILLS & B. HAMILTON, *supra* note 31, at 185-197.

60. See J. HEILBRUN, *supra* note 38, at 310-312.

61. See J. HEILBRUN, *supra* note 38, at 304 (1987); E. MILLS & B. HAMILTON, *supra* note 31, at 222-223. Excess demand is

a situation in which the amount of a good or service which buyers wish to buy exceeds that which sellers are prepared to sell. The result is that the price is bid up, inducing sellers to increase the quantity they are prepared to sell, and buyers to reduce the quantity they wish to buy. Price will continue to rise until excess demand is eliminated

G. BANNOCK, *supra* note 25, at 151. Excess supply is the reverse situation which "causes sellers to bid down prices, thus causing an increase in the quantity demanded and a decrease in the quantity offered for sale, until [quantity supplied] and [quantity demanded] are equal." *Id.*

62. See E. MILLS & B. HAMILTON, *supra* note 31, at 222-223 and 243-244.

63. See J. HEILBRUN, *supra* note 38, at 305 ("owners can 'move' their buildings from one rent class to another by remodeling, dividing, or combining units or by changing the level of outlays for operation and maintenance. . . . The owner's objective is to maintain

the landlord will remove the property from the residential rental market or, if there is no alternative profitable use, simply abandon it.⁶⁴

IV. ECONOMIC CONSEQUENCES OF THE WARRANTY OF HABITABILITY

There are essentially four situations in which the impact of the warranty of habitability can be analyzed: "(1) sound neighborhoods — those with well-maintained structures — with stable or rising property values, (2) deteriorated neighborhoods with rising property values, (3) sound neighborhoods with declining property values and (4) deteriorated neighborhoods with stable or declining property values."⁶⁵ In the first situation, by definition, the housing stock will be mostly habitable, and to the extent that compliance increases a rental property's value, thereby reflecting the community's expectations as to adequate housing, the owner will presumably voluntarily comply.⁶⁶ To the extent that compliance does not increase the property's rental value, profits will be reduced and, if reduced below a normal profit, the property will be removed from the rental housing market.⁶⁷ This, however, is not housing that is filtering down to low income tenants. On the contrary, rising property values reflect excess demand for this housing and a filtering up.⁶⁸ It would appear that imposing the warranty of habitability in this situation would do little to alleviate the plight of the poor.

A similar scenario applies to the second situation, with one possible exception.

The argument for code enforcement in this kind of neighborhood is that it will enable the redevelopment process to take place by restoring the owner's confidence that his property improvements

and operate a building at the level of quality that will maximize profits.") (footnote omitted); Abbott, *supra* note 11, at 75 ("As a structure filters down into the low income housing market, landlords must charge lower rents or subdivide the living space to offer less space per unit.").

64. See J. HEILBRUN, *supra* note 38, at 317-320. "Why do property owners abandon title? Stated in its most sterile form, they do so whenever (1) income from the property cannot cover operating costs and (2) the value of the cleared land is less than demolition cost." E. MILLS & B. HAMILTON, *supra* note 31, at 224.

65. Abbott, *supra* note 11, at 67.

66. *Id.* at 67-69.

67. *Id.* at 68.

68. Stable property values reflect a balance between supply and demand and, therefore, neither filtering down nor up.

will be matched by improvements throughout the neighborhood.

. . . .
 . . . In this type of neighborhood, whether uncertainty about a neighbor's investment decision significantly impedes the process is unclear. . . . Perhaps the most significant deterrents to the process are crime, trash in the streets and lack of public services. Housing code enforcement [through the warranty of habitability or otherwise] has no direct impact on these problems unless, by removing low income residents, it lessens any social problems associated with them. . . . Low income families . . . in the neighborhood may constitute a perceived external cost to other[s] . . . contemplating redevelopment. . . . Housing code enforcement . . . will compel substantial displacement. . . . The shrinkage in the low income housing supply will produce both increased rents in whatever low income housing remains and displacement from the neighborhood for those who cannot afford to pay higher rents.⁶⁹

Again, this is a situation where housing is filtering up, not down.

Application of the warranty of habitability in the third situation should be viewed primarily as an attempt to slow or stop the filtering down process in the neighborhood.⁷⁰ "[E]ffective code enforcement prevents the expansion of the supply of deteriorating housing but does not prevent and should actually hasten the withdrawal of units from the market."⁷¹ This should not be surprising. Unless the excess supply leading to deteriorating property values reverses, some landlords, caught between declining rents and the costs of complying with the warranty, will remove their property from the residential rental market. In the absence of anticonversion laws⁷² or other barriers to exit from the residential rental

69. Abbott, *supra* note 11, at 70-72.

70. See *id.* at 74; see generally Theiss, *supra* note 31, at 71 (in response to Clevelanders' flight from the City into the suburb of Lakewood, the Lakewood city planners are calling for strict enforcement of the housing policy to fight housing deterioration).

71. Abbott, *supra* note 11, at 75.

72. See generally Berger, *supra* note 7, at 733-742 (discussion of the effects of limitations on condominium conversion).

It is interesting to note that in the 1960s Congress actually supported conversion of low-income housing to condominiums as an economic incentive for private developers to build low-income housing. In addition to providing tax breaks and federal loans, Congress promised that "[a]fter 20 years, building owners could pay off the loans and turn the units into apartments or condominiums for more affluent residents." Celis, *Builders Sue to Convert Low-Income Housing*, Wall St. J., June 19, 1989, at B1, col. 1. Thus far Congress has had a change of heart, placing a moratorium on the conversion by disallowing early loan payoffs through February 1990. *Id.* The analysis of this Note suggests that this Congressional renegeing would have a negative impact on the long-run supply of low-income housing

market, property not earning a normal profit will be removed and the supply of rental housing will shrink until only normal profits are being received by landlords in the long run.⁷³ In the meanwhile, "[e]ffective housing code enforcement will limit . . . subdivision . . . [and] . . . will prevent the landlords from reducing operating expenses. . . . The displacement of tenants from these units causes increased competition for available low income housing elsewhere."⁷⁴

[Finally,] the impact of effective code enforcement in a deteriorated neighborhood with stable or declining property values is either to increase overcrowding and housing prices for low income consumers or to decrease profitability to owners to the extent that they are forced to absorb code compliance costs. The latter effect has long-term consequences for the low income housing supply. Housing that would otherwise have filtered down within the financial reach of low income consumers may instead be withdrawn and converted to other uses as owners, faced with the prospect of continuing code compliance costs, find that the financial means of their consumers will not pay the costs of standard housing.⁷⁵

V. LEGAL UNCERTAINTY AND THE LONG-RUN SUPPLY OF HABITABLE HOUSING

The warranty of habitability increases costs both directly, through increased maintenance expenditures, and indirectly, through increased landlord uncertainty as to actual costs and revenues due to the increased risk of tenant-initiated legal actions.⁷⁶ If

by reducing the profits developers might expect from future government contracts to build housing.

73. Short-run alternative uses for rental property may be nonexistent. In this case, rental property will not be abandoned so long as rents cover current operating costs, but maintenance will be discontinued until the stock of rental housing shrinks enough and rents rise enough so that a normal profit is once again obtained. See R. LIPSEY, *supra* note 52, at 102-103.

74. Abbott, *supra* note 11, at 75.

75. *Id.* at 79-80. In the jargon of economists, the long-run effect of the increased costs due to compliance with the warranty of habitability is to shrink the relative supply of low-quality housing through the removal of rental units until excess demand is created at the existing rental rates. Units continue to be removed and excess demand created at current rental rates until the upward pressure on rents produces a normal profit for the remaining rental units.

76. Tenants' ability to use the legal system to their advantage and landlords' concern over this possibility should not be underestimated.

Tenants increasingly are using bankruptcy and pro-tenant laws to avoid eviction

the warranty of habitability increases the uncertainty of costs and revenues from residential rental property, the expected profit will actually have to *increase* to compensate for the increased risk.⁷⁷ This is because "investors are averse to risk".⁷⁸ Risk averse individuals will accept more risk from an investment only if the expected profits also increase.⁷⁹ For a given increase in risk, the only options for increasing expected profits are to cut costs or raise rents. The warranty of habitability limits the possibilities to cut costs in providing low-income housing, while the limited ability of

or beat landlords out of rent payments. . . . [For example,] a Los Angeles landlord filed to evict a tenant for nonpayment of back rent. The tenant had moved. But his roommate was still living in the apartment, and her name had never appeared on the lease or, consequently, on the eviction notice. She successfully sued the landlord, claiming her due process had been violated. Many California tenants use that precedent to avoid eviction. Typically, after being served with eviction papers, a tenant enlists a friend to pose as a roommate or spouse. The friend's due-process claim halts eviction and can take up to 60 days to resolve. About 3,000 claims were filed last year in Los Angeles alone, 97% of which were found to be without merit by the city's courts. Tenants in several states also are using federal bankruptcy statutes. A bankruptcy filing triggers a stay of eviction and can enable a tenant to skip rent payments for up to three months as the filing is processed. Some tenants then drop the filing and skip out. The tenant's credit history isn't tainted because bankruptcy filings, if not completed, don't appear on credit records.

Tenants Grow Adept at Legal Maneuvering, Wall Street J., Apr. 5, 1988, at 39, col. 1.

Getting evictions, even when tenants do not pay rent, is difficult, often requiring going to court. "Even when you win, you lose, Hwang [a Jersey City landlord] says. "One case dragged on two months. Then they move out, together with your rent, your fridge, break your windows" Bernstein [president of the Small Property Owners of New York] tells of a pending nonpayment eviction she has filed that twice was thrown out of court, once on a technicality and once because the city lost the file. The tenant has since reported a violation: A window does not open and close smoothly. "Now what he's going to be doing is calling [the city housing agency] on a regular basis," she says. "If violations do not exist, he will damage the apartment, and we'll go to court. And you know what? The court's going to say, 'Make the repairs, you bad landlord, or we're going to put you in jail.' If he plays his cards right, he can live rent-free for two or three years and then vacate, and I can't do anything." Legal aid lawyers have kept Casalnuovo [a landlord in New York's Chinatown] in court for three years over a \$16-a-month rent increase.

Lochhead, *supra* note 12, at 39.

77. See H. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 227-39 (2d ed. 1990).

78. J. WESTON & E. BRIGHAM, ESSENTIALS OF MANAGERIAL FINANCE 265 (4th ed. 1977).

79. See generally G. MADDALA & E. MILLER, MICROECONOMICS: THEORY AND APPLICATIONS 594-598 (1989) (The greater the individual's aversion to risk, the more expected profit must increase before he will invest); H. VARIAN, *supra* note 77, at 234-37 (discussing a formula for adjusting returns based on the uncertainty of the investments).

the poor to pay makes it difficult, if not impossible, to raise rents at the current quantity of low-income housing supplied. The only way expected profits can rise then is for the long-run supply of low-income housing to decrease. Thus, the increased risk produced by the warranty of habitability provides further incentive for the supply of low-income rental housing to decrease. The risk of litigation exists, albeit to a lesser degree, even if a landlord attempts to fully comply with the housing code, since a landlord cannot hope to have every infraction instantaneously rectified at every point in time. Also, tenants may initiate an action for breach of warranty for purposes not contemplated by the habitability laws.⁸⁰

This analysis of the uncertainty the warranty of habitability introduces into the rental housing market leads to another interesting conclusion. Landlords, in an attempt to reduce risk, will attempt to discriminate against "riskier" tenants who might complain or bring suit.⁸¹ Some landlords may be willing to take a lower actual rent from a less risky tenant. If the actual rent charged need be reduced only slightly below the market rent to attract significantly less risky tenants, the landlords' expected profits might actually be increased at the same time that risk is reduced. But even if expected profits are reduced by this form of discrimination, by the preceding analysis, risk averse landlords may be willing to accept lower expected profits in order to reduce their risk.⁸² Of course, who this type of discrimination will affect in practice will depend on the landlords' experiences and perceptions as to which tenants, or classes of tenants, pose this risk.⁸³

VI. THE WARRANTY ALONE WILL NOT PROVIDE HABITABLE HOUSING FOR THE POOR

The problem of inadequate housing for the poor is two-sided; it derives from insufficient tenant income and, in the absence of sufficient tenant income, from economic pressures on landlords to either lower the quality of housing units filtering down or else re-

80. See *supra* notes 12 and 76.

81. See Rabin, *supra* note 5, at 575.

82. Although this seems to be the point made by Rabin, *supra* note 5, at 575, he does not explicitly apply an expected-utility or risk-return analysis.

83. Lawyers and law students, perhaps? See, e.g., *Kramarsky v. Stahl*, 92 Misc. 2d 1030, 401 N.Y.S.2d 943 (1977) (landlord's rejection of a tenant-applicant because she was "a lawyer attuned to her legal rights" as opposed to one "who was likely to be less informed and more passive" was upheld).

move them from the residential rental market altogether.⁸⁴ Raising housing standards through the warranty of habitability, taken by itself, serves only to increase the costs to landlords of providing low-income housing, decreasing the rate of return on the landlord's investment and further reducing the incentive to provide quality low-income housing.⁸⁵ While some individuals may obtain improved housing, these individuals may not be the poor.⁸⁶ Even when they are,

the empirical evidence indicates that costs imposed on such tenants appear to outweigh the benefits derived by them. Thus, by enacting habitability laws, and thereby shifting some of the power away from landlords, the welfare of low-income tenants may not be improved, but the amount of substandard housing in SMSAs [Standard Metropolitan Statistical Areas] is reduced.⁸⁷

The extent to which the warranty of habitability adversely affects the market for low-income housing will depend in part on how strictly the standards are enforced⁸⁸ and what remedies are made available to tenants.⁸⁹ The effects of the warranty of habitability on low-income housing will be accentuated as the standards for habitable housing are set higher. This is because the higher the required standards for a habitable dwelling, the more the implied warranty of habitability raises the costs for landlords to comply. As one moves from high-income to low-income housing, the costs of compliance increasingly rise and the rents obtainable increasingly fall, strengthening the incentive to remove property from the residential rental market the farther down the filtering process one goes. This is important because it is not the purpose of this Note to say the warranty of habitability is totally unjustifiable. Using the warranty to enforce "the actual but unexpressed agreement of the parties"⁹⁰ and basic health and safety standards may be sufficiently in the public interest to justify the consequent

84. See *supra* notes 45-64 and accompanying text.

85. See *supra* notes 45-83 and accompanying text.

86. See *supra* notes 30-31, 65-83 and accompanying text.

87. Hirsch & Law, *Habitability Laws and the Shrinkage of Substandard Rental Housing Stock*, 16 *URB. STUD.* 19, 27 (1979).

88. See Abbott, *supra* note 11, at 49-66; Hirsch & Hirsch, *The Changing Landlord-Tenant Relationship in California: An Economic Analysis of the Swinging Pendulum*, 14 *Sw. U.L. REV.* 2, 5 (1983).

89. Discussion of the various remedies and their effects can be found in Abbott, *supra* note 11, at 4-40 & 126-38, Glendon, *supra* note 5, at 503, 532-35, and Hirsch & Hirsch, *supra* note 88, at 8-18.

90. Rabin, *supra* note 5, at 583.

reduction in the supply of low-income housing. As an analogy, while "legislation prohibiting discrimination . . . may reduce the profits of landlords and to this extent discourage the production or preservation of rental housing . . . their cost in these terms is [likely] justified by the noneconomic goals that they achieve."⁹¹ But pressing higher standards as a mechanism for redistributing income is counterproductive of the goal of improving the welfare of the poor.⁹²

VII. INCOME REDISTRIBUTION AND THE EXTRACTION OF QUASI-RENTS

Despite the general agreement among economists that habitability laws, taken by themselves, will reduce the long-run supply of low income housing, at least one commentator has recently advocated selective enforcement of the warranty of habitability as a method to help the poor based on an analysis of housing market filtering.⁹³ The filtering model "suggests that the rent for build-

91. *Id.* at 583-584.

92. See Hirsch & Hirsch, *supra* note 88, at 42-43; see also Hirsch & Law, *supra* note 87, at 27:

[I]f we want to decrease the relative prevalence of substandard rental housing in metropolitan areas, we should seek enactment and enforcement of laws that extend the warranty of habitability in a decisive manner. . . . However, . . . habitability laws initially have been promulgated not so much for the purpose of contributing to the shrinkage of substandard housing, than to assist low-income tenants.

; Hirsch, *Habitability Laws and the Welfare of Indigent Tenants*, 63 REV. ECON. & STAT. 263, 274 (1981):

To the extent that habitability laws are mainly designed to improve the welfare of indigent tenants, the laws have failed, at least in the sample studied. . . . Regulations, whether issued by the legislature or the courts, appear unable to improve the welfare of indigent tenants significantly. Matters are likely to be different if such regulations are accompanied by [direct] income transfers, so that indigents can afford to pay for improved housing. When directives to provide habitable housing are supplemented by rent subsidies, for example, significant welfare improvements of indigent tenants are more likely than where merely law extend the warranty of habitability.

(footnote omitted).

93. Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U.L. REV. 485, 485-486 (1987). Kennedy acknowledges that his analysis is based on the earlier works of 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) and Markovitz, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976).

Rabin, *supra* note 5, at 560-561, though, argues that:

Markovitz's analysis . . . is fatally flawed. At most, he proves only that certain

ings at the very end of the chain will eventually decline to a level that reflects *only* the price of ongoing maintenance (plus taxes) and premiums for good location. In other words, the Ricardian quasi-rent for the structures themselves should decline to zero."⁹⁴ "Ongoing maintenance" here is assumed to mean "current operating costs," since that is what the filtering model predicts will be the minimum acceptable rent if the property is not to be abandoned.⁹⁵ A Ricardian quasi-rent is the amount received by an existing resource (here, the rental structures) in its current use in excess of what the resource could earn in its best short-run alternative use (i.e., it is the amount received in excess of the resource's short-run opportunity cost).⁹⁶ When the quasi-rents for existing rental buildings with no positively valued short-run alternative uses decline to zero, the buildings are at the end of the

tenants will be helped by a code enforcement program more than certain other tenants will be injured. . . . Assuming that Markovitz's analysis is correct and that the dollar amount of the former is greater than the dollar amount of the latter, this still leaves the injured tenants worse off than before code enforcement because code enforcement programs do not provide a mechanism by which benefited tenants compensate injured tenants. In Markovitz's model, the injured tenants are the poorest tenants, and the benefited tenants are the wealthier tenants.

It has been established elsewhere that the Ackerman analysis suffers from very restrictive assumptions (one being a perfectly fixed supply of housing) and, more importantly, is a strictly short-run economic analysis. See generally W. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* 45 (1979) (Ackerman's short-run solution does not take into account landlord reactions to enforcement of habitability laws.); Abbott, *supra* note 11, at 108-115 (Ackerman's analysis is flawed because it does not adequately explore "code enforcement"); Hirsch, Hirsch, & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 1100 (1975) (Ackerman's article is "an entirely theoretical piece which offered no empirical evidence to support the hypotheticals presented."); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175, 1192 (1973) (The problem with Ackerman's analysis was its desire to promote a program before issues basic to the choice of any program had been stated, let alone solved."). Kennedy's analysis is also a short-run economic analysis, as discussed in the text *infra*.

94. Kennedy, *supra* note 93, at 487.

95. See R. LIPSEY, *supra* note 52, at 102-103; E. MILLS & B. HAMILTON, *supra* note 31, at 224.

96. See G. BANNOCK, *supra* note 25, at 340; R. CLOWER, P. GRAVES, & R. SEXTON, *INTERMEDIATE MICROECONOMICS* 415-417 (1988) [hereinafter R. CLOWER]; J. GOULD & E. LAZEAR, *MICROECONOMIC THEORY* 433-435 (6th ed. 1989).

The "premiums for good location" are actually economic *rents*, not quasi-rents, and are not very relevant to the discussion here. R. CLOWER, *supra* at 409-416. It is important to distinguish the economic return to the rental structure from the return to the land upon which the structure sits, since structures can be removed from the market in the long run (through deterioration or demolition) but land itself generally cannot. *Id.* at 419.

filtering chain and the long-run normal profit on these existing structures has declined to zero.⁹⁷ The existence of nonzero quasi-rents is important to the argument in favor of using the warranty of habitability to help the poor, because, to the extent that there exist alternative uses to which the structures can be converted in the short run (i.e., to the extent that positive normal profits exist in the short run), increasing landlords' costs and reducing their profits would reduce the existing supply of low-income housing in the short run.

Professor Kennedy proposes that the warranty of habitability should be selectively enforced against landlords who cannot shift their residential rental buildings to other uses in the short-run. Essentially what is being argued is that society should take advantage of the inability of landlords to shift existing housing structures to alternative uses in order to redistribute quasi-rent from landlords to tenants through the warranty of habitability.⁹⁸ But this is essentially an argument that, in the long run, society should deny some landlords a normal profit. What, in the long run, is a normal profit on rental structures becomes a quasi-rent on existing structures in the short run only for those structures that cannot be converted to any alternative use.⁹⁹ The investors' response, should this proposal be enacted, would be to discontinue new investment

97. Operating costs could include compensation for the owner's current *labor services* in operating the facility, but not a return on the owner's investment in the structure itself.

98. Why stop with landlords? All residential property owners have *imputed* quasi-rents to the extent that they are unwilling to become tenants (i.e., renting from someone else). Why not force all residential property owners with quasi-rents sufficient to maintain habitable premises to rent out a portion of their home (e.g., any bedrooms in excess of occupants) at a rate just sufficient to cover operating costs? Besides the fact that many would argue this is somehow inherently unfair, I suspect the long-run stock of owner-occupied housing would adjust so that most homes had no room for renters.

99. Long-run normal profits represent quasi-rents to the extent that the best alternative use in the short run yields a lesser return than the best long-run alternative use. If there is no profitable alternative use in the short run, the entire amount of long-run profits are quasi-rents in the short-run. See generally R. CLOWER, *supra* note 96, at 415-420.

In a short-run period . . . specialized capital equipment [such as a rental structure with no alternative use] is . . . perfectly inelastic in supply, and cost of production is not relevant once it has been produced. Thus, in a short period, the return on [rental structures] . . . is similar to land rent; it may be designated as quasi-rent. But this is a short-period phenomenon only; since [rental structures] are produced and wear out, over a long period the return is dependent upon the cost of production of the equipment and must cover this cost plus an interest return on the money [invested].

Id. at 419. This interest return includes any risk premium. *Id.* at 423.

in residential rental housing, or, in the alternative, to establish a long-run investment policy of converting residential rental housing to other uses before the extraction of normal profits begins, *i.e.*, before residential rental property filters down to where the warranty of habitability becomes a serious issue. Therefore, while it is conceivable that this proposal would benefit some poor tenants in the short run (specifically, those tenants in existing housing with no alternative use and whose landlords obtain enough quasi-rent to finance compliance with the warranty of habitability rather than abandon their buildings), the long-run impact is to shrink the supply of low-income housing.

Another argument made in favor of this proposal is that its implementation will break the “‘downward vicious cycle’ in those neighborhoods that are at the end of the filtering chain.”¹⁰⁰ The idea is that the warranty will reduce or eliminate “negative externalities” — the adverse effects on the neighborhood when the decision to undermaintain by some landlords accelerates the decisions of other landlords to undermaintain their properties.

Because of these . . . externalities, it is possible for all the landlords in a neighborhood to find themselves “forced” to make investment decisions that all agree are worse for them than those that would occur if it were possible for them to act in concert. For example, every landlord might be able to invest more in maintenance of existing structures, hoping thereby to get higher rents and increase property values, were it not for the fact that each believes that others are and will continue disinvesting, so that the neighborhood is in an inevitable state of decline.¹⁰¹

But if this is a neighborhood at the end of the filtering chain, how can landlords hope to obtain higher rents and property values through improved maintenance? They cannot, unless this neighborhood is expected to filter back up the chain. And if it does filter up, low-income households will be dislocated.

This second argument in favor of the warranty of habitability appears to confuse two different, although somewhat related, goals — arresting urban blight and alleviating poverty. A policy designed to correct one of these problems may not correct the other. For example, it may be possible to slow or stop urban blight by using the warranty of habitability to keep poor people from moving into a sound neighborhood with declining property values,

100. Kennedy, *supra* note 93, at 513.

101. *Id.* at 512-513.

but this obviously does not help the very poor. On the other hand, direct income transfers to the poor will alleviate poverty, at least for the duration of the payments, but they might not arrest urban blight in a particular area, since the poor in that area will now presumably be free to move out.¹⁰²

VIII. ALTERNATIVE METHODS TO ACHIEVE THE GOAL OF THE WARRANTY OF HABITABILITY

If one's central goal is to provide habitable housing for the poor, the warranty of habitability has only a minor role to play. The major hurdle is to make habitable housing affordable to the poor. Once the poor can afford habitable housing, the warranty may be a useful device to help guarantee that tenants get what they bargained for and that their dwellings meet minimum health and safety standards.

Housing subsidies paid directly to tenants¹⁰³ are to be preferred to public housing projects and subsidies paid directly to landlords or housing contractors as a method for making habitable housing affordable to the poor for several reasons. First, "supply-oriented programs [for new construction of low-income housing or public housing] are almost twice as expensive as demand-oriented programs."¹⁰⁴ This result follows directly from the filtering pro-

102. In contrast, supporting resident efforts to renovate existing structures in conjunction with subsidizing tenant purchases of abandoned or publicly-owned housing appears not only to alleviate poverty, but also to arrest urban blight. See *infra* notes 114-19 and accompanying text.

103. Housing subsidies to tenants could be paid either in cash or "in kind" in the form of housing vouchers or certificates. Recipients would generally prefer the subsidy in the form of cash, since that would most improve the recipient's welfare, but the grantor (presumably the government and, indirectly, the taxpayers) would generally prefer to give the subsidy in kind. See T. POGUE & L. SGONTZ, *supra* note 23, at 131. Other methods of making in-kind transfers of housing have included turning ownership of public housing over to tenants and selling abandoned or (tax-deficient) forfeited housing to the poor at extremely low prices with the proviso that the property be properly maintained. See Shapiro, *supra* note 23, at 20, 23; Celis, *Detroit Suburb Sells Homes to Poor for \$1*, Wall St. J., Sept. 23, 1988, at 17, col. 2.

104. E. MILLS & B. HAMILTON, *supra* note 31, at 243; see also J. HEILBRUN, *supra* note 38, at 355 ("[F]or a given federal outlay, about twice as many households can be assisted with housing allowances as could be served by new construction."). A reasonable alternative to building new low-income housing is to repair existing publicly-owned structures where available. "Fixing existing housing is still cheaper than building new units. It now costs between \$65,000 and \$70,000 to gut and rehabilitate an apartment in a vacant building [in New York City], but \$120,000 to build a new apartment." Minerbrook, *The Big-City Push to Fill the Housing Gap for the Poor*, U.S. NEWS & WORLD REPORT 28, 28 (Aug. 28/Sept. 4, 1989). Unfortunately, many cities have razed vacant buildings, leaving

cess in the market for housing.¹⁰⁶

In most cities there is a surplus . . . of low-income housing. . . . Not surprisingly, a major effect of new construction of low-income housing is that this glut becomes more serious, and the new units provide housing services worth only a fraction of the construction cost. [This] probably also aggravates the abandonment problem and certainly hastens housing retirement in other neighborhoods.¹⁰⁶

Second, direct subsidies (i.e., transfer payments) to tenants provide more housing options and greater freedom in choosing where to locate.¹⁰⁷ In turn, this may help reduce segregation. Also, since recipients of direct housing subsidies can choose where to live (to the extent that income plus subsidy allows it), it is unlikely that there will be the sort of confrontations that sometimes occur between current residents and government and/or the new residents when low-income public housing is integrated into a higher-income community.

Third, direct subsidies to tenants are more equitable than the construction of new housing or subsidiaries paid to landlords.¹⁰⁸ They are easily disbursed according to a "means tested" formula.¹⁰⁹ A "standard" rent for adequate housing would be determined for households of various sizes. This would be the maximum subsidy allowed and would be phased out at some pre-determined rate as the recipient's income rises from zero.¹¹⁰ This "housing gap formula" works in much the same way as the federal food stamp program¹¹¹ and, other than the limitation that the subsidy be used on housing, very much like the negative income

fewer to rehabilitate. *Id.* at 29.

105. See J. HEILBRUN, *supra* note 38, at 348-352.

106. E. MILLS & B. HAMILTON, *supra* note 31, at 243-244.

107. See J. HEILBRUN, *supra* note 38, at 356.

For that reason, they are opposed by spokespeople for builders, banks, and local governments, all of whom now share in government programs to subsidize low-income housing. Housing allowances would circumvent such groups, placing money directly in the hands of intended beneficiaries and encouraging them to spend the money to their best advantage, subject only to the restriction that they inhabit housing deemed adequate.

E. MILLS & B. HAMILTON, *supra* note 31, at 243.

108. See J. HEILBRUN, *supra* note 38, at 355.

109. See *supra* note 30 and accompanying text.

110. See J. HEILBRUN, *supra* note 38, at 351-353.

111. See D. FUSFELD, *ECONOMICS: PRINCIPLES OF POLITICAL ECONOMY* 578 (3d ed. 1988).

tax proposals.¹¹² This formulation would have an important ramification for the low-income housing market.

It provides benefits based not on actual rent paid but on the estimated standard rent for adequate housing. The tenant who can find adequate housing at less than the standard rent "keeps the change"; the tenant who wants housing that rents for more than the standard pays the difference out of his or her own pocket. At the margin, the tenant is paying the rent and is correspondingly drawn into the market process as an active participant. Thus housing allowances, under this formula, do not create a class of passive tenant beneficiaries, as some welfare housing assistance programs do.¹¹³

One alternative to cash payments or vouchers for housing,¹¹⁴ which appears to work successfully in at least certain instances, is to allow community groups or individual tenants to renovate abandoned or publicly-owned buildings and assume ownership, either free of charge or at a subsidized price.¹¹⁵ For instance, in the South Bronx,

[p]oor people in need of decent housing . . . banded together in 1977 and stopped the city from demolishing three empty tenements in the 900 block of Kelly Street. After working all day driving taxis or operating machines, they worked an additional eight hours in shoulder-high debris, restoring the abandoned shells that landlords had left to rot and burn. The apartments finally sold for \$250 to those who had invested at least 600 hours of labor. . . . Today the [Banana Kelly Community Improvement Association] has a staff of 90 that manages 415 apartments, plus a \$22 million budget that includes funds to renovate an additional 333 units.¹¹⁶

112. See E. MILLS & B. HAMILTON, *supra* note 31, at 242 n.19. For a brief discussion of the negative income tax, see P. SAMUELSON & W. NORDHAUS, *MICROECONOMICS* 471-473 (13th ed. 1989).

113. J. HEILBRUN, *supra* note 38, at 353.

114. See *id.* at 352-353; *supra* note 23. Congress apparently is reacting favorably to various innovative proposals to increase the availability of affordable, habitable housing. See Roberts & Shapiro, *Can Jack Kemp Clean Up the HUD Mess?*, *U.S. NEWS & WORLD REP.*, July 3, 1989, at 26-27.

115. See Celis, *supra* note 103, at 21, col. 2 (ownership of city-owned homes assumed by tenants and liability for improvement loans forgiven after five years of residence); Shapiro, *supra* note 23, at 20, 23 (District of Columbia program allowing public housing tenants to purchase housing units at a discount and manage their housing complexes).

116. Graham & Boyce, *Out of the Ashes: A South Bronx Street Rises Through the Toil of Poor Homesteaders*, *Wall St. J.*, Aug. 22, 1989, at A1, col. 1. This renaissance has not been without consequent difficulties. With revival of the area have come higher rents.

In Washington, D.C., "residents of the Kenilworth-Parkside housing project . . . have turned a once squalid housing project into an oasis of safe, well-kept, two-story brick buildings. . . . Residents were trained in home repairs and put on rounds to clean up trash and fix up the grounds."¹¹⁷ The residents of Kenilworth-Parkside were the first "public-housing tenants [in the nation] to purchase their units at a discounted price."¹¹⁸ This project, managed and owned by the tenants, operates a day-care center, an addiction treatment center, a beauty shop, a moving company, and a food co-op, employing about eighty of the project's residents.¹¹⁹

CONCLUSION

In sum, the excess supply of rental housing typically found at the low-income end of the market, and the concomitant low quality and deterioration, can be remedied better by increasing the effective demand for habitable housing by low-income persons than by implying a warranty of habitability. This increase in effective demand may be most efficiently and equitably accomplished through residential rehabilitation and ownership programs and through housing subsidiaries paid directly to tenants. An implied warranty of habitability, on the other hand, may actually reduce the supply of low-income housing by forcing some units out of the market. These forms of incomes policy would do much to

"Part of the neighborhood . . . has . . . been designated a historic landmark district, where apartments rent for up to \$700 a month and stately brownstones have sold for nearly \$200,000." *Id.* There is concern "that the area's new commercial potential may lead to the sort of gentrification that could force the old-time residents out." *Id.* at A6, col. 5. "The success of groups like Banana Kelly has shown city planners what potential lies in the vast wasteland just north of Manhattan." *Id.* at A1, col. 1.

The homesteaders are protective of the improvements they have effected and "are torn between extending a helping hand and pulling up the ladder before their rebuilt neighborhood is swamped by new waves of the desperately poor." *Id.* "[R]esentment simmers over the city's plan to cluster in the South Bronx nearly 70% of the homeless families it is resettling — a policy that some term 'the laundering of Manhattan.'" *Id.* at A6, col. 4. Although it is highly unlikely that city officials would agree to the following proposal, one possible way to limit the influx of undesirable high-income residents (and, for that matter, undesirable low-income residents) would be to allow abandoned buildings to be owned only by those persons willing to individually invest at least 600 of their own labor hours to rehabilitate them, just as the original Kelly Street rehabilitators did.

117. Shapiro, *supra* note 23, at 23.

118. *Id.* However, there is some concern that the success of Kenilworth-Parkside may be expensive to reproduce. "'If everybody gets as much money as Kenilworth-Parkside, they would all be happy', says Roberta Youmans of the National Housing Law Project. 'But the money isn't there.'" *Id.*

119. *Id.*

ensure the provision of habitable housing, even in the absence of an implied warranty of habitability.

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